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"Human Rights in Criminal Justice Systems"

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BACKGROUND PAPER

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Note from the co-organisers:

To prepare and facilitate the discussions during the 9th Informal ASEM Seminar on Human Rights, the co-organisers and Steering Committee defined a framework for a Background Paper and asked two eminent experts to prepare this report:

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Participants are kindly asked to come to the discussions with practical examples from their experience, which could complement and illustrate this general paper.

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Chapter 1 - Criminal Justice Systems

1 Introduction

Classification of legal systems is essentially an academic exercise, there being about 42 legal systems in the world. However, comparative law generally attempts to divide legal systems into several different categories, of which civil and common law systems have been the most dominant due to the impact of European imperialism and colonialism from the 15th century. Civil law systems are characterised as those originating in Europe which developed from the Roman Code, as codified in the 6th century, and modernised in the 18th and 19th century. The two most commonly cited examples are the French and German types. Common Law Systems are those originating from English legal tradition resulting from the Norman Conquest in the 11th century. The two systems, of which a description of their general characteristics will be given in the following section have, at least philosophically, significant differences in their approach to law and legal process. However, a variety of other categories of legal systems exist, such as those based upon from religious tradition, the Talmudic, Hindu and Islamic legal systems;¹ political belief, such as communist or socialist; as well as a variety of other indigenous legal traditions that exist in many parts of the world. Even within the European Continent, distinctions are often drawn between the French and German civil law systems, and the Scandinavian legal systems are considered to be a separate category outside of the civil law tradition.

In reality, clear cut distinctions can no longer be drawn between the various systems with the increasing globalisation and homogenisation of law. No systems exist in their ideologically pure state. Reforms in the various systems have created a tapestry of institutions and processes which defy easy categorisation. Easy access to information on the functioning of other judicial systems; less adherence to dogmatic understandings of traditional legal processes, coupled with an increased awareness of the need to find pragmatic solutions to a range of legal problems; and an overall desire to improve fairness and efficiency in accordance with established international standards, have resulted in a growing congruence. Mixed jurisdictions, incorporating parts of civil law and common law systems are now seen in many countries though the process of integration have been difficult and still not harmonised in some countries.²

2 General Principles Underlying Civil and Common Law Systems

This section will attempt to highlight some of the main historical, philosophical principles underpinning the civil and common law systems. Inevitably by attempting to abstract in this manner, the principles will become separated from the reality of everyday legal process. However, the analysis will provide a useful basis for understanding the differences between criminal processes in common and civil law countries.

In civil legal systems, one of the principle philosophical objectives is to create comprehensive rational bodies of substantive law, contained in codes, which exist as complete descriptions of

¹ In his mission report on the Kingdom of Saudi Arabia in 2002 the UN Special Rapporteur on the Independence of Judges and Lawyers addressed generally that Islamic State's compliance with international standards and criminal procedure in terms of right to a fair trial. See E/CN.4/2003/65 Add. 3.

² Thailand is an interesting case study. See Kittipong Kittayarak (a public lecture on criminal policy in 1996) "Criminal Justice Reform in Thailand – Recent Problems and Future Prospects".

the law. All areas of the law are considered to form part of a whole based upon an underlying structure of legal concepts. The aim of this approach is to make the law coherent and rational thereby providing certainty to everyone subject to the law of what their rights and duties are; to make the law clear and accessible by placing it in one document; and to be comprehensive in detail in order to avoid arbitrary application.³ In contrast, in the common law system, law develops in a more dispersed manner, on a case by case basis over a period of time through its application by judges to cases through the adjudicative function. In that regard, historically there was less of a desire to codify the law but rather the focus was upon developing a system of procedures which would facilitate the adjudication of disputes. Substantive categories of law and rights flowed from the various procedures and decisions of courts, and it wasn't until later in its development in the 19th century, did legislation begin to play a more important role.⁴

Flowing from these philosophical approaches, in civil law systems, the legislative branch is considered to be the only source of law. The Executive has no inherent powers to make laws or regulations and can only exercise the powers granted to it by the legislature. The judiciary, in particular, is not considered to have any law making function, and is required to apply the law to the facts of the cases that appear before it, without interpreting the law. In contrast, in common law systems "judge made law" forms an important source of law, in addition to legislation. In terms of legal processes, in civil legal systems, the centrality of the state (as embodied by a democratically elected legislature) in the formation of law is reflected in the centrality of the state in terms of criminal legal process. The state drives and directs the criminal process, and can be trusted to do so fairly and impartially. In contrast, common law criminal process reflects a distrust of the State's ability to adjudicate to criminal disputes, and places its faith in an independent judge acting as an "umpire," between partisan parties.

The aforementioned general principles as applied to criminal justice in civil law systems result in a system described as follows:

*"An examination of the reality of Continental criminal procedure is said to discover centripetal decision-making through the centralisation of the police, prosecutors and judiciary; the rigid ordering of authority, both internally (e.g. within the judiciary) and in relation to other branches of government (e.g. the authority of the courts derives from the legislature); a preference for determinative rules; the importance of official documents and reports (the dossier constituting the "backbone" of criminal proceedings and serving as a prerequisite for review by superiors); and bureaucratic techniques and modes of thinking reinforced by the selection, training and promotion systems for officials, including judges."*⁵

In contrast the criminal justice process in common law systems can be characterised as follows:

An examination of the general pattern of criminal procedure in Anglo-American countries (it being noted that the United Kingdom is moving

³ See generally Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (1969) Stanford University Press

⁴ See generally David & Brierley, *Major Legal Systems in the World Today* (1985, 3rd ed) Stevens and Sons Ltd, Part III.

⁵ McKillop, B., "Behind the Faces of Justice", (1990) 15 Bull Aust Soc of Legal Philos 55 at 60 as cited in *Inquisitorial Systems of Justice and ICAC: A Comparison* (1994) Independent Commission Against Corruption, Australia. http://www.icac.nsw.gov.au/files/pdf/pub2_5q1.pdf

closer to Continental systems) is said to discern centrifugal decision-making through the decentralisations of the police, prosecutors, the jury and the judiciary; the mild ordering of authority within the judiciary; a preference for flexible rules; the informal style or the relatively decreased importance of official documentation and bureaucratic techniques, including the lack of a counterpart of the dossier; and officials behaving as problem-solvers attuned to community values rather than as professional experts, independent-minded people often recruited laterally as achievers in other fields and without bureaucratic backgrounds.⁶

As a result, common law systems are often described as having adversarial or accusatorial criminal justice processes, whilst civil law systems are inquisitorial. This distinction is most important in terms of the differing roles each system assigns to the main actors in the process.

In the adversarial process, the judge plays a less significant role in controlling procedure, which is primarily driven by the parties appearing before him/her. This encompasses two principles. Firstly, party autonomy, i.e. the parties have the right to pursue their legal rights as they wish and to define the dispute in accordance with prescribed procedure. Secondly, party prosecution, i.e. the parties have the right and the responsibility to choose the manner in which they will go forward with their case and the proof they will present to support it again in accordance with prescribed procedure and rules of evidence. The judge's role is to evaluate passively the merits of the case as and when it is presented to him.⁷ Therefore, the judges' role is simply to adjudicate upon the case before him, generally with the assistance of a jury in countries where that is provided for, and to maintain the fairness of the proceedings. A judge plays no role in the collection of evidence, the framing of arguments or the determination of truth.

In the inquisitorial process, the judge, as a representative of the state, has a more significant role to play in controlling and directing the process. In this regard inquisitorial process could be termed "judicial prosecutions" in contrast to party prosecutions in common law systems. The obligation rests upon the judge to determine what issues are to be considered, how the case is to be conducted and what evidence should be considered. A significant portion of the proceedings are written and the judge gathers the evidence and directs the conduct of the case, including the questioning of witnesses. It is important to note that, in criminal proceedings, in some inquisitorial systems, judges have a role to play in pre-trial investigatory proceedings in addition to trial proceedings.

These different approaches also have implications for the institutional structures that govern the activities of the main actors – judges, prosecutors and lawyers and police – in the criminal process. For example, in civil law systems the judiciary, whilst still independent, is more closely regulated by the state and, as a result, the judiciary is perceived to play a more bureaucratic, less discretionary, role in civil law systems. This is reflected in the fact that individuals wishing to become judges follow the "judicial career," a path which they follow upon graduation from university, and are appointed to progressively higher positions within the judiciary based upon seniority and merit. This is in contrast to judges in common law countries, who are generally appointed to the bench after years of practice of the law, and

⁶ McKillop, B., "Behind the Faces of Justice", (1990) 15 Bull Aust Soc of Legal Philos 55 at 60 - 61 as cited in Inquisitorial Systems of Justice and ICAC: A Comparison (1994) Independent Commission Against Corruption, Australia. http://www.icac.nsw.gov.au/files/pdf/pub2_5q1.pdf

⁷ Evidence (Interim Report) Australian Law Reform Commission (1984) para. 42

selection for the bench is seen as recognition of a successful career. Equally for legal profession, in common law systems, individual lawyers and “the Bar,” play a significant more significant role in ensuring the fairness and effective functioning of the legal system, and have a more preeminent role in society, than in civil law systems.

3 Criminal Justice Procedure: Adversarial (Accusatorial) v Inquisitorial

Given the different historical trajectories of the civil and common law legal systems and their approach to law, there exist significant differences between them with regard to criminal procedure. The two systems do not differ in their ultimate objectives to ascertain the truth via a fair procedure and to balance between the need for effective law enforcement and the need to protect the liberties of the individual. However, they both seek to achieve this through different processes. In particular in inquisitorial systems the criminal process is more integrated than in adversarial systems and is considered to form a continuous whole from investigation, to public exposure of the investigation and determination of punishment at trial. Adversarial systems in contrast separate criminal proceedings into three distinct phases, that of investigation, trial and sentencing.

(a) Investigation

In both systems, the first authorities in a criminal case normally are the police. However, here the first differences appear. In common law systems, after a crime is reported to and recorded by the police, they will conduct an investigation, and if there is sufficient evidence indicating guilt, and it is in the public interest to do so, an individual will be charged and brought before a court. Except in minor cases the decision to charge is usually taken by a prosecutor who thereafter has responsibility for the case. The accused will either be remanded in custody or released on bail by the court.

In most common law countries, prosecutors are part of a dedicated service of lawyers under the authority of the Ministry of Justice or Attorney General, or more commonly today, established as a separate independent body such as a Director for Public Prosecutions. Rarely (although historically more common), in some jurisdictions prosecutions will be carried out by the police save in minor cases.

After an accused has been charged, discretion still remains with the prosecution as to whether the case will go to full trial. In a common law system, the prosecution has wide discretion as to whether to prosecute a case and this discretion is generally not subjected to judicial review⁸. The prosecution may decide to withdraw the charges, or engage in pre-trial bargaining, on either the charge or plea, in order to encourage the efficient resolution of the case. If the prosecution decides to prosecute a case, each side – prosecution and defence – is responsible for the collection of evidence for its own case. The prosecution, however, representing the state, has a significant advantage here as they have the police – vested with all its expertise and equipment as well as with powers of stop and search, arrest, detention, questioning, entering and searching premises, etc. – at its disposal, while the defence is on its own in terms of resources and finances. To level the playing field, at least to a certain degree, there are complex rules of disclosure deciding which party at which stage of the proceedings has to disclose evidence to the other party. Furthermore, the accused is not obliged to assist the prosecution with the case and has the right to remain silent. However, one of the common

⁸ Rule 17, UN Guidelines on the Role of Prosecutors.

criticisms made of the common law system is that unfairness can still occur if the accused is unrepresented or there is an inequality of legal representation.

In the civil law system the judicial police act under the formal supervision of public prosecutors or investigating magistrates. The investigating magistrate or prosecutor dictates the investigating strategy, the gathering of evidence and the interviewing of witnesses and the accused. This information will be gathered in a dossier, upon which the future trial will be based. It is the responsibility of the state to investigate all aspects of a case, whether favourable or unfavourable to either the prosecution or the defence. In that regard, investigating magistrates or prosecutors are required to be neutral and objective and search for the “truth” rather than just collect sufficient evidence to launch a successful prosecution.⁹ The whole dossier of the pre-trial proceedings is disclosed to the defence. There are generally no strict rules of evidence, and a range of evidence, including circumstantial, will be taken into consideration.

After an accused has been charged, a judge will make the determination as to whether to remand the accused in custody.¹⁰ The investigating magistrate or public prosecutor makes the determination as to whether to prosecute. As regards the discretion to prosecute, some civil law countries uphold the principle of full, or mandatory, prosecution. Nonetheless, in practice, in civil law countries, prosecutors exercise at least some discretion in the pre-trial phase. As regards a guilty plea, unlike in adversarial jurisdiction, this will not impact upon the matter going to trial. Prosecutors in the civil law system have a similar status as those in the common law system, and are often organised under the Public Ministry. Investigating magistrates, where they exist, are part of the judiciary.

The defence has the ability to participate in all pre-trial proceedings, including the interrogation of witnesses by the judge; request investigations, raise questions, and question witnesses. Decisions by the investigating judge or prosecution can usually be appealed. The investigation stage is generally perceived to be the most important stage in the criminal process in inquisitorial systems.

(b) Trial Stage

At the trial stage, in the civil law system the process continues to be driven primarily by the judge. Cases are heard by professional judges, in some systems assisted by a jury in serious cases, in others by lay judges. At trial, the presiding judges’ task is to question defendants, victims and witnesses, and to confirm the evidence contained in the dossier and to investigate any other evidence. There is no right to cross-examination for the prosecution, nor for the defence, but both can ask or request the presiding judge to ask additional questions. They can also make closing arguments which can have decisive influence.

For the common law system, the trial proceedings are driven by the parties subject to rules of procedure and evidence. Prosecution and defence bring all relevant information to the

⁹ For example Article 81 of the French Code of Criminal Procedure: “Le juge d’instruction procède, conformément à la loi, à tous actes d’informations qu’il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge”.

¹⁰ See reforms implemented in France in 2001, which removed the power of the investigating magistrate to order the pre-trial detention of the accused and placed that authority under a new judge the “le juge des libertés et de la detention.” See Criminal Justice Systems in Europe and North America (2001) The European Institute for Crime Prevention and Control. Chapter on France.

attention of the court. During trial - depending on the crime that is being adjudicated the trial takes place before (lay) magistrates or a judge and jury (where the system provides for) – both prosecution and defence present evidence, examine witnesses, and conduct cross-examination in order to produce information beneficial to its respective side. The trial stage is governed by a system of complex and sophisticated rules of procedure and evidence to guarantee a fair trial to the accused. The outcome of a case can, as it is mainly party-driven, be heavily influenced by skilful questioning as well as by the closing arguments of the prosecution and the defence. The role of the judge in such a trial is confined to being a moderator and referee. He only takes part in the questioning if there is a necessity to clarify important points of law or fact.

(c) Sentencing and Punishment

At the sentencing stage differences between the two systems continue. In the civil law system, the determination of sentence, and the gathering of evidence to determine the appropriate sentence, form part of the main trial hearing. The factors to be considered by the judge in determining sentence are clearly set out in the law. Relevant factors include the antecedent offenses of the accused; evidence as to his/her character, information concerning the accused propensity to commit further crime.¹¹

In terms of sentencing, in the adversarial system, while it is the jury (in the systems where that is provided for) that decides about guilt or innocence, it is up to the judge to decide about the appropriate punishment, for which decision he/she has of a wide discretion. Relevant factors to be considered, whilst similar to civil law considerations, are generally not specified in the law. The hearings and submissions made by the parties as to sentence are separate from the trial and it is only at this stage, that evidence of the accused background is admissible in order to hand down an appropriate punishment.

In conclusion, the fundamental assumption underlying the inquisitorial system is a belief that a State official will proceed in an objective and professional manner to establish the truth and, at the same time, protect the interests of the accused. In the adversarial system there is scepticism about trusting the State to produce the truth and to protect the interests of the accused. Those goals are best secured by the parties themselves.¹² Although the two systems are not perfect yet in essence attempt to ensure the fair trial of the accused, as indicated by the fact that in Europe both types of systems are subject to the European Convention on Human Rights and in other regions are subject to international and regional standards on fair trial procedures.¹³

4 Some perceived advantages and disadvantages of the inquisitorial and adversarial systems¹⁴

A common criticism directed at the adversarial system is that it is not sufficiently concerned with determining the truth. The conduct of the proceedings are directed by the parties, each

¹¹ Advantages and Disadvantages of the Adversarial System in Criminal Proceedings, 1.3, Section 1, Volume 1, Consultation Papers, Review of the Criminal and Civil Justice System in Western Australia, Project 92 (1999). Law Reform Commission of Western Australia, p. 74.

¹² South African Law Commission, Discussion Paper 96, Simplification of Criminal Procedure, para 2.10 – 2.11

¹³ Article 10-11 Universal Declaration of Human Right; Article 14 ICCPR; Article 8 American Convention on Human Rights; Articles 7 and 26 of the African Charter on Human and Peoples Rights.

¹⁴ For this section see generally Advantages and Disadvantages of the Adversarial System in Criminal Proceedings, 1.3, Section 1, Volume 1, Consultation Papers, Review of the Criminal and Civil Justice System in Western Australia, Project 92 (1999). Law Reform Commission of Western Australia.

trying to convince the judge and jury of the correctness of their version of the truth. The inquisitorial system is said to be better at finding the truth, given the disinterested nature of the State officials who lead and direct the investigations. It is this value in the pursuit of truth in the inquisitorial system which led the Committee on Reform of the Criminal Justice System in India headed by Justice Malimath to propose in 2003 a radical reform to switch from the entrenched adversarial system in that country to that of the inquisitorial system because, *inter alia*, “the criminal justice system is virtually collapsing under its own weight as it is slow, inefficient and ineffective” and that “people are losing confidence in the system.” The proposal came under severe criticism both domestically and from international non-governmental organisations.¹⁵ In stark contrast in the last 15 years, 14 Latin American States in the process of reforms to their criminal justice systems switched to the adversarial system from the inquisitorial. It is also argued that in serious cases, the supervision of the investigation by an investigating judge can lead to a more effective and fair investigation, by controlling tightly measures which may impact on the freedom and rights of the accused.

It is also argued however, that in inquisitorial systems, the reality is far different from the normative strictures. Prosecutors are often partisan and exercise little supervision over investigations; limits to resources restrict evidence-gathering thereby diminishing the quality of the dossier that forms the basis of criminal proceedings; proceedings at trial are not rigorous enough; and investigating magistrates are only used in a small number of cases thereby reducing their impact on the quality of investigation. The inquisitorial system has also been criticised for potentially leaving individuals in pre-trial detention for longer periods of time,¹⁶ during which they can be subject to considerable pressure. All these factors are argued to bring into question the ability of the inquisitorial system to respect the presumption of innocence, a which principle has its origin in the common law system, but now forms part of international law applied in inquisitorial systems.

Other criticisms levelled against the adversarial system commonly relate to the right of the accused to not cooperate with the court or the prosecution and the impact that this has on the due administration of criminal justice (although in response inquisitorial systems are seen to diminish the accused’s right to silence), or the injustice that can flow from an unrepresented or inadequately represented accused. In inquisitorial systems, the absence of complex laws of evidence means that criminal procedure is simpler and can avoid situations which occur in the common law system, where evidence can be determined to be inadmissible at a late stage in the proceedings.

A further criticism levelled against the adversarial system is the marginal role and rights accorded to victims of crimes in the criminal justice process though the trend is gradually changing. Under the civil law system victims have procedural rights to actively be involved in the trial process of the accused including the right to attach a ‘pendant’ claim for civil damages to the prosecution.

In reality, each system has its faults and both face numerous common challenges. Problems such as increased demand and a stagnant or diminishing resource base; problems with unreasonable or undue delays; decreasing confidence amongst the domestic population in the delivery of justice (either by not being tough enough on crime or by not adequately protecting

¹⁵ See International Commission of Jurists (ICJ) position paper on this subject – ICJ 2004 Annual Report p. 147

¹⁶ Concerns about this issue in France led to the creation of a new category of judge “le juge des libertés et de la détention.” See *Criminal Justice Systems in Europe and North America (2001)* The European Institute for Crime Prevention and Control. Chapter on France.

rights of the accused); and insufficiently taking into consideration the concern of victims of crime.

5 Efficiency and Effectiveness of Criminal Justice Systems

Whatever may be the source of a criminal justice system, whether civil law, common law or mixed the efficiency and effectiveness of the system to deliver justice in accordance with established international and regional standards will largely depend on the main actors in the system. These are the judges, prosecutors, defence lawyers and the police. Their training, qualifications and ethical conduct for the discharge of their duties with integrity and free of corruption are essential for the system to deliver. To secure these qualities international and regional standards and training manuals are set and developed.¹⁷ The importance of the integrity of these functionaries in the system was admirably described by a Malaysian judge. He said:

*“The administration of Justice is dependent on a triangular structure with the Judiciary at the apex of the triangle and the Legal Department and the Bar forming the two corners of the base. Without an efficient, confident and incorruptible Public Prosecutor’s Department and a fearless, honest and scrupulous Bar, no Judiciary can be strong and as a result the rule of law would become a mockery and society will be deprived of its just deserts, whether it be civil or criminal. It is the duty of all of us to ensure that the law is not prostituted, justice is not perverted, citizenry is not exploited.”*¹⁸

States must therefore ensure that they put in place the mechanisms to attract the highest calibre individuals to serve in the criminal justice system, and ensure that they can exercise their roles effectively, and in accordance with international standards, to ensure the due and proper administration of justice. Adequate budgetary allocation by governments for the administration of criminal justice is also essential for the system to function efficiently and effectively.

6 Conclusions

The state of the criminal justice systems generally was recently described by Richard S. Frase and Robert R Weidner as follows:

*“The notion of a “system” suggest something highly rational – carefully planned, coordinated, and regulated. Although a certain amount of rationality does exist, much of the functioning of criminal justice agencies is unplanned, poorly coordinated, and unregulated. No jurisdiction has ever re-examined and reformed all (or even any substantial part) of its system of criminal justice.”*¹⁹

¹⁷ UN Basic Principles on the Independence of the Judiciary; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region; Basic Principles on the Role of Lawyers; Guideline on the Role of Prosecutors; Code of Conduct for Law Enforcement Official; Bangalore Principles on Judicial Conduct; Manual on Human Rights for Judges, Prosecutors and Lawyers; Manual for Judges and Prosecutors on Combating Torture.

¹⁸ Justice Fred Arulanandan on his elevation to the Bench address – 1974 1 MLJ p. xxii

¹⁹ <http://law.jrank.org/pages/858/Criminal-Justice-System.html>. See also Brussels Working Group Report on Rule of Law Guarantees – November 2006

Whilst a range of diverse type of criminal justice systems exist what is most important for any analysis of them is the extent to which each sufficiently protects the human rights of the individuals coming into contact with it, rather than upon the precise category in which they fit or the general philosophical approach which underpins the way in which they seek to prosecute crime. Violations of individual rights are unfortunately all too common in the criminal justice systems of most jurisdictions in the world and more attention needs to be devoted to strengthening their protection. This should be approached in a systematic manner, rather than a piecemeal fashion, encompassing all stages of the criminal justice process from investigation to imprisonment, and all actors including police, prosecutors, judges, lawyers and prison officials.

Chapter II - Applicable International Standards

1 Introduction

The criminal justice system in a democratic society adhering to the rule of law has to carefully balance different and sometimes conflicting interests: on the one hand the legitimate interest of the state in the observance of national laws, the fight against crime and the maintenance of internal security; the interest of the victims of crime and abuse; as well as on the other hand the rights of the accused or convicted and sentenced offender. In the special power granted to the authorities responsible for the administration of justice to search arrest and detain suspects, the monopoly of the state on the legitimate use of coercive force becomes most apparent. The degree to which a society is committed to the rule of law and fundamental rights can therefore be measured against the way it respects and ensures the rights of those accused or convicted of breaching criminal law.

2 Relevant Treaty Provisions

The fact that persons have breached the law or committed a criminal offence, does not, of course, deprive them of their fundamental rights. Human rights treaties on the international and regional level contain several articles relevant to the protection of human rights during the administration of criminal justice. The right to personal liberty, that is the right not to be arbitrarily detained, enshrined in article 9 of the UN International Covenant on Civil and Political Rights (ICCPR) and article 5 of the European Convention on Human Rights (ECHR), constitutes one of the oldest and most fundamental guarantees constitutive of a free society and the rule of law²⁰ In recognition of detention as a legitimate means of the exercise of state authority in the administration of criminal justice, this right is not granted absolute, but procedural safeguards are guaranteed against arbitrary and unlawful deprivation of personal liberty by state authorities. The right to independent judicial review of the lawfulness of the detention (amparo or habeas corpus) is the historically and presently most important of these safeguards, which can not be derogated from even in times of emergency.²¹ Taking account of the situation of special powerlessness of persons deprived of their liberty, article 10 ICCPR expressly guarantees the absolute right of all persons in detention, whether during the initial stage investigation or after conviction, to be treated humanely.²²

Perhaps the provision most commonly associated with the administration of criminal justice is the right of the accused to a fair trial by an independent judiciary or, in the common law tradition, the right of due process of law guaranteed in article 14 ICCPR and article 6 ECHR.²³ Directly related to these provisions is the non-derogable prohibition of retroactive criminal laws in article 15 ICCPR and article 7 ECHR, which together with the fair trial

²⁰ Manfred Nowak, UN Covenant on Civil and Political Rights – ICCPR Commentary, 2nd edition, Kehl/Strasbourg/Arlington 2005, p. 211ff; see also Pieter van Dijk/Fried van Hof/Arjen van Rijn/Leo Zwaak (eds.), Theory and Practice of the European Convention on Human Rights, 4th edition, Antwerpen/Oxford 2006, p. 455ff; see *infra* Chapter II “Pre-Trial Detention”.

²¹ HRC, General Comment No. 29, UN Doc. ICCPR/C/21/Rev.1/Add.11, (31 August 2001), at para. 16.

²² *Ibid.* at para.13 a. See also Nowak, ICCPR Commentary, *op. cit.*, p. 241ff. See *infra* Chapter 2 on the rights during the pre-trial stage and Chapter V “Rights in Prison”.

²³ *Ibid.* p. 302ff. See also Van Dijk/Van Hof, *op. cit.*, p. 511ff.

provision constitute the corner stone of the rule of law in the administration of criminal justice.²⁴

In addition to these core provisions relevant to the criminal justice process, all other human rights enshrined in international and regional human rights treaties are, in principle,²⁵ applicable to accused or convicted persons. In light of the high risk of abuse of rights in a situation of deprivation of liberty, particular emphasis should be placed on the prohibition of torture or cruel, inhuman or degrading treatment or punishment guaranteed in article 7 ICCPR and article 3 ECHR, and the prohibition of any form of discrimination based on such grounds as race, colour, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, age, disability, sexual orientation or other status as stipulated in article 26 ICCPR, article 1 of Protocol 12 to the ECHR and article 13 of the EC-Treaty.²⁶

3 Soft Law Standards

Starting from the provisions codified in international and regional human rights treaty law, and recognizing that the protection of human rights in the administration of justice in general and of criminal justice in particular poses a particular challenges in many countries around the world,²⁷ various bodies at the United Nations (UN) and on the regional level have developed a number of important and highly detailed standards and principles designed to improve and guide the implementation of existing treaty provisions. Among these soft law standards are for example the UN Standard Minimum Rules for the Treatment of Prisoners (1955) that have become the baseline reference for the evaluation of prison conditions worldwide. Additional examples include the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995), the Bangalore Principles of Judicial Conduct (2002) and the Commentary on the Bangalore Principles (2007). Other standards and principles deal with the protection of vulnerable or discriminated groups, such as women and children, or address the various actors involved in the criminal justice process, such as lawyers, prosecutors and law enforcement officials. Together with the relevant treaty provision, this significant body of soft law standards constitutes the legal framework applicable to the protection of fundamental rights in the administration of criminal justice.

4 List of relevant International Treaties and Soft Law Standards

(a) International and Regional Human Rights Treaties

- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention on the Elimination of all Forms of Racial Discrimination (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (1984)

²⁴ Nowak, ICCPR Commentary, op. cit., p. 358ff; Van Dijk/Van Hof, op. cit., p. 651ff.

²⁵ See infra Chapter V on the applicability of human rights in a prison context.

²⁶ See Nowak, ICCPR Commentary, op. cit., p. 157ff. (torture) p. 597ff (equality). See also Van Dijk/Van Hof, op. cit., p. 405ff. (torture) and p. 989ff (non-discrimination).

²⁷ See for example the bi-annual Resolutions of the UN General Assembly on Human Rights in the Administration of Justice: UN Docs. A/RES/62/158 (18 March 2008), A/RES/60/159 (26 February 2006), A/RES/58/183 (18 March 2004), A/RES/56/161 (20 February 2002).

- Convention on the Rights of the Child (1989)
- International Convention for the Protection of All Persons from Enforced Disappearances (2006)
- Convention on the Rights of all Persons with Disabilities (2006)
- European Convention on Human Rights (1950)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)

(b) Standards Applicable to the Criminal Justice Process

- Standard Minimum Rules for the Treatment of Prisoners (1955)
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)
- Code of Conduct for Law Enforcement Officials (1979)
- 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)
- Safeguards for the Protection of the rights of those facing the death penalty (1984)
- Basic Principles on the Independence of the Judiciary (1985)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985)
- Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
- Basic Principles on the Independence of the Judiciary (1985)
- Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (1988)
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
- Basic Principles on the Role of Lawyers (1990)
- Guidelines on the Role of Prosecutors (1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (1990)
- UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (1990)
- Declaration on the Protection of All Persons from Enforced Disappearances (1992)
- Declaration on the Elimination of Violence against Women (1993)
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2000) (Istanbul Principles)
- European Prison Rules (2006)

Chapter III - Human Rights in Pre-trial Detention

1 Introduction

The pre-trial phase is a crucial and sensitive stage in the criminal justice process. On the one hand, ensuring effective investigation, securing all available evidence and preventing collusion and interference with witnesses are essential for the effective administration of criminal justice. On the other hand, the suspect has a right to protection from undue interferences by the investigating authorities, particularly in light of the presumption of innocence and the prohibition of enforced self-incrimination. Human rights law and standards applicable to the pre-trial phase therefore aim at striking a careful balance between the public interest in the due investigation and prosecution of crimes and the protection of the rights of the accused.

The pre-trial phase shall be understood here in its broadest possible sense, stretching from the beginning of police investigations until the final judgment of first instance. The detention of a criminal suspect at any point during this phase constitutes one of the severest, albeit sometimes necessary, restrictions of the rights of the accused as it places the person concerned at the hands of the authorities and often forestalls a notion of guilt before a final judgement has been reached. Pre-trial detention should therefore only be used as an exceptional measure and with due regard to the implementation of necessary safeguards to protect the detainee from arbitrariness and ill-treatment.

2 Applicable International Legal Standards

The principle of the presumption of innocence enshrined in article 11 Universal Declaration of Human Rights (UDHR) and article 14 (2) ICCPR, that is the right to be presumed innocent until proven guilty by a court of law, constitutes the starting point for all normative considerations in the area of pre-trial detention. It represents a corner stone of the rule of law and is fundamental to respecting and protecting the dignity and integrity of persons in remand detention.

(a) Surveillance, Search and Seizure

Prior to arrest and detention on remand, a person suspected of having committed a criminal offence is usually subjected to surveillance, search and seizure procedures by the police or other investigating agencies in the process of gathering evidence to substantiate the suspicion. Invasive procedures such as secret surveillance or house searches constitute serious interferences with the right to privacy and the authorities' discretion to employ such measures is not unlimited.

According to article 17 (2) ICCPR, interferences with the right to privacy in the context of the administration of criminal justice are only permissible, if they are **lawful**, that is based on the decision by a state authority expressly empowered by law to do so (usually a court) for the purpose of securing evidence,²⁸ and **not arbitrary and unreasonable** in the specific circumstances of the case.²⁹ The European Court of Human Rights (ECtHR) has elaborated on

²⁸ See Manfred Nowak, UN Covenant on Civil and Political Rights - ICCPR Commentary, 2nd revised edition, Kehl/Strasbourg/Arlington 2005, p. 400.

²⁹ HRC, *Rojas García v Columbia*, Communication No. 687/1996 (03 April 2001), at para. 10.3. See also General Comment No. 16, UN Doc. HRI/GEN/1/Rev.4 (7 February 2000).

these principles of **legality** and **proportionality** with respect to interferences with article 8 of the ECHR by investigating agencies:

- Laws regulating secret surveillance measures, such as phone tapping have to specify the circumstances and conditions under which surveillance measures can be employed to avoid granting unfettered power to the authorities (sufficient clarity and predictability);³⁰ adequate and effective guarantees against abuse, as well as effective legal remedies must be in place.³¹
- While judicial control over house searches is not an absolute requirement, sufficient safeguards against arbitrary interferences must be in place.³² All circumstances of the case, including aim and extent of the house search and the existing safeguards are decisive for the proportionality test. The authorities are also required to take reasonable precautions to avoid unnecessary interferences.³³

(b) Arrest and detention in Police Custody

Deprivation of Liberty in the Context of the Administration of Criminal Justice

Any deprivation of liberty has to comply with the **principle of legality** and the **prohibition of arbitrariness**, meaning that it has to be based on a procedure established by law and not be manifestly disproportionate, unjust or unpredictable and not discriminatory in the specific circumstances of the case.³⁴ In the context of the administration of criminal justice, Art. 9 (1) ICCPR and Art. 5 (1-c) ECHR permit arrest or detention only if there is a reasonable suspicion that a criminal offence has been committed or if this measure is reasonably considered necessary to prevent the suspect from committing a criminal offence.³⁵ Secondly, detention must be aimed at “promptly” bringing the detainee before a competent judicial authority.³⁶ The prompt, independent and impartial review of the custody by a competent judicial authority provides an essential procedural safeguard to minimise the risk of arbitrary arrest and detention and to prevent ill-treatment in custody.³⁷

Rights of Arrested Persons and Safeguards in Police Custody

It is fundamental for the protection from arbitrary arrest and detention that arrested persons are **made aware of the reasons and legal grounds** of their apprehension in order to enable them to assess and, if they so wish, challenge the lawfulness of the arrest. According to Art. 9 (2) ICCPR and Art. 5(2) ECHR arrested persons have the right to

- be informed of the reasons of arrest at the point at which they are deprived of personal liberty;³⁸

³⁰ See e.g. ECtHR, *Malone v UK*, Judgment of 2 August 1984, at paras. 67 - 68.

³¹ See e.g. ECtHR, *Klass and others v Germany*, Judgment of 6 September 1978, at paras. 42 ff.

³² Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, 3rd edition, München/Basel/Wien 2008, p. 217; In cases where a search warrant was missing the ECtHR has therefore exercised special scrutiny, see e.g. ECtHR, *Cremieux v France*, Judgment of 25 February 1993, at para. 40.

³³ See e.g. ECtHR, *Keegan v UK*, Judgment of 18 July 2006, at para. 35.

³⁴ Nowak, *op. cit.*, p. 226; A written arrest warrant is not absolutely essential for the legality of the arrest. The HRC has however indicated that the lack of a warrant might be an indication of an arbitrary arrest, see e.g. *Luyeye v Zaire*, Communication No. 90/1981 (21 July 1983), at para. 8.

³⁵ Pieter van Dijk/G.J.H van Hoof, *Theory and Practice of the European Convention on Human Rights*, 4th edition, The Hague/London/Boston 1998, p. 471ff; Grabenwarter, *op. cit.*, p. 169.

³⁶ See e.g. ECtHR, *Lawless v UK*, Judgment of 1 July 1961, at para.13.

³⁷ See e.g. ECtHR, *Aksoy v Turkey*, Judgment of 18 December 1996, at para. 76.

³⁸ See e.g. HRC, *Wilson v the Philippines*, Communication No. 868/1999 (30 October 2003), at para. 7.5.

- be promptly informed, in a language that the persons concerned understand, of the specific legal charges brought against them;³⁹ this information has to be provided at the latest during the first interrogation;⁴⁰
- be expressly informed of their rights without delay and in a language the persons concerned understand.⁴¹

In the period immediately following the deprivation of liberty and during the initial stages of the criminal investigation, the risk of intimidation and physical ill-treatment is highest. **Fundamental safeguards against torture and ill-treatment** should therefore apply as from the very outset of police custody. The European Committee for the Prevention of Torture (CPT) attaches particular importance to the three following rights:⁴²

- the right of the persons concerned to have the fact of their **arrest notified to a third party of their choice** (family member, friend, consultant);⁴³
- **the right of access to a lawyer**, including in principle the right to choose their own lawyers, to talk to them in private and request their presence during any interrogation conducted by the police;⁴⁴
- **the right of access to a doctor**, including the right to be examined, if the persons detained so wish, by a doctor of their own choice (in addition to any medical examination carried out by a doctor called by the police authorities) and out of the hearing of the law enforcement officials;⁴⁵
- and in cases concerning foreign nationals, the right to **contact the diplomatic representation** of their country of nationality.

In addition to guaranteeing these fundamental rights, the implementation of **procedural and technical safeguards** is essential to prevent torture and ill-treatment and ensure the proper administration of criminal justice during police custody. These include inter alia the keeping of a single comprehensive record for each person in custody,⁴⁶ clear rules and guidelines for the interrogation process, the use of electronic recording of police interviews⁴⁷ and the requirement that authorities detain persons only in official places.⁴⁸ Moreover, the **physical conditions of police custody** should comply with certain minimum standards, including inter alia reasonable size of police cells, adequate lighting, and equipment with adequate means of rest.⁴⁹

³⁹ Ibid.

⁴⁰ Grabenwarter, op. cit., p. 172-173.

⁴¹ Principle 13 of the Body Principles on the Protection of all Persons under any Form of Detention or Imprisonment ("Body of Principles"), UN Doc. A/Res/43/173 (9 December 1988).

⁴² See for the following: European Committee for the Prevention of Torture (CPT) "Standards", CPT/Inf/E (2002) 1 - Rev. 2006, at p. 6.

⁴³ See also Principle 92 of the Body of Principles.

⁴⁴ Ibid. Principle 93.

⁴⁵ Ibid. Principle 91.

⁴⁶ CPT "Standards", op. cit., p. 9.

⁴⁷ Ibid. p. 7; see e.g. the CPT's Report on the visit to Norway in 2005, in which it describes an initiative by the Norwegian police for the general introduction of sound and video recording of interviews in police departments, CPT/Inf(2006)14, at para. 25.

⁴⁸ See Art. 10 of the UN Declaration on the Protection of all Persons from Enforced Disappearance, UN Doc. A/RES/47/133 (18 December 1992); and Art. 17 (1) and 17 (2c) of the UN Convention for the Protection of all Persons from Enforced Disappearances (20 December 2006) (not in force).

⁴⁹ CPT "Standards", p. 15; for a detailed discussion of the standards of physical conditions of police custody developed by the CPT, see Ursula Kriebaum, *Folterprävention in Europa*, Wien 2000 (Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte), p. 282ff.

Length of Police Custody

The promptness requirement in Art. 9 (3) ICCPR and Art. 5(3) ECHR usually means that an arrested person has to be brought before a judge or judicial officer within 24 to 48 hours from the time of arrest.⁵⁰ The exact meaning of promptness has to be assessed in each case according to its special features, but the ECtHR has repeatedly held that even where alleged involvement in terrorist activities may justify prolonged custody subject to sufficient safeguards, the requirement of "prompt" judicial control cannot be dispensed with altogether. In the *Brogan* case the Court therefore held that four days and six hours of police custody without judicial supervision fell outside the strict time constraints under the ECHR.⁵¹ In cases of emergency, where a derogation from the right to liberty has been formally made in conformity with the relevant provisions, the ECtHR found that prolonged and unsupervised detention in the absence of sufficient other safeguards was incompatible with the Convention.⁵²

(c) Continuing Pre-trial Detention*Pre-trial Detention as Exception*

The right to prompt judicial review is an essential safeguard against the arbitrary deprivation of liberty. It is the function of the judge or judicial officers to assess the legality of the initial arrest and to evaluate the necessity of continuing detention until trial. International human rights law is very clear that detention on remand pending trial should be the **exception** (Art. 9 (3) ICCPR "not be the general rule").⁵³ In light of the importance of the presumption of innocence and the right to personal liberty, the judge or judicial officers must order the release of the suspect pending trial, unless there are **sufficient reasons** to render prolonged detention reasonable and necessary. Even where sufficient reasons exist to justify continuing deprivation of liberty, the principle of proportionality commands that less restrictive interferences, such as non-custodial measures, are given priority.

Assessing the Necessity and Length of Continuing Pre-trial Detention

Although the persistence of a reasonable suspicion is the condition sine qua non for continuing pre-trial detention, this suspicion alone is not sufficient to justify the prolonged deprivation of liberty.⁵⁴ Taking into account the circumstances of the case, the gravity of the

⁵⁰ Nowak, *op. cit.*, p. 231; see also HRC, General Comment No. 8 (30 June 1982), where the HRC limits the time period to no more than "a few days"; and HRC, *Borisenko v Hungary*, Communication No. 852/1999 (14 October 2002), at para. 7.4 (period of three days too long).

⁵¹ ECtHR, *Brogan and others v UK*, Judgment of 29 November 1988, at para. 62; see also ECtHR, *Ikincisoy v Turkey*, Judgment of 15 December 2004, at para. 102 (no "carte blanche" in terrorist investigations).

⁵² See e.g., *Aksoy*, *op. cit.*, at para. 84. In the *Brannigan and McBride v UK* (Judgment of 26 May 1993), the ECtHR however held that in light of the UK's derogation and the existence of sufficient safeguards (including the availability of habeas corpus and the absolute and legally enforceable right to consult a solicitor within forty-eight hours after the time of arrest, entitlement to inform a relative or friend about the detention and to access to a doctor) a period of up to seven days in police custody without judicial control for individuals suspected of terrorist offences was permissible under the ECHR (*Ibid.* at paras. 59 – 60 and 62 – 65). See also the ruling of the House of Lords in *A and others v. Secretary of State of the Home Department*, 16 December 2004, UKHL 56, where it was admitted that even under derogation, interferences with Art. 5 ECHR have to comply with the principle of proportionality (at para. 44).

⁵³ See Nowak, *op. cit.* p. 234; for the HRC, see e.g. *M. and B. Hill v Spain*, Communication No. 526/1993 (2 April 1997), at para. 12.3; see also e.g. Principle 39 of the Body of Principles.

⁵⁴ See e.g. ECtHR, *Stögmüller v Austria*, Judgment of 10 November 1969, at para. 4; and ECtHR, *B. v Austria*, Judgment of 28 March 1993, at para. 42.

offence and the complexity of the investigation, international human rights bodies have found the following grounds to be **sufficient to justify the necessity** of continued detention:⁵⁵

- to prevent the recurrence of crime⁵⁶ or “where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner”;⁵⁷
- to prevent suppression of evidence, collusion or intimidation of victims;⁵⁸
- to prevent flight or absconding.⁵⁹

Where a person is detained on one of the preceding grounds, the period in detention must be kept as short as possible and the authorities must exercise special diligence to ensure a speedy trial.⁶⁰ What constitutes a **reasonable time period** for detention pending trial has to be interpreted in light of the specific circumstances of the case but must be proportionate to the maximum potential sentence.⁶¹ The gravity of the alleged offence alone is however not sufficient to justify confinement over a prolonged period of time.⁶² The time span considered for determining the reasonableness of detention starts with the first day of arrest and ends with the delivery of a final first instance judgment. If, in the course of the proceedings, the grounds for prolonged detention cease to exist, for example, if the risk of collusion or intimidation of witnesses has minimised, the suspect has the right to be released immediately subject to appropriate guarantees to appear on trial.⁶³

While the ECtHR has refrained from indicating a maximum permissible length of pre-trial detention, the case law suggests some guidelines for determining the reasonable time criteria depending on the complexities of the case, the conduct of the detainee and the conduct of the authorities.⁶⁴ For example, in a series of cases concerning pre-trial detention in Austria, which had lasted for two years and longer, the Court held that the risk of absconding or collusion could not justify such a long period of confinement and that the authorities had not acted with the necessary promptness.⁶⁵ Austria has subsequently revised the code of criminal procedure, which now prescribes a maximum length of confinement for the respective grounds (e.g. a maximum of two months if there is risk of collusion), which must however not exceed the duration of six months.

⁵⁵ For an extended list of grounds justifying continuing pre-trial detention according to the jurisprudence of the ECtHR, see Grabenwarter, *op. cit.*, p. 174; van Dijk/van Hof, *op. cit.*, p. 494.

⁵⁶ See e.g. ECtHR, *Clooth v Belgium*, Judgment of 12 December 1991, at para. 40.⁵⁷ See e.g. HRC, *David Alberto Campora Schweizer v Uruguay*, Communication No.66/1980 (12 October 1982) at para 81.1; for the ECtHR see e.g. *Tomasi v France*, Judgment of 27 August 1992, at para. 91 (threat to public order).

⁵⁷ See e.g. HRC, *David Alberto Campora Schweizer v Uruguay*, Communication No.66/1980 (12 October 1982) at para 81.1; for the ECtHR see e.g. *Tomasi v France*, Judgment of 27 August 1992, at para. 91 (threat to public order).

⁵⁸ See e.g. HRC, *W.B.E. v The Netherlands*, Communication No. 432/1990, (23 October 1992), at para. 6.3; for the ECtHR see e.g. *Wemhoff v Germany*, Judgment of 27 June 1968, at para. 14 (risk of suppression of evidence); and *Tomasi*, *op. cit.*, at paras. 92-95 (risk of intimidation of witnesses).

⁵⁹ See e.g. ECtHR, *Neumeister v Austria*, Judgment of 27 June 1968, at para. 10; and *B.*, *op. cit.*, at para. 44.

⁶⁰ See e.g. HRC, General Comment No. 8 (30 June 1982) at para. 3.; for the ECtHR, see e.g. *Wemhoff*, *op. cit.*, where the Court held that “an accused person in detention is entitled to have his case given priority and conducted with particular expedition” (at para. 17); see also more recently e.g. *Imre v Hungary*, Judgment of 2 March 2004, at para. 43.

⁶¹ The reasonable time criteria for pre-trial detention in Art. 9 (3) ICCPR and Art. 5(3) ECHR is independent of the reasonableness of the delay before trial enshrined in the fair trial provisions in Art. 14 (3-c) ICCPR and Art. 6 (1) ECHR; see e.g. the ECtHR’s elaborations in the *Neumeister* case, *op. cit.*, at paras. 1ff.

⁶² See e.g. ECtHR, *Jecius v Lithuania*, Judgment of 31 July 2000, at para. 94.

⁶³ See e.g. ECtHR, *Hristov v Bulgaria*, Judgment of 31 October 2003, at paras. 105-107.

⁶⁴ See van Dijk/van Hof, *op. cit.*, p. 496; also Grabenwarter, *op. cit.*, p. 175-176.

⁶⁵ See *Stögmüller*, *op. cit.*, at para. 15; *Neumeister*, *op. cit.*, at para. 15; *Ringeisen v Austria*, Judgment of 16 July 1971, at para. 107; *Toth v Austria*, Judgment of 12 December 1991, at paras. 77-78.

Alternatives to Pre-trial Detention

The presumption for release pending trial contained in Art. 9(3) ICCPR presupposes the existence of alternative, non-custodial measures within the national criminal justice system. The Human Rights Committee held that national systems whose only alternative to pre-trial detention is supervised release, which is granted only under certain circumstances, and which has no provision for bail, does not comply with the requirements of Art. 9 (3) of the Covenant.⁶⁶ When deciding on the necessity of detaining a suspect pending trial, the authorities therefore have the duty to consider less restrictive alternatives.⁶⁷ The use of detention can thus not merely be justified by the need to ensure appearance on trial, if this can be achieved through other guarantees.

The Tokyo Rules on non-custodial measures stipulate that every State should develop such alternative measures to imprisonment commensurate with the gravity of the offence, the personality of the offender etc. to reduce the number of pre-trial prisoners.⁶⁸ Such measures include for example bail, house arrest, confiscation of travel documents and recognizance, which should be introduced systematically and coherently to avoid pre-trial detention wherever possible.⁶⁹ An example for a cross-national initiative to increase the acceptance and use of such measures is a proposal for the mutual recognition of non-custodial measures in the EU presented by the European Commission in 2006.⁷⁰ The UN Office on Drugs and Crime (UNODC) has also presented a series of documents to enhance the use of alternative measures to imprisonment at various stages of criminal proceedings, which can serve as guidance on best practices.⁷¹

(d) Procedural Safeguards in Pre-Trial detention*Writ of Habeas Corpus*

In addition to the requirement of prompt judicial review, Art. 9 (4) ICCPR and Art. 5(4) ECHR guarantee the right to apply for a **writ of habeas corpus** at **reasonable intervals** to have the procedural and substantive lawfulness of the deprivation of liberty reviewed by a court “in view of the assumption that such detention is to be of strictly limited duration”.⁷² To ensure fair and effective review proceedings that guarantee equality of arms, the detainee must in principle have the possibility to be heard either in person or, where necessary, through some form of representation and be granted access to the prosecution files upon request.⁷³ The effectiveness of habeas corpus is therefore closely linked to the **right of access to legal**

⁶⁶ Human Rights and Pre-Trial Detention, Professional Training Series No. 3. United Nations, New York 1994, at p. 15.

⁶⁷ See e.g. ECtHR, *Dzyruk v Poland*, Judgment of 4 October 2006, at para. 41.

⁶⁸ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), UN Doc. A/Res/45/110 (14 December 1990).

⁶⁹ Annual Report of the UN Special Rapporteur on Torture to the UN General Assembly, UN Doc. A/62/221 (13 August 2007), at para. 58ff.

⁷⁰ See the Proposal for a European Framework decision on the European supervision order in pre-trial procedures between Member States of the European Union, 29 August 2006, 2006/0158 (CNS).

⁷¹ See Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment, UNODC, New York 2007; see also Alternatives to Incarceration, Custodial and Non-Custodial Measures No. 3, UNODC, New York 2006.

⁷² See e.g. ECtHR, *Assenov and Others v Bulgaria*, Judgment of 28 October 1998, at para. 162.

⁷³ See e.g. ECtHR, *Kampanis v Greece*, Judgment of 13 July 1995, at para. 47; and *Lamy v Belgium*, Judgment of 30 March 1989, at para. 29.

counsel and effective legal assistance,⁷⁴ which should be provided at the earliest opportunity after the person has been arrested. It is essential that communication and consultation with the legal counsel must be granted without delay or censorship and in full confidentiality.⁷⁵

Prohibition of Torture and Ill-treatment

The prohibition of torture and ill-treatment enshrined in Art. 7 ICCPR, Art. 2 CAT and Art. 3 ECHR is particularly relevant to the pre-trial phase, where detainees are at a high risk of ill-treatment by the authorities for the purpose of exacting information. Any form of violence or other measure designed to take undue advantage of the vulnerability of pre-trial detainees in order to compel a confession or self-incrimination is prohibited.⁷⁶ The authorities responsible for the supervision of pre-trial detention should therefore be independent from the investigating agencies (see *infra*).⁷⁷ Where additional questioning by the police is necessary after a person has been remanded to prison, this should take place within the prison establishment concerned, rather than on police premises and no unsupervised contact with the interrogators should be permitted.⁷⁸ In addition, information obtained through torture cannot be invoked as evidence in any form of proceedings.⁷⁹

Other Safeguards against Abuses in Pre-trial Detention

Procedural safeguards to protect detainees from ill-treatment, similar to those in police custody, apply to remand prisons:

- the authorities have to put in place an effective complaint procedure and to ensure that any allegation of ill-treatment in pre-trial detention is promptly and impartially investigated;⁸⁰
- the right of the concerned persons to have the fact of their continued detention and/or transfer to a remand prison **notified to a third party of their choice** (family member, friend, consultant);⁸¹
- the right to a proper, duly recorded **interview and examination by a medical doctor on the day of admission to the detention facility**, including the right to a second examination by an independent doctor, if the detainee so requests;⁸²
- the keeping of a **detailed record** for every detainee.⁸³

(e) **Conditions of Places of Pre-trial Detention**

*Segregation of Categories of Detainees*⁸⁴

The presumption of innocence requires that accused persons **be given treatment appropriate to their status as unconvicted detainees**.⁸⁵ Therefore Article 10 (2) (a) ICCPR as well as a

⁷⁴ Principles 11, 17 and 18 of the Body of Principles; see also HRC, *G. Campbell v Jamaica*, Communication No. 248/1987 (30 March 1992), at para. 6.4. On the right of access to a lawyer during criminal proceedings in accordance with Art. 14 (3-d) ICCPR and Art. 6 (3-c) ECHR see *infra* Chapter 3 on “Fair Trial”.

⁷⁵ Principle 18 (3) of the Body of Principles.

⁷⁶ *Ibid.* Principle 21.

⁷⁷ See e.g. General Recommendations of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68 (17 December 2002), para.26, at lit. (g).

⁷⁸ *Ibid.* See also CPT „Standards“, p. 14.

⁷⁹ Art. 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), UN Doc. A/Res/39/46 (26 June 1987).

⁸⁰ Art. 13 CAT; see also principle 33 of the Body of Principles.

⁸¹ Principle 16 of the Body of Principles.

⁸² *Ibid.* Principles 24-26.

⁸³ *Ibid.* Principle 12.

⁸⁴ See *infra* Chapter V „Rights in Prison“, Section III.6.

number of international and regional norms provide for the **segregation of pre-trial and convicted detainees**.⁸⁶ According to the European Prison Rules exceptions can be made in order to allow prisoners to participate jointly in organized activities.⁸⁷ Furthermore, because of their special vulnerability, accused juvenile persons shall be detained separately from adults.⁸⁸

Physical Conditions of Detention

The standards for the physical conditions of detention of pre-trial detainees are derived from the presumption of innocence as well as the **obligation to treat detainees with dignity and humanity** under Article 10(1) ICCPR. The regime for pre-trial detainees may not be influenced by the possibility that they may be convicted of a criminal offence in the future.⁸⁹

In addition to the general minimum standards for all persons in confinement,⁹⁰ international human rights standards set out the following principles, which reflect the special status of pre-trial detainees:

- if possible the detainees shall be placed in single cells;⁹¹
- within the limits possible they may, if they wish, have their food procured at their own expense from the outside;⁹²
- access to medical care,⁹³ including psychological and dental care as well as pre- and postnatal care in women's institutions must be guaranteed;⁹⁴ if detainees are able to pay the expenses, they shall be allowed to be treated by their own doctor;⁹⁵
- they shall be allowed to wear their own clothing⁹⁶; alternatively appropriate clean and adequate clothing must be provided by the authorities; in any case, prison uniforms of pre-trial detainees must be distinct from the one of convicted prisoners;⁹⁷
- they shall be offered the opportunity to work but shall not be required to work. If they choose to work they shall receive an equitable remuneration.⁹⁸

*Restraints and Restrictions*⁹⁹

The use of restrictions and restraints on pre-trial detainees must **be based on the principle of presumption of innocence and the requirement to treat persons in detention with humanity and respect for their dignity**. Measures imposed for security and prosecution requirements can often worsen the conditions of confinement for pre-trial detainees. Therefore, international standards specify that such measures shall be **applied with no more**

⁸⁵ Ibid. Principle 36 (1) and Rule 84 (2) of the Standard Minimum Rules for the Treatment of Prisoners (“Standard Minimum Rules”), UN Doc. U.N. Doc. A/CONF/611, annex I (30 August 1955).

⁸⁶ Rule 8 (b) and 85 (1) of the Standard Minimum Rules.

⁸⁷ Rule 18.9 of the European Prison Rules, Recommendation of the Committee of Ministers, Rec(2006)2.

⁸⁸ Art. 10 (2-b) ICCPR; see e.g. also Rule 8 (d) and 85 (2) of the Standard Minimum Rules and Rule 18.8 (c) of the European Prison Rules.

⁸⁹ Rule 95(1) of the European Prison Rules.

⁹⁰ See infra Chapter V “Rights in Prison”.

⁹¹ Rule 86 of the Standard Minimum Rules; Rule 96 of the European Prison Rules.

⁹² Rule 87 of the Standard Minimum Rules.

⁹³ Ibid. Rule 22; Rule 40 of the European Prison Rules.

⁹⁴ Rule 23 of the Standard Minimum Rules.

⁹⁵ Ibid. Rule 91.

⁹⁶ Rule 97.1 of the European Prison Rules.

⁹⁷ Ibid. Rule 97.1.

⁹⁸ Ibid. Rule 89 and Rules 26 and 100.1 of the European Prison Rules.

⁹⁹ For a more detailed discussion on the use of instruments of restraint by law enforcement/prison personnel, see infra, Chapter V “Rights in Prison”, Section III.5.

restriction than is necessary for reasons of investigation, safe custody and a well-ordered community life.¹⁰⁰

Correspondence and Visits

As a general rule, pre-trial detainees **shall receive visits and have the right to communicate with their family and other persons** in the same way as convicted prisoners.¹⁰¹ However, for criminal investigation purposes, a judicial authority may prohibit contacts with the outside world.¹⁰² Such restrictions on external communication must however be strictly proportionate to the legitimate aim pursued.¹⁰³

Solitary Confinement

For investigative reasons, restrictions may be placed on detainees' communal activities, their communication with other inmates. Solitary confinement is sometimes imposed for several weeks. As a consequence of such isolation regimes, detainees spend up to 23 hours in their cells with no contact to the outside world. The European Prison Rules provide that such serious constraints must be strictly proportionate and **allow for an acceptable minimum level of contact**.¹⁰⁴

The European Commission of Human Rights (EComHR)¹⁰⁵ held with regard to solitary confinement that **such detention was in principle undesirable**, particularly when the person concerned was in pre-trial detention and therefore could only be justified for exceptional reasons.¹⁰⁶ The Committee against Torture has recognized the **harmful physical and mental effects of prolonged solitary confinement** and has expressed concern about its use, particularly as a restrictive measure during pre-trial detention.¹⁰⁷ Depending on the particular circumstances of the case, prolonged solitary confinement can amount to inhuman treatment or even torture, especially where it is used as a form of coercion in the investigation process.¹⁰⁸

¹⁰⁰ See e.g. Rule 27 of the Standard Minimum Rules and Principle 36(2) of the Body of Principles.

¹⁰¹ Rule 92 of the Standard Minimum Rules and Rule 99 (a) of the European Prison Rules.

¹⁰² Rule 92 of the Standard Minimum Rules.

¹⁰³ See e.g. ECtHR, *Vlasov v. Russia*, Judgment of 12 June 2008, at para. 138; *Pfeifer and Plankl v Austria*, Judgment of 25 February 1992, at para. 46.

¹⁰⁴ Rule 24.2 of the European Prison Rules.

¹⁰⁵ The European Commission of Human Rights and the European Court of Human Rights established under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 were replaced in 1998 by a single permanent court named as the European Court of Human Rights pursuant to Protocol No. 11 to the Convention.

¹⁰⁶ Van Dijk/van Hof, op. cit., p. 421.

¹⁰⁷ E.g. CAT Committee, Annual Report to the UN General Assembly (concluding observations on Denmark), UN Doc. A/52/44 (10 September 1997) at paras. 181 and 186.

¹⁰⁸ See e.g. HRC, *Polay Campos v. Peru*, Communication No. 577/1994 (06 November 1997), at para. 8.4 (incommunicado detention); see also General Comment No. 20 (10 March 1992), at para. 6; for the ECtHR, see e.g. *Mathew v The Netherlands*, Judgment of 15 February 2006, at para. 102; see further, Report of the UN Special Rapporteur on Torture on his mission to Denmark in May 2008 (forthcoming), and Report of the UN Special Rapporteur on Torture to the UN General Assembly, UN Doc A/63/175 (28 July 2008), at paras. 77-85).

3 Actors and Institutions Involved in Pre-trial Detention

(a) Police

International standards, such as the Code of Conduct for Law Enforcement Officials, require the police to respect and protect human dignity and maintain and uphold the human rights of all persons in the course of performing their duty with respect to the investigation and arrest of criminal suspects.¹⁰⁹ Police officers have the duty to ensure the **full protection of the health** of suspects in their custody and to **oppose and combat all forms of corruption**.¹¹⁰ In cases of torture and ill-treatment, the defence of superior order or exceptional circumstances can not be invoked and law enforcement officials have the **duty to prevent and report such abuses**.¹¹¹ In addition to the procedural and technical safeguards mentioned above, the existence of **independent and impartial investigating mechanisms** that operate outside the police apparatus, and the **imposition of adequate sanctions** are essential for the effective deterrence against torture and ill-treatment.¹¹² However, the best guarantee against torture is the unanimous refusal of such practices by the concerned officials. Continuing professional **human rights training for law enforcement officials**, including a special focus on interrogation techniques therefore constitutes an important component of the prevention of torture and ill-treatment in custody.¹¹³

(b) The Prosecutor and Investigating Agencies

The prosecutor plays an important role with regard to combating torture and ill-treatment by the police, in particular as far as the refusal is concerned to use any evidence in the course of the proceedings where it is suggested that such evidence was obtained through torture.¹¹⁴ More generally, the prosecutor's duty is to **supervise the legality of the investigation** with due respect to the human dignity and rights of the suspect and the victim. This means in particular, that he or she has to **avoid the stigmatization** of pre-trial detainees in light of the presumption of innocence.¹¹⁵

To avoid undue pressure, remand prisons should not be placed under the authority of investigating agencies, but should be **supervised by a separate chain of command**.¹¹⁶ This applies in particular to the imposition of restrictive measures, such as isolation or restrictions on communication, which, if dominated by the prosecution's interest, could be used to obtain information or extract confessions.¹¹⁷ Decisions on the imposition of **restrictions on remand prisoners** should therefore be **subject to a court order** in the individual case, to ensure the necessity and proportionality of these measures with due respect to the presumption of innocence.

¹⁰⁹ Art. 2 of the Code of Conduct for Law Enforcement Officials, UN Doc. A/34/169 (17 December 1979).

¹¹⁰ Ibid. Art. 6 and 7 respectively.

¹¹¹ Ibid. Art. 5 and 8 respectively.

¹¹² See the practice of the CPT, in: Ursula Kriebaum, *op. cit.*, p. 265ff.

¹¹³ Ibid. p. 276-277.

¹¹⁴ See e.g. No. 16 of the Guidelines on the Role of Prosecutors, adopted at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹¹⁵ Ibid. No. 18.

¹¹⁶ Human Rights and Pre-trial detention, Professional Training Series No. 3, United Nations, New York/Geneva 1994, p. 13.

¹¹⁷ On this problem see e.g. the observations by the UN Working Group on Arbitrary Detention with respect to Norway, UN Doc. A/HRC/7/4/Add.2 (11 October 2007), at para. 74.

(c) Judges and Judicial Officers

In light of the fundamental role of judicial oversight for the protection of the rights of the accused, the judicial authority responsible for the determination of the lawfulness of pre-trial detention must fulfil the requirements of **independence, objectivity and impartiality**.¹¹⁸ This means in particular that the judge or judicial officer has to be institutionally and substantively **independent from the prosecution**.¹¹⁹ In the context of habeas corpus proceedings, Art. 9 (4) ICCPR and Art. 5(4) ECHR guarantee not only recourse to an independent court, but also the participation of the suspect in **truly adversarial proceedings** to ensure equality of arms between the detainee and the prosecution.¹²⁰

Judicial oversight also plays an important role in combating torture and ill-treatment in police custody and pre-trial detention. The right to be physically brought before a judge is a timely opportunity for a criminal suspect, who has been ill-treated to lodge a complaint. Even in the absence of an express complaint, the judge or judicial officer must take appropriate steps when there are indications that torture and ill-treatment in custody may have occurred.

(d) The Role of International and National Monitoring Mechanisms

Independent detention monitoring mechanisms, such as the CPT, as well as the recently established UN Subcommittee on the Prevention of Torture (SPT) and the National Preventive Mechanisms (NPM) under the Optional Protocol to the UN Convention against Torture (OPCAT)¹²¹ play a central role for the prevention of torture and ill-treatment in police custody and pre-trial detention. Both international and national bodies have the mandate to conduct regular visits to places of detention as well as to engage in a constructive dialogue with the authorities and make recommendations to improve the situation of the persons deprived of their liberty. In order to carry out effective monitoring, they must be guaranteed among others to have regular access to all places of detention, the right to move freely and hold private interviews with all detainees. NPMs play a particularly important role, as they are permanently based in the respective country and therefore better equipped through regular and continuous monitoring, to expose (the often closed) places of pre-trial detention to public scrutiny and effectively contribute to the respect and protection of the rights of the detained persons. Moreover, their visits often provide the only contact for detainees with the outside world. The role of monitoring bodies is therefore not merely preventive in nature. For example, through its regular reporting on detention conditions in Member States of the Council of Europe, the CPT has considerably contributed to the development of standards and safeguards for pre-trial detention.

Furthermore, independent non-governmental organisations also play an active role in monitoring pre-trial detention and promoting penal reform. In India for example, regular visits

¹¹⁸ See e.g. HRC, *Yuri Bandajevsky v Belarus*, Communication No. 1100/2002 (18 April 2006), at para. 10.3; for the ECtHR, see e.g. *Schiesser v Switzerland*, Judgment of 4 December 1979, at para. 31.

¹¹⁹ For many others, see e.g. HRC, *Kulomin v Hungary*, Communication No. 521/1992 (22 March 1996), at para. 11.3; and ECtHR, *Assenov*, op. cit., at para. 148.

¹²⁰ See e.g. ECtHR, *Hristov*, op. cit., at para. 118.

¹²¹ So far 25 States have ratified OPCAT out of which 16 are European States (Albania, Croatia, Czech Republic, Denmark, Estonia, Georgia, Lichtenstein, Malta, Poland, Republic of Moldova, Serbia, Slovenia, Spain, Sweden, Ukraine, United Kingdom) and one is member State of ASEAN (Cambodia). In Europe, Albania, Armenia, the Czech Republic, Denmark, Estonia, Liechtenstein, the Republic of Moldova, Poland, Slovenia and Sweden have established a National Preventive Mechanism.

by human rights organisations to places of pre-trial detention have contributed to sensitizing officials of that region to the agonising situation of pre-trial detainees and instigated a debate on the reform of the penal system.¹²²

4 Problems and Challenges to Human Rights in Pre-trial Detention

(a) Excessive Use of Pre-trial Detention around the World

Although international human rights law and standards provide that pre-trial detention should only be applied sparingly, the detention of criminal suspects pending trial is excessively used all over the world. At any given moment, at least 2,5 m persons are held in pre-trial detention around the world, and in some countries pre-trial prisoners make up to over 80% of the overall prison population.¹²³ The use of pre-trial detention is generally higher in developing countries¹²⁴ (albeit it is also widely used in some developed states) and can often be linked to resource-related problems in the criminal justice sector, such as the slow pace of investigations, heavy overload of the courts, limited number of lawyers, corruption, insufficient financial resources for free legal assistance schemes, conservative approach to granting bail and lack of alternative non-custodial measures. Ironically, the high number of pre-trial detainees only increases the pressure on the already strained criminal justice system and entails high costs for the society as a whole.

In addition to structural reasons, the excessive use of pre-trial detention is often based on an “arrest first, investigate later” policy by law enforcement and investigating authorities. While the use of pre-trial detention does not per se constitute a human rights violation (unless it is used as a form of punishment or sanction), and may be necessary in the interest of justice and for the protection of victims and the community, the automatic recourse to pre-trial detention of suspects runs against the spirit and text of international human rights norms. More importantly, the *consequences* arising from the excessive use and length of pre-trial detention pose serious challenges to the rule of law and the protection of human rights in the administration of criminal justice.

¹²² See R.K. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India”, in: *Reducing the Excessive Use of Pretrial Detention*, Open Society Justice Initiative, Spring 2008, p. 57 – 69.

¹²³ World Pre-Trial/Remand Imprisonment List, International Centre for Prison Studies (ICPS), January 2008. The rate of pre-trial detainees in relation to sentenced prisoners varies significantly between different countries and regions. According to a recently published study by the Open Society Justice Initiative, Asia as a region headed the list in 2006 with an average percentage of 47,8% of pre-trial prisoners as opposed to an average of 20,5% in Europe (See “Reducing the Excessive Use of Pretrial Detention”, Open Society Justice Initiative, Spring 2008). For detailed statistics on the rate of untried prisoners in European countries, see also the Annual Penal Statistics of the Council of Europe (SPACE), which found an average rate of 22,5 % of pre-trial detainees in 2006 (PC-CP (2007)9 rev3, 23 January 2008).

The frequent and arbitrary use of pre-trial detention in European and Asian countries is also addressed in the successive reports of the UN Special Rapporteur on Torture, see e.g.: Report on Indonesia (10 March 2008), A/HRC/7/3/Add.7; Report on Sri Lanka (26 February 2008), A/HRC/7/3/Add.6; Report on China (10 March 2006), E/CN.4/2006/6/Add.6; Report on Nepal (9 January 2006), E/CN.4/2006/6/Add.5; Report on Mongolia, (20 December 2005), E/CN.4/2006/6/Add.4; Report on Georgia (23 September 2005), E/CN.4/2006/6/Add.3; Report on Moldova (forthcoming).

¹²⁴ Open Society Justice Initiative, op. cit., p. 31. The study also suggests an inverse correlation between countries’s low ranking on the Human Development Index and high rates of pre-trial detention.

(b) Length of Pre-trial Detention

In some countries, it is common that pre-trial prisoners spend months and even years in detention, often without any mechanisms to challenge the lawfulness of the deprivation of liberty, only to be finally acquitted or sentenced to a non-custodial penalty. Even where suspects receive a prison sentence, the time they have spent in pre-trial detention awaiting trial often exceeds the maximum length of imprisonment applicable to their case. Such unreasonably long periods of confinement constitute per se serious violations of the right to personal liberty and the presumption of innocence. The negative impact of pre-trial detention on the human rights of the detainee is aggravated by the severe emotional stress, risk of torture and ill-treatment and health related-problems as a consequence of long periods of confinement in overcrowded and often extremely unhealthy prison conditions.

(c) Overcrowding and Inhumane Prison Conditions

In many parts of the world, pre-trial detainees are exposed to much worse prison conditions than convicted prisoners. The excessive use and length of pre-trial detention results in massive overcrowding of remand detention facilities, with the number of detainees up to 3 times higher than the actual capacity of the penitentiary institution.¹²⁵ Places of pre-trial detention usually receive low priority in the allocation of funds and detainees often suffer from neglect by the prison administration because of their “temporary” status. As a result they are regularly denied access to many of the facilities, rights and privileges granted to convicted prisoners.¹²⁶ In addition, and contrary to human rights standards prohibiting restrictions other than strictly necessary for the process of investigations,¹²⁷ pre-trial detainees are often placed under very restrictive regimes, imposing heavy limitations on communication rights and communal activities, which often amounts to the total isolation of the person concerned.

Overcrowding exacerbates poor physical prison conditions. Space in the cells may be so limited, that detainees have to take shifts to lie down and sleep. Overcrowded and dirty conditions are conducive to the transmission of infectious diseases among detainees and access to sanitary and medical facilities is often restricted. These conditions increase the risk of inter-prisoner violence. Overcrowding also further limits access to legal assistance, thus contributing to the length of proceedings. In addition, in some countries newly arrived prison inmates are placed in special cells (sometimes called quarantine) for several days, which do not fulfil the international standards regarding the physical conditions of detention.¹²⁸

In addition to extremely poor conditions of detention, the indeterminate duration and uncertainty about the outcome of the impending proceedings aggravates the severity of the confinement. The suicide rate among pre-trial detainees is significantly higher than among convicted prisoners.¹²⁹ Moreover, pre-trial detainees have higher incentives to make self-incriminating statements or plead guilty in order to be able to leave the unbearable conditions of confinement. The excessive use of pre-trial detention therefore not only poses mutually

¹²⁵ See e.g. Report of the UN Special Rapporteur on Torture on his mission to Indonesia in November 2007 UN Doc. A/HRC/7/3/Add.7 (10 March 2008), at paras. 26-28.

¹²⁶ Open Society Justice Initiative, op. cit., p 18.

¹²⁷ See supra.

¹²⁸ See e.g. UN Special Rapporteur on Torture, Report on Indonesia, op. cit., at para. 28; see also UN Special Rapporteur on Torture, Report on Moldova (forthcoming).

¹²⁹ Open Society Justice Initiative, op. cit., p. 19.

reinforcing challenges to the rights of the individual detainee, but also risks challenging the rule of law and the credibility of the criminal justice system as a whole.

(d) Challenges to the Rule of Law

The unnecessary use and excessive length of pre-trial confinement combined with the lack of judicial oversight and the frequent failure to effectively implement procedural and substantive safeguards provided for by human rights law and standards risk undermining the presumption of innocence, which functions as a cornerstone of a rights-based criminal justice system. This is particularly the case, where detention pending trial is systematically used as a sanction or repressive measure against suspect offenders (“sentenced to pre-trial detention”).¹³⁰ Moreover, persons detained for weeks or months are likely to lose their job, housing and social status, which amounts to a de facto punishment even when they are finally acquitted.

A related problem is that pre-trial detainees are disproportionately likely to be poor,¹³¹ unable to afford legal assistance and lacking the financial means to be released on bail if this option is available at all. In countries where comprehensive legal aid systems do not exist, or release on bail is not available at a realistically proportionate amount to the accused person’s means, pre-trial detention becomes de facto discriminatory against indigent persons. Under such circumstances, the criminal justice process can no longer be considered fair and equitable. The discriminatory nature of pre-trial detention is exacerbated, when the criminal justice system is corrupt. Where judicial control, release on bail or expedition of the proceedings depend on the suspect’s social status or financial means to bribe the responsible authorities, the rule of law is seriously challenged.

5 Conclusions and Recommendations

International Human Rights law and standards strike a careful balance between the legitimate interest of the prosecution in effective criminal proceedings and the provision of substantive and procedural guarantees to protect the rights and freedoms of suspected persons. In practice however, the problems of excessive and often arbitrary use of detention pending trial, unreasonable length of detention together with overcrowding of detention facilities and inhuman prison conditions, as well as the systematic lack of alternatives to custodial measures, seriously challenge the protection and implementation of human rights at the pre-trial stage. In many countries, these problems are less of a de jure nature but rather caused by a failure to effectively implement already existing legal standards due to a slow, malfunctioning or corrupt criminal justice system, lack of training, capacity and resources or the use of pre-trial detention as a form of sanction on the suspect. The discussion on the protection of human rights in the pre-trial phase therefore has to take into account the need to advance necessary reforms of the penal system and the justice sector in general.

Summing up, the following recommendations can serve as a starting point for discussing ways forward in advancing human rights protection at the pre-trial stage.

¹³⁰ See eg. Report of the UN Special Rapporteur on Torture of his mission to Mongolia in June 2005, UN Doc. E/CN.4/2006/6/Add.4 (20 December 2009), at para. 29.

¹³¹ Open Society Justice Initiative, *op. cit.*, p. 28ff.

Avoiding Arbitrary and Unnecessary Pre-trial detention and Limiting its Duration

- Limiting the period of police custody in line with international standards (max. 48 hours).
- Implementing an obligatory and periodical system of judicial control over any deprivation of liberty in the context of criminal investigations by an independent and objective judicial body.
- Limiting the maximum length of confinement pending trial by domestic law, commensurate with the grounds of confinement.
- Guaranteeing procedural safeguards, in particular the effective availability of a writ of habeas corpus to challenge the deprivation of personal liberty.
- Providing effective legal assistance, where necessary, from the beginning of pre-trial detention.

Reform and Regular Oversight of Pre-trial detention Facilities

- Ensuring that pre-trial detention facilities comply with international minimum standards for the physical conditions of places of detention.
- Ensure that pre-trial detainees are treated in accordance with international standards.
- Providing for procedural safeguards and effective complaint procedures to protect the detainees against torture and ill-treatment in line with international standards.
- Placing pre-trial detention facilities under a separate authority, independent from the police and prosecution.
- Opening detention facilities to regular visits by independent monitoring bodies such as NPMs, including forensic experts.

Systematic Use of Alternatives to Pre-trial Detention

- Comprehensively reforming the criminal justice sector in order to offer a wide range of measures avoiding the deprivation of liberty.
- Introducing systematically and coherently non-custodial measures, such as bail, house arrest, confiscation of travel documents and recognizance.
- Placing minor offences outside the criminal law system to concentrate resources on processing grave crimes.

Chapter IV - Human Rights – Fair Trial Procedures

1 Introduction

The fairness of a State's criminal justice system is often the standard upon which the fairness of its entire justice system is judged. Historically, and unfortunately still in some places of the world today, States use the criminal justice process as a means of persecuting and harassing perceived opponents of the state. In that regard, the ability of a State to be able to guarantee independent and impartial justice says a lot about its ability to ensure respect for the rule of law and human rights.

Trial proceedings are also the most public element of the criminal justice process and therefore their fair and effective functioning are essential to maintain public confidence in the administration of justice. Human rights standards in this area set out a range of specific minimum guarantees, governing trial procedures and the roles of the various court actors, in order to protect the integrity of the criminal justice system. At its core are the two basic principles of fairness and public justice. These work to ensure the transparency of the criminal justice system thereby limiting arbitrary or politicised abuse of the system.

The trial phase is considered for the purposes of this chapter to run from the initial hearing to determine guilt or innocence to the final appeal.

2 Applicable Legal Standards

The right to a fair trial is set out in all major international and regional human rights instruments: Article 14 of the ICCPR, Article 6 of the ECHR, Article 8 of the American Convention on Human Rights (ACHR) and Article 7 and 26 of the African Convention on Human and Peoples Rights (ACHPR). It is also included in Article 10, 11 of the UDHR, which is generally considered to reflect customary international law. Numerous fair trial principles are also included in the Statute of the International Criminal Court and the Statutes of the International Criminal Tribunal for Rwanda and the Former Yugoslavia. The UN Basic Principles on the Roles of Lawyers also provide procedural safeguards in the administration of criminal justice.

The core guarantees for a fair trial given explicit common recognition in the aforementioned treaty law are the right to a hearing; the right to be tried within a reasonable period of time by an independent and impartial court or tribunal; the presumption of innocence; and the right to defence, including the right to be defended by a counsel of his/her own choosing.

International humanitarian law also elaborates on fair trial standards in the context of trials of civilians in occupied territories during times of war.¹³² It contains the following minimum guarantees: right to know the particulars of the charges; the right to be tried as rapidly as possible; the right to be defended by a qualified advocate or counsel of their own choosing, and to have counsel appointed for serious charges; the right to have all the necessary facilities, to prepare a defence; the right to call witnesses and have the assistance of an interpreter if appropriate; the right to appeal; and the right for any judgement and sentence to be

¹³² Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949

communicated to the accused.¹³³ The independence of the court system must also be maintained.¹³⁴ This treaty has been ratified by 194 States and is widely regarded as reflecting customary international law. Given that these provisions regulate trials during wartime when human rights are at their most vulnerable and can subject to the most limitations, these principles could be argued to represent the minimum standards that all states must uphold for ensuring the right to a fair trial.

3 General Human Rights Guarantees for Trial Proceedings

(a) The Right to a Fair and Public Hearing

Fairness

The Principle of fairness forms the core of the human rights guarantees governing criminal trial proceedings. The UN Human Rights Committee (HRC) states that “fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.”¹³⁵

A core component of the requirement of fairness is the equality of arms¹³⁶ between the prosecution and the defendant. This requires that the “same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.”¹³⁷ The ECtHR has described the equality of arms as requiring that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent ... importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.”¹³⁸

Circumstances in which the equality of arms has found to be violated include: where the accused is denied the possibility to attend the proceedings; where the accused is not able to properly instruct his counsel; where the accused is not served a properly framed indictment;¹³⁹ and where the prosecution makes submissions without the knowledge of the defence.¹⁴⁰ Both parties should be able to argue their cases on an equal footing.

The HRC and the ECtHR, in this context, have also highlighted the importance of adversarial proceedings, which means “in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision.”¹⁴¹ However the ECtHR has emphasised that this did not require that a particular

¹³³ *Ibid*, Articles 64 - 75

¹³⁴ Article 64, Commentary on the Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. Accessed at <http://www.icrc.org> on 23 November 2008

¹³⁵ HRC, General Comment 32, para 25.

¹³⁶ The Equality of Arms forms part of the overall guarantee of equality before the courts contained in Article 14(1) and the general prohibition of discrimination in Article 2 ICCPR

¹³⁷ HRC, General Comment 32, para 13. See also, *Dudko v. Australia*, Communication No. 1347/2005, para. 7.4.

¹³⁸ ECtHR, *Bulut v. Austria*, Judgement of 22 February 1996, Reports 1996-II, p. 359, para. 47.

¹³⁹ *D. Wolf v. Panama*, Communication No. 289/1988, para. 6.6.

¹⁴⁰ ECtHR, *Brandstetter v. Austria*, Judgment of 28 August 1991, Series A, No. 211, pp. 27-28, para. 67

¹⁴¹ ECtHR, *Lobo Machado v. Portugal*, Judgement of 20 February 1996, Report 1996-I, para. 31 at p. 207.

form of legal process to be followed and that “various ways are conceivable in which national law may secure that this requirement is met.”¹⁴²

Article 14(3) of the ICCPR lists a number of specific guarantees of the right to a fair hearing, and the content of these will be detailed in the rest of this chapter. However, their observance “is not always sufficient to ensure the fairness of a hearing,”¹⁴³ as the guarantees specified therein constitute only the minimum steps that a state must take.¹⁴⁴ Other situations that the HRC has found to affect the fairness of trials are, for example, if the defendant was faced with a hostile atmosphere from the public in the courtroom during the trial¹⁴⁵ or where there is the expression of racist attitudes by the jury,¹⁴⁶ if these circumstances are tolerated by the judge.

In Africa, the AU Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,¹⁴⁷ also give further content to this right by setting out, in addition to the procedural guarantees specified in Article 14(3) of the ICCPR, various elements that make up the requirement of fairness. These include, elements such as: the importance of the equality of access to, and the equality of all persons before, the courts; the respect for the inherent dignity of the human person, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused; and an entitlement to have a party’s rights and obligations affected only by a decision based solely on evidence presented to the judicial body.

Public Hearing

Public hearings form an essential part of the right to a fair trial by ensuring transparency of the proceedings.¹⁴⁸ This is in the interests of the individual concerned, in that it facilitates the search for truth, and democratic control of the proceedings by the public.¹⁴⁹ It is fundamental to maintaining society’s confidence in the operation of the court system.¹⁵⁰ The requirement of publicity encompasses two elements: the public nature of the trial process itself and the public nature of the judgement.

With regard to the trial process, the hearing must be both public and oral.¹⁵¹ This does not depend upon a request by the parties but must be provided for in domestic legislation and judicial practice. Furthermore, there is a positive duty placed upon the state to take action to publicise trial proceedings. This includes the publicising of information about the time and venue of oral proceedings and the provision of adequate facilities for members of the public to attend, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made.¹⁵²

¹⁴² ECtHR, *Brandstetter v. Austria*, Judgement of 28 August 1991, Series A, No. 211, pp. 27-28, para. 67.

¹⁴³ HRC, General Comment 13. Now replaced by General Comment 32.

¹⁴⁴ See also ECtHR, *Artico v. Italy*, Judgement of 13 May 1980.

¹⁴⁵ HRC, *Gridin v. Russian Federation*, Communication No. 770/1997, para. 8.2.

¹⁴⁶ See Committee on the Elimination of Racial Discrimination, *Narrainen v. Norway*, Communication No. 3/1991, para. 9.3.

¹⁴⁷ Adopted by the African Commission on Human and Peoples Rights (2001).

¹⁴⁸ Article 11 UDHR, Article 14(1) ICCPR, Article 6(1) ECHR, Article 8(5) ACHR

¹⁴⁹ Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary), 2nd revised edition, Kehl am Rhein Publishers 2005 p 324.

¹⁵⁰ ECtHR, *Axen v. the Federal Republic of Germany*, Judgement of 8 December 1983, para. 25

¹⁵¹ HRC, General Comment 32, para 28. See Also ECtHR, *Fischer v. Austria*, Judgement of 26 April 1995, para. 44. Not all instances of a proceeding need to be oral. As long as there has been a full consideration of fact and law at one stage of the proceedings that is usually sufficient to meet the requirement of publicity.

¹⁵² HRC, *G. A. van Meurs v. the Netherlands*, Communication No. 215/1986, para. 6.1

The ICCPR and the ECHR provide that in exceptional circumstances the public (and the press) may be excluded from all or part of trial:

- for reasons of morals, public order or national security in democratic society,
- or when the interests of the private lives of the parties so requires,¹⁵³
- or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The exclusion of the public from a trial must be a reasoned decision of the court, and based upon law, i.e. it must have a pre-existing basis within the domestic legal order of the state. The state must clearly specify the basis upon which it seeks to exclude the public.

With respect to the judgement, the ICCPR does not require that the judgement be pronounced publicly (i.e. orally), but rather that it be made accessible to the public in an appropriate form.¹⁵⁴ The judgement must detail the essential findings, evidence and legal reasoning and be delivered within a reasonable time of the hearing.¹⁵⁵ The ECtHR has held that in “each case the form of publicity to be given to the ‘judgement’ under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose” of article 6(1).” There is stronger protection for the publicity of judgements than publicity at trial, with exceptions only being permitted in cases where there is a need to protect the interests of juveniles, in matrimonial disputes or concerning the guardianship of children.¹⁵⁶

(b) Independent and Impartial Tribunal established by Law

Independence

In order to protect the right to a fair trial the courts need to be able to exercise their judicial power free from the influence of the other branches of Government. In that respect, international law provides that States should guarantee the independence and impartiality of the court system.¹⁵⁷ This is an absolute right and is not subject to exception.¹⁵⁸ The institutional guarantees for an independent judiciary are complex and only a brief description will be given here.¹⁵⁹

Judicial independence is made up of two components: the institutional independence of the court system and the individual independence of the judges. Institutional independence refers at its most basic level, to the separation of powers between the judicial, executive and legislative branches. The independence of the judiciary must be enshrined in the Constitution or the law of the State, and all State organs are under a positive duty to respect it.¹⁶⁰ This includes allowing the judiciary independence in respect of administrative matters, particularly the allocation of cases; providing sufficient funds to ensure that it can properly and effectively

¹⁵³ In the ECHR this is phrased as “where the interests of juveniles or the protection of the private life of the parties so require.” ECHR Article 6(1). Article 8(5) of the ACHR provides that “Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.”

¹⁵⁴ Nowak, ICCPR Commentary, op. cit., p. 328.

¹⁵⁵ HRC, *Curne v Jamaica*, Communication No. 377/1989, para 13.5.

¹⁵⁶ Article 14(1) ICCPR

¹⁵⁷ See Article 10, UDHR; Article 14(1) ICCPR; Article 6(1) ECHR; Article 7(1) & 26 ACHPR; Article 8(1) ACHR.

¹⁵⁸ HRC, *Gonzalez del Rio v. Peru*, Communication No. 263/1987, para. 5.2

¹⁵⁹ For further detail see UN Basic Principles on the Independence of the Judiciary (1985)

¹⁶⁰ UN Basic Principles on the Independence of the Judiciary, Principle 1.

perform its functions;¹⁶¹ respecting court processes and enforcing judgements;¹⁶² and the autonomy to determine its jurisdiction as defined by law.¹⁶³ Judges are also responsible for upholding judicial independence by ensuring that judicial proceedings are conducted fairly and the rights of the parties are respected.¹⁶⁴

The individual independence of a judge refers to the ability of the judge to decide cases before him/her on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹⁶⁵ Relevant issues for safeguarding individual independence include ensuring selection and appointment of judges is based solely on merit;¹⁶⁶ ensuring security of tenure and adequate remuneration and conditions of service, pension and age of retirement secured by law and shall not be altered to their disadvantage¹⁶⁷, not subject to removal except on proved grounds of incapacity or misconduct rendering him/her unfit to continue in office after a fair and full hearing.¹⁶⁸

Impartiality

The notion of impartiality refers to the manner in which the judge deals with the individual cases that appear before him/her. This requires a judge to “not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other”.¹⁶⁹ In cases where grounds for disqualification exist, it is the responsibility of the court to consider ex officio these grounds and replace members who meet the criteria. The tribunal must also appear impartial to the reasonable observer. In the jurisprudence of the ECtHR, this is known as objective impartiality (subjective impartiality referring to the actual impartiality of the judge).¹⁷⁰ In the words of the ECtHR, objective impartiality is just as relevant as subjective as “what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.”¹⁷¹

4 Specific Guarantees of the Right to a Fair Trial

(a) Presumption of Innocence

The presumption of innocence, which is relevant at all stages of criminal proceedings, is of particular importance at the trial stage. This right is enshrined in all international and regional instruments of human rights, namely Article 11 of the UDHR; Article 14(2) of the ICCPR, Article 6(2) of the ECHR; Article 8(2) of the ACHR; and Article 7(1)(b) of the ACHPR.

¹⁶¹ Ibid, Principle 7

¹⁶² Ibid, Principle 4

¹⁶³ Ibid, Principle 3

¹⁶⁴ Ibid, Principle 6

¹⁶⁵ Ibid, Principle 2

¹⁶⁶ Ibid, Principle 10 See also *Finlay v. United Kingdom* (1997) 24 EHRR 221, 244-245; see also *Porter v. Magill* 2002 2AC 357 at 489; and *North Australian Aboriginal Legal Aid Service Inc. v. Hugh Benton Bradley & Anor* (2004) HCA31 judgement delivered on June 17, 2004

¹⁶⁷ Ibid, Principles 11-14

¹⁶⁸ Ibid, Principles 17-20

¹⁶⁹ HRC, *Karttunen v. Finland*, General Comment 32, para 21 and Communication No. 387/1989, para. 7.2.

¹⁷⁰ ECtHR, *Piersack v. Belgium*, Judgement of 1 October 1982, para. 30

¹⁷¹ ECtHR, *Daktaras v. Lithuania*, Judgment of 10 October 2000, para. 32

The presumption of innocence “requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any reasonable doubt should benefit the accused.”¹⁷² Whilst the standard of proof that the prosecution must adduce in proving the guilt of the accused is not specified in any of the international instruments, it is generally accepted that guilt must be proved beyond reasonable doubt.¹⁷³

The manner in which the accused is presented in court can impact upon the presumption of innocence. Requiring an accused to wear handcuffs; to be shackled; to wear a prison uniform; to sit in a cage “or otherwise [be] presented to the court in a manner indicating that they may be dangerous criminals”¹⁷⁴ may violate this principle.

The duty to respect the presumption of innocence and “to refrain from prejudging the trial”¹⁷⁵ rests upon all public authorities. Therefore statements on the guilt of the accused by public officials, particularly Ministers or other high governmental officials, or the media may violate the presumption of innocence.¹⁷⁶

(b) Right to Be Informed of the Charge

Article 14(3)(a) of the ICCPR provides the accused with the right to be informed promptly and in detail in a language which he/she understands of the nature and cause of the charge against him. This right is linked to the right to be able to adequately prepare a defence. The accused must be notified as soon as he/she is formally charged with a criminal offence under domestic law, or as soon as he/she is publicly named as such.¹⁷⁷ The notification must detail information as to the “nature and cause” of the charge, i.e. the substantive offence with which the person has been charged and the facts on which the charge is based. It may be communicated orally and subsequently provided in writing, or solely in writing and must be translated if relevant in the circumstances.¹⁷⁸

(c) The Right to have adequate time and facilities for the preparation of his/her defence and to communicate with counsel of his own choosing

This guarantee primarily deals with pre-trial preparation of the case and therefore partners with the broader right to defence at trial, which is an essential component of ensuring the equality of arms. The adequacy of the time for preparation of the defence will depend upon all the circumstances of the case, including its complexity and the seriousness of the charge. If the defence considers that sufficient time has not been allowed it is incumbent upon them to request the adjournment of the trial.¹⁷⁹ However, there is an obligation on the court to grant reasonable requests for adjournment.¹⁸⁰

¹⁷² ECtHR, *Barberá, Messegué and Jabardo v. Spain*, Judgement of 6 December 1988, para. 77

¹⁷³ HRC, General Comment 32, para 30. See also Nowak, ICCPR Commentary, op. cit., 330.

¹⁷⁴ HRC, General Comment 32, para. 30.

¹⁷⁵ Ibid, para 30.

¹⁷⁶ See for example *Gridin v. Russian Federation*, Communication No. 770/1997 para. 8.3; ECtHR, *Allenet de Ribemont v. France*, Judgement of 10 February 1995.

¹⁷⁷ HRC, *Márques de Morais v. Angola*, General Comment 32, para 31; Communications No. 1128/2002, para. 5.4

¹⁷⁸ HRC, *Mbenge v. Zaire*, Communication No. 16/1977, para. 14.1

¹⁷⁹ HRC, *Morais v. Angola*, Communication No. 1128/2002, para. 5.6.

¹⁸⁰ Ibid, *Chan v. Guyana*, Communications No. 913/2000 para. 6.3; *Phillip v. Trinidad and Tobago*, Communication No. 594/1992, para. 7.2.

The adequacy of the facilities, according to the HRC, entails access to documents and other evidence. This access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory evidence includes not only that which shows innocence but that which could assist the defence.¹⁸¹ The European Commission on Human Rights (EComHR) similarly has held that the breadth of evidence that the accused is “to have at his disposal, for the purposes of exonerating himself/herself or of obtaining a reduction in sentence, [is] all relevant elements that have been or could be collected by the competent authorities.”¹⁸² Therefore, this guarantee requires the provision of all material evidence and implies that there is a duty upon the investigating authorities to gather that evidence.

If the individual is in pre-trial detention, he/she shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.¹⁸³ The ECtHR has ruled that any interference with the rights of an accused or detained person to communicate with his/her lawyers must be prescribed by a law which is precise and ascertainable and which clearly sets out the circumstances in which such interferences are permitted.¹⁸⁴

(d) The Right to Be Tried Without Undue Delay¹⁸⁵

This provision serves the due purpose of providing legal certainty as well as limiting the amount of time an accused is kept in an uncertain position as to his/her fate. It not only refers to the period between the charge of the accused and the commencement of the trial but to all stages of the criminal proceeding up to the delivery of the final judgement on appeal.¹⁸⁶ A state cannot cite its level of development or its economic situation as justification for criminal procedural delays.¹⁸⁷

What constitutes undue delay will depend upon the circumstances of the case “taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.”¹⁸⁸ As a result the delineation of a definitive time period beyond which a delay will be considered undue or unreasonable is not possible. In the circumstances where the accused is in pre-trial detention the proceedings must be as expeditious as possible.¹⁸⁹

A large proportion of the workload of the ECtHR is with regard to applications concerning unreasonable trial delays. As a result it has a well developed body of jurisprudence on this issue. In its jurisprudence, the complexity of the case includes both the factual and legal issues at stake in the case, and the Court has given weight to factors such as the nature of the

¹⁸¹ HRC, General Comment 32, para 33

¹⁸² *Jespers v Belgium* (1981) 27 D.R.61

¹⁸³ UN Basic Principles on the Role of Lawyers, Principle 8.

¹⁸⁴ Mole and Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2006) Council of Europe, p. 61

¹⁸⁵ HRC, *E. Pratt and I. Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, para. 13.3

¹⁸⁶ HRC, *E. Pratt and I. Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, para. 13.3

¹⁸⁷ HRC, *B. Lubuto v. Zambia*, Communication No. 390/1990, para. 7.3

¹⁸⁸ HRC, General Comment 32, para 35.

¹⁸⁹ HRC, *Sextus v. Trinidad and Tobago*, Communication No. 818/1998, para. 7.2

facts that are to be established, the number of accused persons and witnesses, international elements, and the joinder of the case to other cases.¹⁹⁰

With respect to the conduct of the defence, the ECtHR has held that the ECHR does not require the defence to cooperate actively with the judicial authorities, nor does it condemn delays caused by the defence taking advantage of all the provisions of national law applicable to their defence – so long as there was no display of any determination to be obstructive at the hearings.¹⁹¹

With respect to the conduct of the relevant authorities, the ECtHR has regard to two principles.¹⁹² Firstly, that domestic courts are under a duty to deal properly with the cases before them¹⁹³ and therefore some delays may be justified. However, a special duty rests upon the domestic court to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay. Secondly, that states have a duty to “organise their legal systems so as to allow the courts to comply with the requirements of Article 6 (1) including that of trial within a reasonable time.”¹⁹⁴ Therefore States are under an obligation to put sufficient resources at the disposal of their systems for the administration of justice to ensure that unacceptable delays did not occur.¹⁹⁵

(e) **The Right to be Present at Trial**¹⁹⁶

The right to be present at trial is an essential component of the overall right to defend oneself in person or through a lawyer of ones choosing. Denial of this right may severely impact upon an accused’s ability to refute fully the State’s case against him/her. Therefore a positive duty is placed upon the State to ensure that sufficient efforts are made to inform the accused of the time and date of the proceedings and to request his/her attendance. This requires more than the issuance of a summons - the State must take steps to transmit the summons to the accused.¹⁹⁷ Furthermore, the Court that is trying the case must verify that the accused has been informed of the case before proceeding with the trial in the absence of the accused.¹⁹⁸

Whilst an accused has the right to be present at his/her trial, the trial in absentia is not an ipso facto violation of the right to a fair trial. The HRC has ruled that “proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the date of the trial before proceedings sufficiently in advance, declines to exercise his/her right to be present) is permissible in the interest of the proper administration of justice.”¹⁹⁹ However, in those circumstances the right to a fair trial must be maintained, the state must take sufficient

¹⁹⁰ Mole and Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2006) Council of Europe, p. 26. See also 85th Report of the Indian Parliamentary Standing Committee on “Laws Delays: Arrears in Courts in 2002”.

¹⁹¹ See ECtHR, *Yagci and Sargin v. Turkey*, Judgment of 8 June 1995, Series A, No. 319-A p.21, para. 66

¹⁹² See Mole and Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2006) Council of Europe, p. 27 – 28.

¹⁹³ ECtHR, *Boddaert v. Belgium*, Judgement of 12 October 1992, para. 39.

¹⁹⁴ ECtHR, *Zimmerman and Steiner v. Switzerland*, Judgement of 13 July 1983, para. 29.

¹⁹⁵ ECtHR, *Guincho v. Portugal*, Judgement of 10 July 1984.

¹⁹⁶ Article 14(3)(d) ICCPR. The ECHR does not explicitly refer to the right to be tried in ones presence, however, the ECtHR has held that the existence of this right is shown by the object and purpose of Article 6 as a whole. See ECtHR, *Brozicek Case v. Italy*, Judgement of 19 December 1989, Series A, No. 167, p. 19, para. 45.

¹⁹⁷ HRC, *Mbenge v. Zaire*, Communication No. 16/1977, para. 14.1 – 14.2

¹⁹⁸ HRC, *A. Maleki v. Italy* (Views adopted on 15 July 1999), Communication No. 699/1996, in UN doc. GAOR, A/54/40 (vol. II), p. 183, paras. 9.2-9.3.

¹⁹⁹ HRC, *Mbenge v. Zaire*, Communication No. 16/1977, para. 14.1

efforts to notify the accused, and the State itself must show that the principles of a fair trial were respected.²⁰⁰

(f) The Right to Defend Oneself in Person or Through Counsel of His/Her Own Choosing

The right to defend oneself in person or through counsel of his/her own choosing is a fundamental element to a fair trial. It is found in all international human rights instruments and the statutes of the international courts.²⁰¹ The right, as described in Article 14 of the ICCPR, is complex and made up of the following components: -

- Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and defend himself/herself;
- He/She can forego this right and make use of defence counsel, with the court required to inform him /her of this right;
- In principle, he/she may select an attorney of his/her own choosing if he/she can afford to do so; and
- If he/she cannot afford to do so, he/she has the right to the appointment of counsel by the court at no cost where it is in the interests of justice to do so. This will depend upon the seriousness of the offence and the potential punishment.²⁰²

As everyone has the primary right to defend oneself that right must be provided for in the national law of the State.²⁰³ However, the right to defend oneself in person is not absolute. HRC General Comment 32 on the right to a fair trial, lists the following circumstances when, in the interests of justice, legal counsel may be assigned against the wishes of the accused: -

- in cases of accused persons who persistently obstruct the proper conduct of the trial;
- or facing a grave charge but being unable to act in his/her own interests;
- or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused.²⁰⁴

Any restrictions of the right of self representation “must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.”²⁰⁵ This is because the imposition of unwanted counsel may seriously affect the ability of the accused to effectively defend himself/herself in that it undermines the trust that forms the basis of the lawyer client relationship. It is the responsibility of the relevant court to make the determination in each individual specific case whether the assignment of a lawyer would be in the interests of justice.²⁰⁶

The Rome Statute of the International Criminal Court provides an alternative method for dealing with obstructive defendants. Article 63(2) provides “If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him/her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall

²⁰⁰ HRC, *A. Maleki v. Italy*, Communication No. 699/1996, paras. 9.2-9.3.

²⁰¹ Article 14(3)(d) ICCPR; Article 6(3) ECHR; Article 8(2)(d) ACHR; Article 7(1)(c) ACHPR; Article 20(4)(d) Statute of the International Criminal Tribunal for Rwanda; Article 21(4)(d) Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 67(1)(b) Rome Statute of the International Criminal Court

²⁰² Nowak, ICCPR Commentary, p. 339.

²⁰³ HRC, *M. and B. Hill v. Spain*, Communication No. 526/1993, para. 14.2.

²⁰⁴ At para 37

²⁰⁵ Ibid, at para 37

²⁰⁶ HRC, *Correia de Matos v. Portugal*, Communication No. 1123/2002, paras. 7.4 and 7.5

be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”

If the accused foregoes the right to defend himself/herself and cannot afford counsel of his/her own choosing, the State is only required to appoint counsel if it is in the interests of justice. In determining whether the interests of justice require it, the HRC assesses the gravity of the offence.²⁰⁷ The HRC has held that the requirement of counsel must be met in all cases involving the death penalty and at all stages of the proceedings;²⁰⁸ and in cases involving constitutional questions stemming from an earlier criminal trial.²⁰⁹ The ECtHR applies a similar test assessing the seriousness of the offence, the severity of the possible sentence²¹⁰ and the complexity²¹¹ of the case. The Court has ruled where the deprivation of liberty is a possibility, the interests of justice in principle calls for the provision of legal assistance.²¹² The ECtHR has also ruled that it is not necessary to show that the absence of legal assistance had caused actual prejudice in the case in order to violate Article 6 of the ECHR.²¹³

Counsel appointed by the State must provide effective representation to the accused.²¹⁴ The ECtHR has held that an accused is entitled to assistance that is practical and effective and not merely theoretical and illusory.²¹⁵ “Blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case, or absence during the examination of a witness, in such cases may entail the responsibility of the State concerned for a violation of article 14(3)(d), provided that it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.”²¹⁶

(g) The Right to Call and Examine Witnesses

This right is an important element of the equality of arms and guarantees the defence the same powers to call and question witnesses as the prosecution. However, this right is not absolute. Where there is no evidence that the courts refusal to call a certain witness does not violate the principle of equality of arms e.g. if the evidence is not part of the case under consideration - there is no violation of the principle of equality of arms.²¹⁷ Therefore it is essential to show prejudice. The requirements of this provision will have been met if the witnesses relevant to the defence have been admitted, and the defence has been given the opportunity to question and challenge them at some stage of the proceedings.²¹⁸

(h) Free Assistance of an Interpreter

This right is available equally to nationals and non-nationals and is applicable at all stages of oral proceedings. It does not entitle the accused to an interpreter if he/she understands the

²⁰⁷ HRC, General Comment 32, para 38

²⁰⁸ HRC, *D. Pinto v. Trinidad and Tobago*, Communication No. 232/1987, para.12.5.

²⁰⁹ HRC, *P. Taylor v. Jamaica*, Communication No. 707/1996, para. 8.2.

²¹⁰ ECtHR, *Benham v. the United Kingdom*, Judgement of 10 June 1996.

²¹¹ ECtHR, *Hoang v. France*, Judgement of 29 August 1992, paras. 40-41

²¹² ECtHR, *Benham v. the United Kingdom*, Judgment of 10 June 1996

²¹³ ECtHR, *Artico v. Italy*, Judgement of 30 April 1980, para. 35

²¹⁴ HRC, General Comment 32, para 38

²¹⁵ Mole and Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2006) Council of Europe, p. 63

²¹⁶ HRC, General Comment 32, para 38

²¹⁷ *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) OHCHR Professional Training Series 3 p. 285.

²¹⁸ HRC, General Comment 32, para 38

language of the court sufficiently to ensure the fairness of the trial.²¹⁹ Whether his provision requires the translation of all written documents of the trial proceedings is uncertain under the ICCPR.²²⁰ The ECtHR, however, has ruled that this right extends to include all written documents available at the trial.²²¹

In terms of the State incurring the cost of the interpreter, this right is absolute, and the costs of interpretation may not be imposed upon the accused following a conviction.²²²

(i) Prohibition of Self Incrimination

This guarantee originated in the common law but is now considered to be one of the minimum guarantees necessary for ensuring a fair trial²²³ As described by the ECtHR this right presupposes that “the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 (2) of the Convention.”²²⁴ It prohibits the imposition of any direct or indirect or undue psychological pressure by the investigating authorities²²⁵. Domestic law should also ensure that statements or confessions obtained by torture and other cruel, inhuman or degrading treatment should be impermissible as evidence in the trial except as evidence that such practices occurred.

5 Appeal

Article 14(5) of the ICCPR provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. This right is similarly reflected in Article 8(2)(h) of the ACHR and Article 7(1)(a) of the ACHPR. The ECHR does not explicitly refer to this right, however it is contained in Article 2, Protocol No. 7 to the ECHR subject to “exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in first instance by the highest tribunal or was convicted following an appeal against acquittal.”

This right imposes a duty on the State party to review substantively the conviction and sentence, on both the sufficiency of the evidence and of the law.²²⁶ This obligation exists for all levels of the court system, i.e. if a conviction and sentence is imposed by the highest court after trial in the first instance before that court Article 14(5) will be violated if there is no right of appeal from that decision.²²⁷ A review which only considers the formal or legal aspects of a conviction will not be sufficient, but international law does not require a full retrial, as long as

²¹⁹ UNHRC, *D. Guesdon v. France*, Communication No. 219/1986, para.10.2

²²⁰ See discussion in also Nowak, ICCPR Commentary, op. cit. pp. 343-344.

²²¹ ECtHR, *Luedicke, Belkacem and Koç*, Judgment of 28 November 1978, para. 40 at p. 17

²²² *Ibid.*, pp. 20-21, paras. 49-50

²²³ See Article 14(3)(g) ICCPR; Article 8(2)(g) & 8(3) ACHR. Whilst not expressly contained in the ECHR the ECtHR has ruled that this forms part of the right to a fair trial, *Saunders v. the United Kingdom*, 17 December 1996, paras. 68- 69.

²²⁴ ECtHR, *Saunders v. the United Kingdom*, Judgement of 17 December 1996, paras. 68- 69.

²²⁵ HRC, General Comment 32, para 41

²²⁶ HRC General Comment No 32, para 48

²²⁷ HRC, *Terrón v Spain*, Communication No. 1073/2002, para. 7.4

the appellate court can assess the facts of the case.²²⁸ The right is relevant to not only serious offences but also to minor offences.

With respect to legal systems where leave to appeal must be sought, the HRC has ruled that these are not inconsistent with Article 14(5) if “the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence.”²²⁹

In order to be able to effectively exercise this right, the convicted individual must have access to a reasoned written judgement, and other documents such as trial transcripts to ensure the effectiveness of the appeal.²³⁰ The right to effective representation by counsel is also relevant at the appeal stage, particularly in death penalty cases. In order not to prejudice an individual’s right to review States must preserve all evidential material.²³¹

6 Actors Involved in Guaranteeing the Right to a fair Trial

(a) Prosecutors

The Prosecution plays a crucial role in the administration of justice. The structures and rules governing its functions should promote the respect of, and compliance with, the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing, thereby contributing to fair and equitable criminal justice and the effective protection of citizens against crime. The UN Guidelines on the Role of Prosecutors²³² require prosecutors to perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.²³³ They are required to perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights.²³⁴ In particular they should: -

- Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights.²³⁵

In that regard, if they obtain evidence of the innocence of the accused they should make efforts to suspend the proceedings. In line with their duty to uphold human rights, they should

²²⁸ Ibid, *Rolando v. Philippines*, Communication No. 1110/2002, para. 4.5

²²⁹ Ibid, *P. Lumley v. Jamaica*, Communication No. 662/1995, para. 7.3

²³⁰ Ibid, *P. Lumley v. Jamaica*, Communication No. 662/1995, para. 7.5.

²³¹ Ibid *M. Robinson v. Jamaica*, Communication No. 731/1996, para. 10.7

²³² Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders (1990)

²³³ Principle 11

²³⁴ Principle 12

²³⁵ Principle 13

give due attention to crimes committed by public officials, particularly for human rights violations, and refuse to use any evidence obtained by torture or cruel, inhuman or degrading treatment.²³⁶

(b) Judges

As highlighted in this chapter earlier judges play a central role in ensuring respect for the right to a fair trial. Judges are front-line actors in the protection of human rights. Their role is pivotal in the process of enabling people to assert their rights and in enforcing their claims to those rights.²³⁷ Judges are required to decide matters before them independently and impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. They have a positive duty to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. They are required to deliver a reasoned judgement. In circumstances where domestic law is ambiguous or uncertain, judges should have regard to international human rights obligations – whether or not they have been incorporated into domestic law.²³⁸

(c) Defence lawyers

Defence lawyers are essential to the maintenance of the equality of arms in criminal proceedings and therefore to the securing of fair trial rights. Broader than that, adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.

Defence lawyers have the following primary duties in criminal proceedings: -

- Advise clients as to their legal rights and obligations and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- Assist clients in every appropriate way, and taking legal action to protect their interests;
- Assist clients before courts, tribunals or administrative authorities, where appropriate.²³⁹

Lawyers, similar to judges and prosecutors, are required to uphold human rights and at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.²⁴⁰

Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely both within their own country and abroad; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.²⁴¹ If the

²³⁶ See Generally Guidelines on the Role of Prosecutors, Principles 10 – 16. See also Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, International Association of Prosecutors 1999.

²³⁷ Vienna Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms 2003, para 1.

²³⁸ Bangalore Principles on the Domestic Application of Human Rights Norms 1988, Principle 7

²³⁹ Basic Principles on the Role of Lawyers (1990), Principle 13

²⁴⁰ Ibid, Principle 14

²⁴¹ Ibid, Principle 16

security of lawyers is threatened as a result of the discharge of their functions, Government's are under an obligation to adequately safeguard them.²⁴²

Courts shall not refuse to recognize the right of a lawyer to appear before it for his/ her client unless that lawyer has been disqualified in accordance with national law. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.²⁴³

7 Problems and Challenges to Human Rights During Criminal Trials

(a) States not parties to international or regional treaties for human rights protection.

It will be observed from what has been outlined in this chapter on the application of international and regional standards of fair trial procedures by domestic courts are where States are parties to international and/or regional treaties and supervised by international treaty bodies and/or regional courts. There are still some countries that have not ratified the ICCPR, but many State parties do not implement their treaty obligations in their domestic courts thereby denying the right to fair trials in their criminal justice systems. The Asian region, for example, does not have a regional mechanism like a human rights commission or court to have oversight over compliance with international standards on fair trial procedures by national courts. Compliance of fair trial procedures in those countries is dependent on what is provided in the national constitutions or national criminal procedural laws.

(b) Non-Independent Courts

Despite the international guarantees for the independence and the impartiality of the judiciary, the reality in many parts of the world is that judicial systems are not provided sufficient institutional guarantees to safeguard their independence. Appointment procedures for judges do not ensure appointment based upon merit and judges are appointed or removed for political reasons. Courts are not provided with sufficient resources to discharge their functions nor are judicial officers sufficiently well paid to attract the best candidates to the position. The court system, despite its status as the third branch of Government, is marginalised and de-prioritised. As a result it is often difficult for the court system to adequately safeguard the right to a fair trial and the broader protection of human rights.

Where independent courts do exist, actors in the administration of justice are frequently targeted and suffer from threats, harassment, intimidation, and other forms of interference. These threats take place in various forms from mere verbal threats, either directly or indirectly (such as anonymous phone calls, threatening mail), to physical intimidation or violence to extra-judicial killings. With respect to judges and prosecutors, threats also include demotions, travel bans, or dismissal. These risks are more pronounced for those judges, lawyers or prosecutors who are active in the defence of human rights, and in particular seek to guarantee

²⁴² Ibid, Principle 17

²⁴³ Ibid, Principles 19, 20, 22

the right to a fair trial. In the report of the Special Rapporteur on the Independence of Judges and Lawyers for his 2006 activities, he reported that:

- 55% of communications,²⁴⁴ relating to some 148 cases in 54 countries, concerned violations of the human rights of judges, lawyers, prosecutors and court officials.
- Threats, intimidation and acts of aggression directed against lawyers accounted for 17% of communications issued by the Special Rapporteur, and the corresponding figure for judges and prosecutors was 4 per cent.
- Arbitrary detention and judicial harassment accounted for 26 per cent of communications concerning lawyers and 4 per cent of those concerning judges and prosecutors.
- Assassinations of lawyers, judges and prosecutors accounted for 4 per cent of the total number of communications

(c) Threats to Civil Order

In countries with threats to the civil order, whether as a result of war, widespread disturbances, terrorism or serious crime, judicial systems are particularly challenged. Government's often resort in these circumstances to special "legal processes," such as the use of military courts or other forms of special courts; "faceless judges;" limiting habeas corpus, restricting access to defence counsel or making use of evidence that has been obtained in violation of the accused human rights.

The provisions of Article 14 of the ICCPR, apply to all courts and tribunals irrespective of their denomination as "special" or "military." In that regard, the ICCPR does not prohibit their establishment but rather requires them to follow the minimum guarantees set out by international law. The various procedural variations described in the paragraph above have been consistently found to violate the accused right to a fair trial. In particular, the HRC has noted that the trial of civilians in these courts create problems for the fair administration of justice and, as a result, should be "limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and valid reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials."²⁴⁵

If a state declares a state of emergency, international law generally recognises that the provisions concerning right to a fair trial can be derogated from.²⁴⁶ However in accordance with the international law governing the declaration of states of emergency, any derogations should not exceed those strictly required by the exigencies of the situation. Furthermore, derogations of fair trial rights that would circumvent the protection of non-derogable rights²⁴⁷ are not permitted. Therefore, in cases where the death penalty may be imposed, all fair trial rights must be guaranteed and no statements or confessions or, in principle, other evidence

²⁴⁴ Letters sent to Governments concerning violations of human rights within the mandate of the Special Rapporteur

²⁴⁵ HRC General Comment 32, para 22. See also *Madani v. Algeria*, Communication No. 1172/2003, para. 8.7.

²⁴⁶ HRC General Comment 32, para 6; Article 4(2) ICCPR; Article 15(2) ECHR; Article 27(2) ACHR. In the African system they are considered to be non-derogable. See ACHPR, *Civil Liberties Organisation and Others v. Nigeria*, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001

²⁴⁷ Non-derogable rights are the right to life, prohibition of torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery or servitude; prohibition of imprisonment on the grounds of failing to fulfil a contractual obligation; *nullem crimen sine lege*; recognition by the law; and the freedom of thought, conscience and religion.

obtained in violation of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, may be used as evidence.

(d) Delays in Court Proceedings

One of the most common problems that judicial systems around the world face are delays in court proceedings. In the European system of human rights protection for example, in approximately 25% of the judgements delivered in 2007, the Court had to consider issues relating to the length of court proceedings at the national level.²⁴⁸ Court delays can result from a variety of causes either external or internal to the process. Some causes are: widespread changes in the economic or political context of the country; concentration of cases in particular geographic areas; neglect by judicial authorities (poor timetabling); shortage of judges or other staff; judges not spending sufficient time on judicial activities; insufficient judicial control over proceedings; failure to summon witnesses or defendants; poor cooperation by necessary interlocutors resulting in frequent adjournments.²⁴⁹

These delays have a significant impact on the accused given the impact and uncertainty that being subject to criminal process has, and if in pre-trial detention, can result in detention for long periods of time. In addition to the negative consequences for the accused, delays in the court system, undermine confidence in the due administration of justice.

(e) Access to effective legal representation

In many parts of the world, many defendants who come before the courts cannot afford to be represented by counsel of their own choosing. Despite the obligations imposed upon them by international law, States often struggle to provide effective legal representation to all those who require it in the interests of justice. This is as a result of several factors. Firstly, the growth in the number of cases being brought before criminal courts increases the financial burden of providing legal aid which many states are finding to be prohibitive. Secondly, States are not sufficiently recognising the centrality of effective legal representation to securing the right to a fair trial and fail to sufficiently prioritise the development of effective functioning legal aid leading to poorly organised and underfunded systems. Furthermore, the quality of lawyers funded through legal aid programs is lacking, severely impacting on the accused right to a fair trial and effectively making the achievement of fairness and justice dependant on the financial situation of accused. As a result in some jurisdictions, mandatory legal aid is only available for the most serious of crimes.

8 Recommendations

The following recommendations can serve as a starting point for discussing ways forward in advancing human rights protection during the trial stage:

- The independence and impartiality of the judiciary shall be guaranteed by the State. This includes both the individual and institutional independence of judges. In particular, appointment procedures for judges must ensure selection based upon merit. The establishment

²⁴⁸ ECtHR, Survey of Activities 2007, p. 58 -59

²⁴⁹ Calvez, Length of Court Proceedings in the Member States of the Council of Europe Based on the Case-Law of the European Court of Human Rights (2006). Commissioned by the European Commission for the Efficiency of Justice.

of an independent judicial service commission to make such appointments is a good practice in this regard.

- Sufficient resources must be allocated to ensure the effective and fair functioning of the judicial system. A good practice adopted by some states is to have a dedicated percentage of the annual budget for the judiciary.
- Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
- The right to a fair trial is a fundamental human right and should be guaranteed by the Constitution or ordinary law of the State. It should protect at a minimum the guarantees specified in Article 14(3) of the ICCPR
- Equality of arms is an essential part of maintaining the fairness of trials. Due attention needs to be given by the State to ensuring that legal aid or other assistance is provided to indigent defendants where the interests of justice require
- Delays in the conducting of trials can have a significant impact on the protection of human rights and liberty, and undue delays violate the human rights of the accused. Criminal justice processes should be approached and analysed in a systematic manner to ensure their operational efficiency.
- Training in human rights should be provided to judges, prosecutors and lawyers, particularly on the provisions for guaranteeing the right to a fair trial.

Chapter V - Crime and Punishment

1 Introduction

The imposition of punishments by a State for the commission of a criminal offence, particularly custodial punishment, constitutes one of the most intrusive and coercive areas of state action. As a result it is essential that the process and the punishment ensure respect for fundamental human rights, in particular the principles of non-arbitrariness and proportionality. This chapter will consider the sentencing process and the types of punishments, and any limitations that international law imposes upon them, that can be imposed for a violation of criminal law.

2 Purposes and Principles of Sentencing and Punishment

Sentencing and punishment involve consideration of different issues, although they are closely linked. The choice of a punishment framework involves a determination by the State of what its objectives are in the imposition of punishment, and the types and levels of punishments that will aid in the achievement of those objectives. The objectives chosen, in a sense, provide a moral basis, a justification for the State's imposition of a limitation on an individual's rights. Sentencing, on the other hand, would be more appropriately described as the process through which a court determines what specific sentence, from the various types of available sentences, should be imposed, and what factors are relevant in fitting the sanction to the crime, in order to achieve the specified objectives of punishment.²⁵⁰

In practice, most criminal justice systems in the world do not specify clearly what the precise objectives of their punishment frameworks are, nor do they prioritise between competing objectives. This leaves judges with a large amount of discretion when determining sentence (as what sentence is imposed will depend upon what is sought to be achieved) and undermines consistency in sentencing. The most commonly referred to objectives of punishment are: deterrence, retribution, rehabilitation, and incapacitation.²⁵¹ Other possible objectives include community protection, denunciation, education, and proportionality.

3 Sentencing

In civil law jurisdictions, the sentencing and punishment function is much more formally regulated by statutory law, than in common law countries. In addition to statutory maximum sentences the Penal code will set out a range of aggravating or mitigating factors that the judge will apply to the case in accordance with the facts.²⁵² Sentencing forms part of the overall trial process and no separate sentencing hearing is held. The judge during the trial will ask questions relevant to the determination of the sentence, such as on the offender's personal background and present circumstances, motivation for the commission of the crime, and any other evidence that the accused wants to lead in mitigation will also be considered during the trial. The defendant's previous convictions, and statements from the victim, will be included

²⁵⁰ Bagaric, *Punishment and Sentencing: A Rational Approach* (2001) Cavendish Publishing, Great Britain, p. 3

²⁵¹ See for example *Sargeant* (1974) 60 Cr App R 74 (UK Court of Appeal); *Veen* (No. 2) (1998) 164 CLR 465

²⁵² See for example Chapter II, French Penal Code

as part of the trial dossier. The judge will also consider the gravity of the offence, and other aggravating circumstances in deciding on the sentence. The sentencing decision is usually made solely by the judge, although in some jurisdictions it is with the assistance of lay judges.

In common law systems, the situation is varied with some jurisdictions, such as the USA, having an extensive body of sentencing guidelines, whereas others such as Australia, England and Ireland, still reserve for individual judges a large amount of discretion in determining the relevant sentence. In the latter jurisdictions, whilst maximum sentences for a crime are specified in statute law, the process of determining a sentence is regarded as an “intuitive process” not readily regulated through the application of rigid formulas. However, there is a growing tendency to restrict this process through sentencing guidelines either promulgated by the appellate courts, or through an independent body.

With respect to sentencing procedure, in common law systems the sentencing aspect of the trial is separate from the main consideration of the accused’s innocence or guilt. It either takes place as a separate hearing or immediately after judgement. Both parties will be able to submit evidence of aggravating or mitigating factors, and other information relevant to sentence determination, similarly to civil law jurisdictions. Increasingly, victims are able to submit “victim impact statements” or their interests are otherwise considered during the sentencing phase.

In practice, because of the infinite variety of cases that present themselves before courts, and the inability and impracticability of attempting to provide for them all precisely in the law, judges in both jurisdictions exercise a certain degree of discretion in determining an appropriate sentence. The main difference between the two resides in the highly unregulated discretion of the judge in sentencing matters that exists in some common law countries. In fact, in common law countries many members of the judiciary feel that regulation by the State of the sentencing function (other than establishing the maximum sentences) is an infringement upon judicial independence.

(a) Applicable International Law

The sentencing procedure, whether part of the main trial proceeding or as a separate hearing forms an integral part of the trial and therefore must comply with the same procedural guarantees set out in international law. The accused should be represented by legal counsel; they should have the opportunity to present evidence of mitigating factors; the right to be present should be respected as well as the ability to call and examine witnesses. The right to legal assistance is particularly important in cases involving the death penalty, and in these cases the HRC has ruled that the accused has a right to have legal assistance provided to them in accordance with Article 14(3)(d) of the ICCPR. The effectiveness of legal representation will be particularly tightly scrutinised.²⁵³

The overarching requirements of fairness, publicity and equality relevant to fair trials should also be met when determining a sentence. The sentence must be determined by an independent and impartial court. General considerations of fairness require that like cases are treated in a like way and that irrelevant considerations are not taken into account in determining a sentence, i.e. not arbitrarily. Therefore, of key importance is ensuring that there is consistency in the sentences imposed by a court system. This is also necessary to ensure

²⁵³ HRC, General Comment 32 at 59

that individuals are equal before the law. Whilst some flexibility is desirable to ensure that fairness is done in a given case, inconsistent application undermines the overall fairness of the system, and undermines public faith in the judicial system.

Additionally, Article 9(1) of the ICCPR on the liberty and security of the person, applies in circumstances where a court has ordered the imprisonment of an individual.²⁵⁴ Therefore any deprivation of liberty has to comply with the principle of legality and the prohibition of arbitrariness, meaning that it has to be based on a procedure established by law and not be manifestly disproportionate, unjust or unpredictable and not discriminatory in the specific circumstances of the case.²⁵⁵

There are several other provisions of international human rights law which are applicable to sentencing. Firstly, Article 15(1) of the ICCPR provides “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”²⁵⁶ This right is also contained in Article 11(2) UDHR, Article 7(1) ECHR, Article 9 ACHR, and Article 7(2) ACHPR. This principle protects an individual against the retroactive application of law and is fundamental to the protection of the rule of law and the guarantee of legal certainty. This right is of such a fundamental status that it is not derogable in states of emergency.²⁵⁷

In the jurisprudence of the ECtHR, this right has been interpreted more broadly to include the principle that “only the law can define a crime and prescribe a penalty” and therefore that offences and their respective punishments must be clearly defined in law.²⁵⁸

Secondly, Article 15(1) of the ICCPR also provides that “nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby

4 Punishment

(a) Theories of Punishment

There are two main theories of punishment, retributive and utilitarian, and numerous sub categories within those. The retributive theory of punishment is essentially backward looking and states that punishment is justified because of the commission of an offence. No other reason is necessary.²⁵⁹ Utilitarian theories in contrast are forward looking and consequentialist. Punishment is justified as it deters the offender from re-offending and other potential offenders from committing crimes in the first place; and once the offender is captured facilitates the rehabilitation of the offender.²⁶⁰ Whilst the retributive theory is pre-

²⁵⁴ Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary, 2nd revised edition, Kehl am Rhein Publishers 2005, at 220. See also Article 5(1)(a) ECHR;

²⁵⁵ See the Chapter on Pre-trial detention of this background report, Section II.2 Arrest and Detention in Police Custody

²⁵⁶ This is known as *Nullum Crimen Sine Lege* (No Crime Without Law)

²⁵⁷ Article 4(2) ICCPR, Article 15(2) ECHR, Article 27(2) ACHR

²⁵⁸ ECtHR, *Kokkinakis v. Greece*, Judgment of 25 May 1993, Series A, No. 260-A, p. 22, para. 52

²⁵⁹ Bagaric, *Punishment and Sentencing: A Rational Approach* (2001) Cavendish Publishing, Great Britain, p. 40

²⁶⁰ *Ibid*, p. 43

eminent in many parts of the world, most jurisdictions do not apply either theory purely, but rather some combination of the two.²⁶¹

(b) Types of Punishment

Most states around the world do not differ in the forms of punishments that can be imposed as a result of the commission of a criminal offence. In that regard, philosophical or normative distinctions cannot be drawn between common law and civil law countries. States generally impose a range of punishments ranging from full time or part time custodial imprisonment, probation, limitations of civil rights (such as the right to vote or hold public office), fines, forfeiture and other forms of non-custodial punishment such as community service. Some states still maintain the most serious sanction for criminality, the death penalty, although the number of countries which impose this penalty is decreasing. Other states also impose a variety of corporal punishments.

International law does not regulate in detail, the types of punishments that can be imposed by a State for the commission of criminal offences, except in the field of capital and corporal punishment. The regulation of the latter punishments is linked to the requirement that when imposing a punishment the prohibition on torture and other cruel, inhuman or degrading treatment and punishment contained in Article 7 of the ICCPR must be strictly observed. However, as a general principle, Article 10(3) of the ICCPR provides that “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

5 International legal limits on Punishment

(a) Corporal Punishment

The HRC has held that the prohibition contained in Article 7 of the ICCPR must “extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”²⁶² The HRC has ruled on several occasions that imposition of corporal punishment violates Article 7 of the ICCPR, and furthermore the Covenant is violated even if the sentence is not carried out.²⁶³ The UN Convention Against Torture equally prohibits the imposition of corporal punishment.²⁶⁴

Similarly the ECtHR has found the imposition as a sentence of corporal punishment of sufficient severity, as breaching the prohibition of degrading treatment. The Court stated that punishment did not cease to be degrading just because it acted as an effective deterrent or an aid to crime control. The court went on to say:

“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

²⁶¹ Ibid, p. 49. See also UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) 1990, at 8.1

²⁶² General Comment No. 20 (Art. 7), para. 5

²⁶³ HRC, *Higginson v Jamaica*, Communication No. 792/1998, 28 March 2002, para 6.

²⁶⁴ See Concluding Observations of the Committee Against Torture on Saudi Arabia, UN Doc. CAT/C/CR/28/5, 2002, para 8(b).

*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.”*²⁶⁵

The Inter-American Court on Human Rights (IACtHR) and the African Commission on Human and Peoples Rights have also found the imposition of corporal punishment to be incompatible with the provisions of international human rights law.²⁶⁶

(b) Capital Punishment

Under certain conditions, the death penalty is not considered as a violation of the right to life. Article 6(2) of the ICCPR²⁶⁷ only allows the imposition of the death penalty for the most serious of crimes, it must be pursuant to a final judgement by a competent court in accordance with the law prior to the commission of the crime; and it shall not be imposed upon juveniles or pregnant women. Whilst the HRC hasn’t specified a list of serious crimes for which the death penalty can be imposed, it has emphasised that it must be an “exceptional measure.”²⁶⁸ The HRC has also emphasised that the imposition of the death penalty requires a determination of its appropriateness in the given case. Therefore where a State imposes a mandatory death penalty for the commission of a certain crime, without considering the offender’s personal circumstances nor the circumstances of the offence, this would constitute an arbitrary deprivation of life.²⁶⁹

As highlighted in the chapter on fair trials, the procedural guarantees prescribed by Article 14 need to be scrupulously followed in cases involving the death penalty. Given the seriousness of the punishment, it is in the interests of justice for an accused to be provided with legal aid through the entirety of the criminal proceedings. If a person is facing the death penalty after an unfair trial this will automatically constitute a violation of article 6²⁷⁰ and can even amount a breach of article 7 ICCPR.²⁷¹

²⁶⁵ ECtHR, *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, Series A, No. 26 p. 16, para 33.

²⁶⁶ IACtHR, *Caesar v Trinidad and Tobago*, IACHR (Series C) No. 123, Judgement of 11 March 2005, at 73. See also Principle 1 of the “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas”, adopted by the IACtHR, Resolution 1/08 (2008). ACHPR, *Doebbler v Sudan*, Communication No. 236/2000, 33rd session, 15-29 May 2003, para.36. See also the judgment of the Constitutional Court of Uganda, in *Kyamanywa v. Uganda*, Reference No. 10/2000, 1 December 2001, where the Constitutional Court in its ruling on a reference from the Supreme Court decided that corporal punishment was inconsistent with article 24 of the Constitution (and therefore void under article 2 of the Constitution) as being cruel, inhuman or degrading punishment.

²⁶⁷ See also Article 4 ACHR which prohibits the imposition of the death penalty for political offences or common crimes. The ACHR also prohibits the reestablishment of the death penalty in states that have abolished it. The ECHR allows the imposition of the death penalty in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law.

²⁶⁸ HRC, General Comment 6 (1982) para 7.

²⁶⁹ HRC, *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998, at para. 8.2. See also IACCommHR, *Baptiste v Grenada*, Case 11743, Report No. 38/00, 13 April 2000, at para. 89.

²⁷⁰ HRC, *Mbenge v Zaire*, Communication No. 16/1977, 25 March 1983, at para. 17. See also HRC, *Kurbanova v Tajikistan*, Communication No. 1096/2002, 6 November 2003, at para. 7.7.

²⁷¹ HRC, *Larrañaga v The Philippines*, Communication No. 1421/2005, 24 July 2006, para 7.11. See also AfrCommHPR, *Forum of Conscience v Sierra Leone*, Communication No. 223/98, 28th session, 23 October–6 November 2000, at 19.

Article 6 ICCPR strongly suggests that capital punishment should be abolished and that abolitionist States are prohibited from reintroducing it.²⁷² This trend towards abolition has been underlined by the adoption of the 2nd Optional Protocol to the ICCPR in 1990, the 6th and 13th Additional Protocol to the European Convention on Human Rights, adopted in 1983 and 2002 respectively, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 1990. In addition, the UN General Assembly in December 2007 called upon all retentionist States to establish a moratorium on executions with a view to abolishing the death penalty.²⁷³ The trend towards abolition is also reflected in State practice and can be considered as one of the great success stories of the international human rights movement. While in 1945 only 7 States in the world had abolished the death penalty, this number has gradually increased to 141 States in 2008.²⁷⁴ With the exception of Belarus, Europe is a death penalty-free zone.

Moreover, as there are now a large number of countries that have abolished the death penalty, there is a form of indirect pressure from abolitionist states on non-abolitionist states through extradition treaties. Some abolitionist states agree and facilitate the extradition upon one condition: the receiving state commits not to implement the death penalty on the extradited person. For example the French Council of State has a general rule of law (based on the public order) prohibiting the government to extradite if it does not justify having gotten that commitment.

General Comment 20 on Article 7 of the ICCPR states that, when imposing capital punishment, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering."²⁷⁵ In assessing this, the HRC will consider "the relevant personal factors regarding the convict, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent."²⁷⁶ As to particular modes of execution, the Committee has held that gas asphyxiation constitutes a violation of Article 7,²⁷⁷ but lethal injection does not.²⁷⁸ However, with respect to the lethal injection, the Committee Against Torture has held more recently that it should be reviewed due to its potential to cause pain and suffering.²⁷⁹ The CAT-Committee has also held that execution by stoning would constitute a violation of the Convention Against Torture.²⁸⁰

So far, the death penalty has not been considered by any of the international treaty monitoring bodies as cruel, inhuman or degrading punishment. This is due to a systematic interpretation of the right to personal integrity and human dignity in Article 7 ICCPR in conjunction with the right to life in Article 6 ICCPR. This historical interpretation has, however, been challenged by a more dynamic interpretation of the term "cruel, inhuman or degrading punishment" in light of the present-day conditions and modern understanding of human rights

²⁷² See the decision of the HRC, *Judge v Canada*, Communication No. 829/1998, 5 August 2003, at paras. 10.2-10.6.

²⁷³ UN Doc. A/Res/62/149 of 18 December 2007. 104 States voted in favour of this resolution, 54 against and 29 abstained.

²⁷⁴ See the 2008 report of the UN Secretary General "Moratoriums on the use of the death penalty", UN Doc. A/63/293 (15 August 2008), at para. 12.

²⁷⁵ 1992, at 6

²⁷⁶ HRC, *Kindler v Canada*, Communication No. 470/1991, 30 July 1993, at 15.3.

²⁷⁷ HRC, *Ng v Canada*, Communication No. 469/1991, 5 November 1993, at 16.4.

²⁷⁸ HRC, *Cox v Canada*, Communication No. 539/1993, 31 October 1994, at 17.3.

²⁷⁹ CAT, Concluding Observations on the USA, UN Doc. A/61/44, 2006, at 37(31).

²⁸⁰ CAT, *A.S. v Sweden*, CAT Communication No. 149/1999, 24 November 2000.

and human dignity.²⁸¹ This dynamic interpretation has already led to a general prohibition of corporal punishment under present international law and prompted an increasing number of domestic courts to also consider capital punishment as cruel, inhuman or degrading punishment.²⁸² It is indeed difficult to understand why ten strokes on the buttocks constitute inhuman or degrading punishment whereas execution – by whatever method – can still be considered “humane” punishment.

(c) Non-Custodial Punishment

By far the majority of punishments imposed for the commission of a criminal offence are those which usually do not involve imprisonment. However, even for those serious offences for which custodial sentences are imposed, increasingly it is being questioned whether they are the most effective way of achieving the objectives of the criminal justice system. In many countries of the world prison conditions are poor, have a significant impact upon detainees’ health and family life, and have long term impacts upon their ability to reintegrate and contribute to society.

In 1990, the General Assembly adopted the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) in order to encourage States to consider other options when considering imprisonment as punishment for the commission of criminal offences. Non-custodial measures should be available in order “to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid the unnecessary use of imprisonment.”²⁸³ In the implementation of non-custodial measures an individual’s rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.²⁸⁴

The rules identify several types of non-custodial penalties available at the sentencing phase, which may include: (a) verbal sanctions, such as admonition, reprimand and warning; (b) conditional discharge; (c) status penalties; (d) economic sanctions and monetary penalties, such as fines and dayfines; (e) confiscation or an expropriation order; (f) restitution to the victim or a compensation order; (g) suspended or deferred sentence; (h) probation and judicial supervision; (i) a community service order; (j) referral to an attendance centre; (k) house arrest; (l) or any other mode of non-institutional treatment.²⁸⁵

²⁸¹ See report of the UN Special Rapporteur on Torture to the UN Human Rights Council in March 2009 (forthcoming).

²⁸² See the landmark decision of the South African Constitutional Court in the case of *State v. Makwanyane and Mchunu*, Judgment of 6 June 1995, Case No. CCT/3/94; see also the judgments of the *Constitutional Court of Hungary*, Ruling 23/1990 (X 31)AB, *Constitutional Court of Hungary*, Judgment of 24 October 1990, Magyar Közlöny (Official Gazette), 31 October 1991; *the Constitutional Court of Lithuania*, Case No. 2/98; *the Constitutional Court of Albania*, Decision in the name of the Republic on the Incompatibility with the Constitution of the Criminal Code of the Republic of Albania dispositions providing for the death penalty, Tirana, 10 December 1999; *Constitutional Court of Ukraine*, Case No. 1-33/99, Judgment of 30 December 1999, para. 2.

²⁸³ UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) 1990, at 2.3

²⁸⁴ *Ibid.*, at 3.10

²⁸⁵ *Ibid.*, at 8.2.

6 Trends

In this section two contrary trends in sentencing and punishment are presented, mandatory sentencing and restorative justice.

(a) Mandatory Sentencing

Mandatory sentencing has been increasingly suggested, particularly in common law countries, as a solution to widespread community concerns regarding the levels of crime and the perceived inadequacy of the sentences for those crimes. The desire is to ensure that certain crimes get sufficiently tough sentences that reflect the community's condemnation of the offence, and the seriousness with which they regard it, and act as a sufficient deterrent. The effect is a limiting of the independence of judges to take into consideration a variety of factors that might limit or mitigate the sentence based upon the precise circumstances of the accused or the offence. They can take the form of mandatory minimums, that permit judicial discretion within a certain sentence range, or mandatory sentences which permit no judicial discretion once an individual has been convicted of the specified crime.

What is at issue here is the need to balance two, sometimes conflicting, objectives of the sentencing policy. These are, the need to promote consistency and equality in sentencing, and to properly reflect the wishes of the community, and the need to ensure that each sentence is fair to the individual, i.e. it requires the balancing of the overall fairness of the criminal justice system and the fairness to the accused.

As highlighted earlier in this chapter the imposition of a mandatory death sentence, denying the judge of his ability to tailor the sentence to the offender's personal circumstances or the circumstances of the offence, constituted an arbitrary deprivation of the individual's life. Whilst the HRC has not ruled on the matter, it is likely that other mandatory sentences which similarly deprive judges of their ability to tailor sentences to the individual circumstances of the offender and the crime, where they result in detention, would similarly fall foul of the ICCPR's prohibition of arbitrary detention, and potentially could be considered to be cruel, inhuman or degrading punishment.²⁸⁶

Equally mandatory sentences raise issues with respect to the principle of judicial independence. Principle 3 of the UN Basic Principle on the Independence of the Judiciary provides that "The judiciary should have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law." Whilst it is undeniable that States may regulate sentencing, through the specification of crimes, their respective punishments, aggravating and mitigating factors, the removal of the ability of the judge to ensure the basic fairness of the sentence would seem to deprive the act of its judicial nature. A mandatory sentence would also remove the right of the accused to have his or her sentence reviewed on appeal, as the court will be similarly bound by the legislative prescription.

(b) Restorative Justice

In recent years there has been a growing debate about the need to find alternatives to the traditional criminal justice punishment approach. This has largely been based upon the

²⁸⁶ See Supreme Court of Canada, *R v Smith* (Edward Dewey) (1997) 1 SCR. 1045

perceived failings of existing approaches to properly deter and resolve crime; concerns over the fairness of criminal justice processes, particularly their disproportionate impact upon poor and marginalised groups in society; and the marginalised role of victims and the lack of consideration for their interests, at least in common law systems, in criminal procedure.

As a result of these concerns there has been growing attention upon the issue of restorative justice approaches, such as reconciliation and reparation. This development has also been reflected upon the international plane, with restorative justice approaches being tried in post conflict situations to deal with massive violations of human rights. Restorative justice can be thought of as

*“an alternative measure in the criminal justice system that is not punitive in nature but rather seeks to render justice to offenders and victims alike, instead of tilting the balance heavily in favour of one of the stakeholders to the disadvantage of another. It seeks to re-establish social relationships that are the end point of restorative justice and seeks to address the wrongs in the doing and the suffering of a wrong that is also the goal of corrective justice.”*²⁸⁷

In this regard it entails a set of different objectives, actors and processes than traditional criminal justice systems. In terms of objectives, it seeks to restore the interests of all the parties affected by a crime, and therefore focuses upon participation by the victim, the offender and the relevant community. The victim and the community are at the centre of such processes, and the offender has direct personal responsibility to them. The aim is to facilitate better understanding by the offender of the impact of his/her crime.²⁸⁸ Generally restorative justice mechanisms are thought of as a complement to regular criminal justice systems, and are only utilised when appropriate. Examples of restorative justice currently in use in criminal justice systems are, for example, payment of compensation to the victim for minor offences, using alternate diversionary procedures in cases involving juveniles, such as family group or community conferences, or other forms of mediation. The outcome of restorative justice processes are usually reparations, restitution and community service.

The UN Economic and Social Council (ECOSOC) in 2002 adopted a resolution setting out several basic principles on the use of restorative justice programmes in criminal justice matters.²⁸⁹ The principles require that: -

- Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender;²⁹⁰
- The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings;²⁹¹
- Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process;²⁹²
- The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.²⁹³

²⁸⁷E/CN.15/2002/5, Restorative Justice, Report of the Secretary General, 7 January 2002.

²⁸⁸ Ibid, at para 11.

²⁸⁹ Economic and Social Council resolution 2002/12, annex

²⁹⁰ Ibid, Principle 7

²⁹¹ Ibid, Principle 8

²⁹² Ibid, Principle 9

The principles emphasise that fundamental procedural safeguards guaranteeing fairness to both offender and victim should be guaranteed by a restorative process, including access to counsel; the parties should be advised of their rights before agreeing to the process; and participation should be based upon consent.²⁹⁴

7 Recommendations

The following recommendations can serve as a starting point for discussing ways forward in advancing human rights protection in sentencing and punishment: -

- The overarching requirements of fairness, publicity and equality relevant to fair trials must be met when determining a sentence, in order to provide consistency in sentences and to avoid arbitrariness.
- States should specify more precisely in domestic law what precise objectives are sought to be achieved through the imposition of criminal punishments in order to guide the sentencing process and improve its consistency.
- States should establish a moratorium on executions and consider revoking the imposition of the death penalty in their domestic law. Where it is still maintained it must be an exceptional measure and a proportionate response to the individual circumstances of the case. Mandatory death sentence should in any case be prohibited.
- The imposition of corporal punishment should be prohibited by law
- States should give due consideration to non-custodial forms of punishment as an alternative to imprisonment to provide greater flexibility in sentencing consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid the unnecessary use of imprisonment
- Whilst certainty and consistency need to be achieved in sentencing, states should ensure that sentencing processes permit the tailoring of the sentence to the precise circumstances of the accused and the offence.
- States should give due consideration to the use of restorative justice processes in their criminal justice systems, where appropriate but particularly in the case of juveniles, as an alternative to traditional criminal procedures.

²⁹³ Ibid, Principle 10

²⁹⁴ Ibid, Principle 13

Chapter VI – Rights in Prison

1 Introduction

This chapter deals with the rights and entitlements of detainees that have been convicted and sentenced to imprisonment. While convicted prisoners are a separate category of detainees with distinct legal status, other categories of detainees, such as pre-trial detainees or persons held in administrative detention are entitled to similar standards regarding conditions of detention and general treatment as sentenced prisoners.

Prisoners are among the most vulnerable human beings in society as they have forfeited one of the most fundamental aspects of individual autonomy, the freedom of personal liberty, thereby finding themselves in a situation of powerlessness where they depend on the prison authorities for the fulfilment of basic human needs. States are therefore under a particular responsibility to care for the physical and mental well being of prisoners in their custody regardless of the reasons for their imprisonment. The justified public interest in the lawful punishment of criminal offenders is fulfilled with the deprivation of liberty, which in itself is afflictive by the very fact that it severely limits the right to self-autonomy. The conditions of imprisonment must therefore be such as not to aggravate the suffering inherent in such a situation.

In practice however, conditions of detention often amount to an additional punishment of being held in unacceptable physical conditions, which can become a veritable sentence to die, where prisoners are in poor health without medical treatment. International and regional standards for the treatment of prisoners provide a detailed body of principles and rules specifically designed to ensure a minimum of acceptable treatment. In addition, general and regional human rights law is also applicable in a prison context.

2 Applicable International Standards and Basic Principles

(a) Applicability of International Human Rights Norms and Standards

In accordance with the increasingly recognised principle that “incarceration deprives individuals of their liberty but not of their liberties”²⁹⁵, international human rights law is applicable to all convicted prisoners, with the exception of those rights inevitably taken away or restricted by the lawful decision to deprive those persons of their liberty. On this background, it is possible to distinguish three categories of rights, based on their respective availability in the context of imprisonment:

- a. By nature of their legal status, prisoners have forfeited their rights to personal liberty, freedom of movement and freedom of peaceful assembly for the period of their imprisonment.
- b. Other rights, including the right to family, privacy and correspondence, the right to education and to work as well as civil liberties, including freedom of expression, information and religion, the right to vote and to marry should in principle be available to every prisoner. In practice however, wide-ranging restrictions are often imposed with reference to so called “implied limitations” inherent to life in prison.²⁹⁶

While limitations may be justified by the practical circumstances of prison life, the

²⁹⁵ Jim Murdoch, *The Treatment of Prisoners – European Standards*, Strasbourg 2006, p. 237.

²⁹⁶ Manfred Nowak, *UN Covenant on Civil and Political Rights - CCPT Commentary*, 2nd edition, Kehl/Strasbourg/Arlington 2005, p 242.

- need to maintain security and good order or for the prevention of crimes, they must be strictly necessary to pursue these aims in the individual circumstances of the case.²⁹⁷
- c. Certain rights may never be limited, but must always be fully observed and protected. These include the right to life as well as all absolute and non-derogable rights, such as the right to physical and mental integrity, the right to respect for human dignity, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and serfdom, the right to be recognised as a person before the law and the freedom from discrimination and freedom of thought as well as the right to habeas corpus and due process standards.

(b) Specific Standards and Principles Applicable to Prisoners

In addition to the applicability of general human rights norms, the special power relationship within closed facilities, which leaves the well-being of detainees primarily to the benevolence of prison guards and prison administration, has prompted the development of specific standards designed to protect the rights of detainees. Most importantly, article 10 (1) of the ICCPR stipulates that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.²⁹⁸ This principle of humane treatment of prisoners constitutes the starting point for any considerations on prison conditions and the design of prison regimes. It complements the prohibition of torture and ill-treatment by requiring States (and subsequently the prison authorities) to take positive measures to ensure minimum guarantees of humane treatment for persons in their custodial care.²⁹⁹ This means inter alia that lawful restrictions on the human rights of detainees (see above) must also be measured against the standard of humane treatment.³⁰⁰ It further purports that the overall quality of life in prison should not aggravate the suffering of prisoners beyond what is incidental to life in incarceration, regardless of the material resources available in the respective States.³⁰¹

According to article 10 (3) ICCPR, the essential aim of the penitentiary system is the rehabilitation and ultimately social reintegration of prisoners into the community.³⁰² To this end, standards and rules for the treatment of prisoners were developed on the international and regional level that emphasise what can be called “the principle of normalisation”³⁰³, aiming at combating the debilitating effects of incarceration, promoting the self-reliance and autonomy of prisoners and facilitating reintegration. For example, one of the guiding principles of the 1955 UN “Standard Minimum Rules for the Treatment of Prisoners” is the minimisation of differences between prison life and life at liberty.³⁰⁴ Similarly, the revised

²⁹⁷ See e.g., the recent judgment of the European Court of Human Rights (ECtHR) in *Dickson v the UK*, Judgment of 4 December 2007, at para. 68.

²⁹⁸ Under the European Convention on Human Rights (ECHR), there is no equivalent article. The States Parties’ positive obligation to treat prisoners humanely has been subsumed under article 3 by the ECtHR.

²⁹⁹ HRC, General Comment No. 21, 10 April 1992, at para. 3. On the relationship between the prohibition of torture and ill-treatment (Art. 7 ICCPR) and the principle of humane treatment see Nowak, ICCPR Commentary, op.cit. p. 241ff.

³⁰⁰ See e.g. HRC, *Estrella v Uruguay*, Communication No. 74/1980 (29 March 1983), at para. 9.2.

³⁰¹ Rule 57 of Standard Minimum Rules; Rule 102 (2) of European Prison Rules; HRC General Comment No. 21, op. cit., at para. 4.

³⁰² For the ECtHR, see e.g. *Dickson v the UK*, Judgment of 4 December 2007, at para. 75.

³⁰³ See Report of the UN Special Rapporteur on Torture on his mission to Denmark in May 2008 (forthcoming).

³⁰⁴ Rule 60 (1) of the Standard Minimum Rules on the Treatment of Prisoners (hereinafter “Standard Minimum Rules”), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

European Prison Rules (2006) stipulate that “life in prison shall approximate as closely as possible the positive aspects of life in the community”.³⁰⁵ A corollary of the rehabilitative aim of imprisonment is that prisoners should receive treatment that takes into account to the greatest extent possible the individual needs of every prisoner (principle of individualised treatment) and is tailored to their individual sentence and rehabilitation plan.³⁰⁶

Based on international law and standards, the following section will provide a summary discussion of the minimum standards for the treatment of prisoners, the scope of various rights in prison as well as essential safeguards to ensure the effective guarantee of these rights.

3 Rights in Prison and Standards for the Treatment of Prisoners

Ill-treatment in prison can take many forms. While the deliberate infliction of torture and physical abuse of prisoners is explicitly prohibited, international and regional jurisprudence as well as other standard setting bodies have increasingly recognised that conditions of detention, in particular the cumulative effect of overcrowding, poor physical prison conditions and inadequate activity regimes can also amount to inhuman or degrading treatment or punishment by default or neglect.³⁰⁷ States are therefore under the positive obligation to ensure that the conditions of detention contribute to the maintenance of the physical and psychological well-being of persons in their custody.

(a) Accommodation and Basic Needs

Standards of Accommodation

The standard of accommodation is central to the overall quality of life in prison. Together with overcrowding and insufficient sanitary facilities, poor accommodation can be extremely detrimental to the health and mental well-being of prisoners.³⁰⁸ The Standard Minimum Rules therefore stipulate that accommodation of prisoners “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”.³⁰⁹ There is no universally agreed upon minimum standard for cellular space. As a rough guideline, the CPT has set 4 square metres as absolute minimum of living space for every prisoner and has recommended that single cells with less than 6 square metres should not be used.³¹⁰ More desirable however would be cellular space of 9 to 10 square metres per prisoner.³¹¹ If confinement to very small cells, which provide so little space that prisoners can only stand or crouch, is used as a punishment, this can even amount to torture.³¹² While the CPT has recognised that cultural specificity may

³⁰⁵ Rule 5 of European Prison Rules, adopted by the Committee of Ministers of the Council of Europe in Recommendation Rec(2006)2 (11 January 2006).

³⁰⁶ Rule 63 (1) of Standard Minimum Rules; Rule 103 of European Prison Rules.

³⁰⁷ See e.g., HRC, *Sextus v Trinidad and Tobago*, Communication No. 818/1998 (16 July 2001), at para. 7.4; for the ECtHR, see e.g., *Dougouz v Greece*, Judgment of 6 June 2001, at para. 45 ff.; and *Kalashnikov v Russia*, Judgment of 15 October 2002, at para. 102; see infra Section V.1.

³⁰⁸ Murdoch, op.cit., p. 213.

³⁰⁹ Rule 19 of Standard Minimum Rules; see also Rule 18.1 of European Prison Rules.

³¹⁰ CPT Report on visit to Poland, CPT/Inf(98) 13, at para. 70; this standard is seemingly been followed in the jurisprudence of the ECtHR, see e.g. *Iorgov v Bulgaria*, Judgment of 11 March 2004, at para. 80 (cellular space of 7 to 8 square metres for single prisoner considered to be adequate).

³¹¹ See e.g. CPT Report on visit to Austria, CPT/Inf(2005) 13, at para. 112.

³¹² See e.g. the report of the Committee Against Torture on its visit to Turkey, in which it called upon the government to “demolish immediately and systematically all the solitary confinement cells known as “coffins”, which in themselves constitute a kind of torture. These cells measure approximately 60 by 80 centimetres, they

render multi-occupancy accommodation preferable to single cells, it has also heavily criticised the use of large capacity dormitories in central and eastern European countries, in particular with respect to the inevitable lack of privacy, heightened risk of inter-prisoner violence and the impossibility of individualised treatment.³¹³

Provision of Basic Needs

Prisons must be equipped with adequate and clean sanitary installations, which should be accessible during day and night and grant a minimum of privacy.³¹⁴ Where toilets are inside multi-occupancy cells, they must be separated by a screen; it is however preferable that these facilities are kept in a different area from the living and sleeping space of prisoners. In addition to adequate space and hygiene, the provision of sufficient natural light and ventilation is essential to guarantee a minimum standard of humane accommodation.³¹⁵ For example, in the case of *Peers v Greece*, the ECtHR found that the fact that the applicant had been held in a cell lacking natural lighting and ventilation which at times became exceedingly hot, combined with the a lack of privacy and insufficient cellular space amounted to degrading treatment.³¹⁶ With respect to the provision of basic needs, prisoners are also entitled to a separate bed and sufficient bedding,³¹⁷ adequate clothing, which does not degrade or humiliate its wearers,³¹⁸ and the provision of drinking water at all times and suitably prepared and presented food of nutritional value taking into account the health and dietary needs of prisoners.³¹⁹ States fail to comply with their duty of care for the well-being of prisons if, as is the case in many countries, prisoners are left totally dependent on their families for food and medicine.³²⁰

Location and Transfer of Prisoners

The respective place of imprisonment should be located as closely as possible to the prisoners' home or places of residence,³²¹ and the frequent transfer of prisoners from one place of detention to another should be avoided as this can have harmful effects on their psychological and physical well-being and seriously restrict their ability to maintain family contacts.³²² In any case, prisoners are entitled to notify members of their family or other appropriate persons of their new place of confinement after each transfer to another prison.³²³

(b) Procedural Safeguards against Ill-Treatment in Prison

have no light and inadequate ventilation, and the inmate can only stand or crouch.” UN Doc. A/48/44/Add.1 (15 November 1993), at para. 52.

³¹³ CPT/Inf(2001) 16, at para. 29.

³¹⁴ Rule 12 of Standard Minimum Rules; Rule 19 of European Prison Rules.

³¹⁵ Rule 11 of Standard Minimum Rules; Rule 18 (1) of European Prison Rules.

³¹⁶ ECtHR, *Peers v Greece*, Judgment of 19 April 2001, at para. 75.

³¹⁷ Rule 19 of Standard Minimum Rules; Rule 21 of European Prison Rules.

³¹⁸ Rule 17 of Standard Minimum Rules; Rule 20 of European Prison Rules.

³¹⁹ Rule 20 of Standard Minimum Rules, Rule 22 of European Prison Rules.

³²⁰ See e.g. Report of the UN Special Rapporteur on Torture on his mission to Indonesia, UN Doc. A/HRC/7/3/Add.7 (10 March 2007), at para. 30; on his mission to Paraguay, UN Doc. A/HRC/7/3/Add.3 (1 October 2007), at para. 67; on his mission to Nigeria, UN Doc. A/HRC/7/3/Add.4 (22 November 2007), at para. 51; on his mission to Indonesia, UN Doc. A/HRC/7/3/Add.7 (10 March 2008) at para. 30.

³²¹ Principle 16.1 of Body of Principles; Rule 17(1) of European Prison Rules.

³²² The CPT has noted that “the overall effect on the prisoner of successive transfer could under certain circumstances amount to inhuman and degrading treatment”, CPT/Inf (92) 3, at para. 57.

³²³ Rule 44(3) of Standard Minimum Rules.

Upon admission to the detention facility, prisoners must be informed of their rights and duties in prison, and be provided with written information about the internal prison regulations and existing complaint mechanisms.³²⁴ The effective availability of mechanisms to make requests or file complaints constitutes an essential safeguard against ill-treatment and a remedy to address grievances in relation to the physical conditions of detention or the individual prison regime. Such mechanisms should be available inside the prison system, such as the possibility to raise concerns with the director of the penitentiary institution on a daily basis, to lodge complaints with the central prison administration and to speak to the inspector or independent monitoring body in private during their visits.³²⁵ If a request is denied or a complaint is rejected, prisoners must have the right to appeal such a decision to an independent authority outside the prison system; they are entitled to consult and communicate with a lawyer and receive legal assistance where necessary.³²⁶ Another essential safeguard against ill-treatment and detrimental health effects of imprisonment is the existence of an independent and proactive medical service in prison that undertakes regular medical examination of prisoners and, in any case, as soon as possible after the admission of a new prisoner.³²⁷ Prisoners should have the right to be examined by a forensic expert, if they so request.

In practice, the protection of prisoners' rights depends to a great extent on the keeping of comprehensive records containing information about each individual prisoner and his or her treatment.³²⁸ Prisoner files should be opened upon admission and be kept up-to-date with accurate information on the age, sex, health and well-being of the person concerned, including medical examination reports and information about treatment and medication prescribed and received, dietary requirements, an inventory of personal belongings, external contact details and information on complaints or requests made and any action taken by the authorities in this respect as well as prisoners' respective programme for rehabilitation.³²⁹ The effective management of prisoner files does not only raise the awareness about the rights of prisoners among prison staff but also facilitates the individualisation of treatment according to the detainees' specific requirements and needs.

(c) Other Aspects of Treatment and Prison Regime

Provision of Health Care

The lack of sufficient health care is a frequent aspect of the ill-treatment of prisoners.³³⁰ In addition to prisoners' right of access to a medical doctor whenever needed, the CPT has developed the principle of "equivalence of medical care" which entitles prisoners to the same level and specialisation of medical care that is available in the community at large.³³¹ Prisoners are therefore not only entitled to emergency care, but to any other treatment indicated by their psychological and physical condition. Failure to provide necessary medical assistance may amount to ill-treatment, and cannot be justified for disciplinary reasons.³³² The authorities are also under a positive obligation to detect and treat any specific physical and

³²⁴ Rule 35 (1) of Standard Minimum Rules; Rules 15.2 and 30 of European Prison Rules.

³²⁵ Rule 36 of Standard Minimum Rules; Rule 70 of European Prison Rules.

³²⁶ Rule 70 of European Prison Rules; Principle 18 of Body of Principles.

³²⁷ Rule 24 of Standard Minimum Rules; Rule 16 (a) of European Prison Rules. See *infra* Section IV.3..

³²⁸ Rule 7 of Standard Minimum Rules; Rule 15 (10) of European Prison Rules.

³²⁹ "Handbook on Prisoner File Management", Criminal Justice Series, United Nations, New York 2008, p. 22.

³³⁰ See e.g. Report of the UN Special Rapporteur on Torture on his mission to Nigeria, UN Doc. A/HRC/7/3/Add.4 (22 November 2007), at para. 37.

³³¹ CPT/Inf(93) 12, at para. 31.

³³² See e.g. ECtHR, *Iorgov v Bulgaria*, Judgment of 7 July 2004, at para. 95.

mental defects that may arise as a result of incarceration.³³³ For example, precautionary measures must be taken where a prisoner suffers from mental illness or is at risk of committing suicide.³³⁴ The CPT has moreover emphasised that the duty of care for the well-being of prisoners also entails measures to effectively prevent, screen and treat transmittable diseases in prison.³³⁵

Exercise and Recreational Facilities

An essential element of ensuring the well-being of prisoners is the provision of adequate exercise and recreational facilities. International standards stipulate that each prisoner should be allowed at least one hour of exercise per day in the open air,³³⁶ even when prisoners are punished with strict solitary confinement.³³⁷ In addition, prisoners should be provided with recreational opportunities, such as sport, games, cultural activities and the possibility to follow individual hobbies.³³⁸ In Denmark for example, according to the principle of the “exercise of responsibilities” by prisoners, a variety of activities and workshops are offered and most detainees are on self-cooking regime.³³⁹

Contact with the Outside World

The maintenance of regular contact with family and friends constitutes an important safeguard against torture and ill-treatment in detention and contributes to public scrutiny and awareness of the physical conditions of prisons and of the respective prison regime in place. International standards widely recognise that sustained social contact with the outside world helps combating the debilitating effects of imprisonment and achieving the overall aim of successful rehabilitation and social reintegration of prisoners after release.³⁴⁰ From the perspective of prisoners’ rights, contacts with the outside world are protected by the rights to family life and communication guaranteed under article 17 ICCPR and article 8 ECHR.

(1) Right to Family Life

Prisoners have the right to receive regular visits from family members and close friends and the prison authorities are under a responsibility to promote and facilitate these visits.³⁴¹ Any restrictions on visiting rights can only be justified, if they are subject to legal safeguards against arbitrary application and strictly necessary in the individual case to meet a legitimate state interest, such as security concerns or the prevention of crime.³⁴² Under any circumstances, a minimum of contact must always be guaranteed in light of the importance of

³³³ Rule 40(4) of European Prison Rules. On the role of prison health services in preventing the ill-treatment of prisoners and protecting their well-being, see further infra.

³³⁴ See e.g. ECtHR, *Keenan v the UK*, Judgment of 3 April 2001, at para. 116.

³³⁵ CPT/Inf(2001) 16, at para. 31.

³³⁶ Rule 21 (2) of Standard Minimum Rules; Rule 27(1) of European Prison Rules.

³³⁷ CPT/Inf(92) 3, at para. 48.

³³⁸ Rule 78 of Standard Minimum Rules; Rule 27(6) of European Prison Rules.

³³⁹ See Report of the UN Special Rapporteur on Torture on his visit to Denmark (forthcoming).

³⁴⁰ Rule 80 of Standard Minimum Rules; Rule 24(1) of European Prison Rules; see also CPT/Inf (92) 3, at para. 51.

³⁴¹ Rule 37 of Standard Minimum Rules; Rule 24 (4-7) of European Prison Rules; see also ECtHR, *Messina v Italy* (No 2), Judgment of 28 December 2000, at para. 61.

³⁴² HRC, *Miguel Angel Estrella v Uruguay*, op. cit., at para. 9.2. Under the jurisprudence of the ECtHR, States Parties retain a wide discretion in imposing limitations on visiting rights as long as these limitations can be justified under one of the grounds in article 8 (2) and are not applied arbitrarily or disproportionately. The imposition of restrictions on the right to family life as a disguised sanction for prisoners’ behaviour would be contrary to the Convention (article 18), since punishment is not listed as one of the grounds in article 8 (2). However, even when limitations on prisoners’ rights are not intended as additional punishment, they, in practice, have the same effect; see Van Dijk/Van Hof, op.cit., p. 717.

the right to family in conjunction with the principle of humane treatment.³⁴³ The world-wide practices regarding the number of permitted monthly prison visits by family members or friends varies considerably.³⁴⁴ The CPT deemed a single visit of one hour per month unsatisfactory³⁴⁵ and the ECtHR found in *Nowicka v Poland* that the restriction to one family visit per month was not proportionate in the circumstances of the specific case.³⁴⁶

In order for prisoners to maintain effective and meaningful relationships with family members, in particular with partners, parents and children, the prison authorities should provide open visiting facilities wherever possible, allowing prisoners physical contact with their family.³⁴⁷ The CPT has recommended extended unsupervised visits, including conjugal visits as long as they take place in conditions respecting human dignity,³⁴⁸ and the overwhelming majority of European countries now permit visits respecting privacy.³⁴⁹ Greenland and Denmark stand out as examples of best practices providing special family houses in some prisons that allow prisoners to stay together with their partners and children during visits.³⁵⁰

(2) Right to Communication

Prisoners also have the right to communication with the outside world through correspondence and telephone conversations, albeit restrictions with respect to frequency of communication are regularly imposed in practice. Certain limitations may be justified by prison regulations and resource considerations, but correspondence must generally be possible and the prison authorities are under a responsibility to assist prisoners through the provision of notepaper etc.³⁵¹ Under the jurisprudence of the ECtHR, correspondence of prisoners is protected to a high degree and an automatic censorship of private letters cannot be justified, even where criticism or contempt for prison officials is concerned.³⁵² Correspondence between lawyer and client is particularly privileged.³⁵³ In general, censorship of letters sent and received by prisoners must be strictly necessary to meet a legitimate state interest and if letters are opened, this should be done with the necessary safeguards in place, such as opening it in the presence of the detainee.³⁵⁴ In the opinion of the Human Rights Committee, rigorous censorship of correspondence may also amount to inhuman treatment in violation of Art. 10 ICCPR.³⁵⁵

³⁴³ Rule 37 of Standard Minimum Rules; Rule 24 (1-5) of European Prison; see also the HRC, *Estrella v Uruguay*, op.cit. at para 9.2; and Nowak, ICCPR Commentary, op.cit., p. 402.

³⁴⁴ According to a study conducted in 1996 by the United Nations Commission on Crime Prevention and Criminal Justice, some countries allowed more than six visits per month, while others allowed only one or less, E/CN.15/1996/16/Add.1 (22 March 1996), at para. 58.

³⁴⁵ Report on visit to Hungary, CPT/Inf(96)5, at para. 128.

³⁴⁶ Judgment of 3 March 2003, at para. 77.

³⁴⁷ Murdoch, op.cit., p. 238 and FN 272. See e.g. CPT Report on visit to Switzerland, CPT/Inf(93) 3, at para. 42; see also the CPT's recommendation in favour of open as opposed to closed (separated by a glass partition) visiting arrangements in its Report on visit to Hungary, CPT/Inf(2004) 18, at para. 50

³⁴⁸ CPT/Inf(95) 14, at para. 161.

³⁴⁹ Murdoch, op. cit., p. 243.

³⁵⁰ Report of the UN Special Rapporteur on Torture on his mission to Denmark (forthcoming).

³⁵¹ Principle 19 of the Body of Principles; Rule 24 (1) of European Prison Rules.

³⁵² For many others see e.g. ECtHR, *Silver Golders v the UK*, Judgment of 21 February 1975, at para. 45; see also e.g. *A.B. v the Netherlands*, Judgment of 29 April 2002, at paras. 85-88. (blanket prohibition of correspondence with former inmates found to be violation of article 8).

³⁵³ Van Dijk/Van Hof, op.cit., pp. 732-733.

³⁵⁴ See e.g. ECtHR, *Campbell v the UK*, Judgment of 25 March 1992, at para. 48.

³⁵⁵ HRC, *Miguel Angel Estrella v Uruguay*, Communication No. 74/1980 (29 March 1983), at para. 10.

Protection of Privacy

Although certain restrictions on prisoners' right to privacy may be inherent in life in prison, serious intrusion into the private sphere of detainees, such as strip-searching, forced medical examination or continuing camera surveillance can amount to a violation of the right to privacy. Such measures should only be imposed if justified by a legitimate aim, such as the prevention of crime or minimizing the risk of suicide. Serious interferences with the right to privacy of prisoners can also be the result of strict prison regimes. For example, in some prisons and forced re-education camps, strict disciplinary programs and re-education programs require detainees to sit rigidly and study the prison newspapers or prison regulations without flinching and under constant surveillance.³⁵⁶ Where such rigid prison regimes leave no room for privacy at all, they may amount to inhuman treatment.

(d) Making the Best out of Imprisonment: Retention of Human Rights in Prison*Right to Education*

In order to properly ensure the right of prisoners to education, prison facilities must be equipped with or allow access to educational facilities, which give prisoners the opportunity to develop skills and aptitudes as far as possible meeting their individual needs and aspirations.³⁵⁷ The Standard Minimum Rules therefore recommend that every prison must have a well equipped library and that the education of illiterates and young prisoners should be given special attention.³⁵⁸ The provision of adequate educational facilities should be as much as possible integrated with the general educational system of the larger community to ensure the successful reintegration after release.³⁵⁹

Right to Work

The provision of sufficient work of a useful nature to keep every prisoner actively employed for a full working day should be understood as a positive aspect of the prison regime, minimising the detrimental aspects of incarceration and strengthening the self-respect and responsibility of prisoners.³⁶⁰ European standards emphasise that prisoners should be afforded at least some choice in the type of employment and that the allocation of work should be individualised so as to take into account as far as possible the wishes and professional aspirations of each prisoner.³⁶¹ Opportunity for vocational training should be provided and the organisation and methods of work should resemble those in the community in order to increase prisoners' ability to earn a normal living after release.³⁶² In any case, prisoners have the right to equitable remuneration for their work³⁶³ and should generally be employed under conditions similar to those prevailing in the larger community, including their inclusion in the

³⁵⁶ Report of the UN Special Rapporteur on Torture on his mission to China in 2005, UN Doc. E/CN.4/2006/6/Add.6 (10 March 2006), at p. 44; in response to the Special Rapporteur's preliminary report, the Chinese government commented that re-education is premised on helping detainees re-enter society and that since many detainees "are led to a life of crime because they love leisure and hate labour and resort to illegal means to gain others' property", prisons and re-education through labour facilities organize appropriate work "in order to cultivate abilities and habits of self-reliance and prevent problems such as poor mental health because they have nothing to do" (ibid. para 63 and endnote 69).

³⁵⁷ Rule 28 of European Prison Rules.

³⁵⁸ Rules 40 and 77 (1) of Standard Minimum Rules; Rule 28 of European Prison Rules.

³⁵⁹ Ibid..

³⁶⁰ Rule 71 of Standard Minimum Rules; Rule 26 of European Prison Rules; see also Murdoch, op.cit., pp. 217-219.

³⁶¹ Rule 26.6 of European Prison Rules.

³⁶² Rule 72 of Standard Minimum Rules; Rule 26(7) of European Prison Rules.

³⁶³ Rule 76 (1) of Standard Minimum Rules; Rule 26 (10) of European Prison Rules.

national social security system.³⁶⁴ Work should never be imposed as a form of punishment and should not be of an afflictive nature.³⁶⁵

Other Civil and Political Rights

With respect to the retention of civil and political rights, the jurisprudence of the ECtHR has increasingly recognised the importance of retaining and guaranteeing these rights in a situation of deprivation of liberty. For example the right to marry and found a family must in principle be guaranteed to prisoners.³⁶⁶ Thus the Court held that the denial of access to artificial insemination by British authorities in a case where conjugal visits were not permitted was not proportionate in light of the prisoners' right to family life.³⁶⁷

In addition to the protection of their right to correspondence and communication with the outside world, prisoners also enjoy the protection of their freedom of expression, including expressing opinions critical of the prison authorities or the conditions of detention.³⁶⁸ Restrictions on the prisoners' right to communicate with the media for example can only be justified in special circumstances, where the security or good order of the detention facility or another higher public interest is at risk, such as the protection of victims.³⁶⁹ Equally important is the protection of the prisoners' right to receive information about developments in the outside world. International standards therefore explicitly stipulate that prisoners must be provided with adequate means (newspapers, periodicals, radio or TV broadcasting) to keep them informed of public affairs.³⁷⁰ With respect to political rights, prisoners continue to enjoy their right to vote. In Europe, most countries have enacted special provisions granting prisoners the right to vote and the factual opportunity to cast their ballot. While restrictions on the right to vote have been accepted in the past for certain categories of prisoners in light of the circumstances of specific cases (mostly involving "un-citizen-like" conduct), the general and blanket disenfranchisement of convicted prisoners can not be justified under the ECHR.³⁷¹

(e) Restrictions and Restraints

Use of physical force

The use of physical force by prison staff against detainees under their care is subject to the same strict principles that apply to the use of force by law enforcement officials in general:³⁷² recourse to force can only be justified if made strictly necessary by the prisoner's own conduct, and must be limited to the amount strictly necessary to prevent escape or the infliction of harm to oneself or others.³⁷³ In the words of the ECtHR, "recourse to physical force which has not been made strictly necessary by the prisoners own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3".³⁷⁴

³⁶⁴ Rule 26 (17) of European Prison Rules.

³⁶⁵ Rule 71 (1) of Standard Minimum Rules; Rule 26(1) of European Prison Rules.

³⁶⁶ See e.g. ECtHR, *Draper v the UK*, Commission Report of 10 July 1980.

³⁶⁷ *Dickson v the UK*, op. cit., at paras. 81-85.

³⁶⁸ See e.g., ECtHR, *Yankov v Bulgaria*, Judgment of 11 March 2004, at paras. 134-135.

³⁶⁹ See Rule 24 (12) of European Prison Rules.

³⁷⁰ Rule 39 of Standard Minimum Rules; see also Rule 24 (10) of European Prison Rules.

³⁷¹ See e.g. ECtHR, *Hirst v UK*, Judgment of 6 October 2005, at paras. 68-85.

³⁷² See Code of Conduct for Law Enforcement Officials, UN Doc. A/Res/43/169 (17 December 1979); and Basic Principles on the use of Force and Firearms, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August – 7 September 1990.

³⁷³ Rule 54 of Standard Minimum Rules; Rules 64 (1) and (2) and 65 of European Prison Rules.

³⁷⁴ *Satik and others v Turkey*, Judgment of 10 January 2001, at para. 54.

Prisoners against whom force has been used have the right to be immediately examined and if necessary treated by a medical doctor. Record should be kept of every instance of the use of force against prisoners.³⁷⁵ In order to enable prison staff to restrain aggressive prisoners without resorting to excessive use of force, they must receive adequate training; generally, guards should not be armed in their day-to-day contact with prisoners, unless there are special circumstances.³⁷⁶

Restraint techniques and devices

The use of instruments of restraint to control violent prisoners should be regulated by the central prison administration and prison staff should be trained in control and restraint techniques.³⁷⁷ Such instruments are open to abuse and their application constitutes in the words of the CPT “high risk situations insofar as the possible ill-treatment of prisoners is concerned”.³⁷⁸ Some restraint devices can cause serious injury or even death if improperly applied, and others are inherently cruel, inhuman or degrading.³⁷⁹ International standards prohibit the use of chains and leg irons as restraints.³⁸⁰ Other instruments such as handcuffs, restraint jackets and other body restraints must never be used as punishment and only as a means of last resort for the purpose of preventing escape, or subject to the order by a medical officer or the director to prevent self-injury or the injury of others or damage to property.³⁸¹ The application of restraint techniques must therefore be subject to a risk assessment in the individual case,³⁸² follow clear procedures,³⁸³ be limited to a period no longer than strictly necessary and subject to medical supervision.³⁸⁴ In practice however, restraint mechanisms are often used over long periods of time although there is no genuine security need or in ways that cannot be justified by security considerations, such as holding prisoners in chains and shackles for 24 hours a day or attaching them to a bed or shackle board.³⁸⁵ With respect to the frequent practice of handcuffing high-security prisoners sentenced to life-imprisonment, the CPT found that there is “no justification for indiscriminately applying restrictions to all prisoners subject to a specific type of sentence, without giving due considerations to the individual risk they may (or may not) present”.³⁸⁶

³⁷⁵ Rule 65 e of European Prison Rules.

³⁷⁶ Rule 54 (2) and (3) of the Standard Minimum Rules; see also Rule 66 and Rule 69 of European Prison Rules.

³⁷⁷ Rule 34 of Standard Minimum Rules; under the European Prison Rules, the manner of use of instruments of restraint must be regulated by national law (Rule 68 (4)); “Human Rights in Prison”- UN Manual on Human Rights Training for Prison Officials, United Nations, New York and Geneva 2005, p. 89.

³⁷⁸ CPT/Inf (93) 2, at para. 53.

³⁷⁹ Amnesty International, *Combating Torture: a manual for action*, London 2003, p. 128.

³⁸⁰ Rule 33 of Standard Minimum Rules; Rule 68(1) of European Prison Rules.

³⁸¹ *Ibid.*

³⁸² Rule 52.1 of European Prison Rules.

³⁸³ Rule 53 of European Prison Rules.

³⁸⁴ CPT/Inf(93), at para. 44.

³⁸⁵ See e.g. Amnesty International, *Combating Torture*, op. cit., pp. 128ff; see also the Report of the UN Special Rapporteur on Torture on his mission to China, UN Doc. E/CN.4/2006/6/Add.6 (10 March 2006), at para. 68 and 78 (death row prisoners); in response to the UN Special Rapporteur’s preliminary report, the Chinese Government explained that “such measures were necessary for the prisoners’ safety, the security of others, to prevent them from fleeing, and to prevent suicide” (*ibid.* endnote 71); and report on his mission to Mongolia, UN Doc. E/CN.4/2006/6/Add.4 (20 December 2005), at para. 38 and 51; see also forthcoming report on his mission to Moldova (handcuffing of death row prisoners) see also forthcoming report on his mission to Equatorial Guinea (shackling of prisoners for 24 hours).

³⁸⁶ CPT/Inf (2000) 13, at para 33.

Searches

While body searches may be necessary for security reasons, such security measures should be as unobtrusive as possible and avoid humiliation.³⁸⁷ Where a prisoner is required to undress, the search must be carried out only by staff of the same gender and intimate body searches shall only be carried out by a medical doctor.³⁸⁸ The ECtHR has taken a firm approach with respect to the routine practice or inappropriate use of strip searches not based on genuine and immediate security needs, which in light of the degrading and humiliating effect of these searches amount to a violation of article 3 of the Convention.³⁸⁹

Disciplinary Punishment

Domestic prison rules usually specify disciplinary sanctions for certain breaches of rules concerning the security and good order within prisons. International standards stipulate that disciplinary punishment should be a measure of last resort and should only apply to offences that are likely to threaten good order, safety or security in prison.³⁹⁰ Clear disciplinary procedures must be formally established under domestic law specifying what constitutes a disciplinary offence, type and duration of punishment and the competent authority to impose such punishment.³⁹¹ Prisoners charged with a disciplinary offence must be informed promptly, provided with adequate time to prepare their defence and be allowed to defend themselves in person and have the right and opportunity to appeal to a higher authority.³⁹² In addition to the requirement that any disciplinary sanction must be proportionate to the offence, certain forms of punishment are absolutely prohibited under international law: such as the imposition of corporal punishment, punishment by placing in a dark cell, punishment by total denial of family contact, punishment by applying instruments of restraint and all other forms of cruel, inhuman or degrading punishment.³⁹³ According to the Standard Minimum Rules, disciplinary measures that might have adverse effects on prisoners' health (physical or mental) can only be imposed if the medical officer after examination certifies in writing that the prisoner is fit to sustain this, and the person concerned has the right to daily visits by the medical officer, who must advise that the termination or alteration of the measure is necessary for medical reasons.³⁹⁴ While daily visits to prisoners in solitary confinement by a medical practitioner constitute an important safeguard for the person concerned, the requirement that doctors certify prisoners' fitness to undergo such punishment can be harmful to the doctor-patient requirement.³⁹⁵ The latter provision was therefore not re-adopted in the 2006 revision of the European Prison Rules.

³⁸⁷ Rule 54 of European Prison Rules.

³⁸⁸ *Ibid.*; see also CPT/Inf (200) 13, at para. 23; and "Statement on Body Searches of Prisoners" by the World Medical Association, adopted at the 45th World Medical Assembly, October 1993.

³⁸⁹ See e.g. *Iwanczuk v Poland*, Judgment of 12 February 2002, at para 59 (concerning remand prisoner) and *Van der Ven v the Netherlands*, Judgment of 4 May 2003, at para 63 (concerning routine strip-searches in high-security prisons, not "based on any concrete security need or the applicant's behaviour" in combination with otherwise strict regime).

³⁹⁰ Rule 27 of Standard Minimum Rules; Rules 56 and 57(1) of European Prison Rules.

³⁹¹ Rule 29 – 30 (1) of Standard Minimum Rules; Rule 57(2) and 58 of European Prison Rules.

³⁹² Rule 30 (2) of Standard Minimum Rules; Rule 59 and 61 of European Prison Rules; with respect to serious offences (akin to a criminal charge) punishable by sanctions of considerable detrimental effect to the prisoner (e.g. the prolongation of imprisonment), disciplinary procedures are subject to the fair trial standards in article 14 ICCPR and article 6 ECHR, see the criteria developed by the ECtHR in the *Engel* case (*Engel v the Netherlands*, Judgment of 8 June 1976) applied in *Ezeh and Connors v the UK*, Grand Chamber Judgment of 9 October 2003, at paras. 124-129.

³⁹³ Rule 31 of Standard Minimum Rules; Rule 60 of European Prison Rules.

³⁹⁴ Rule 32 of Standard Minimum Rules.

³⁹⁵ See CPT/Inf (2005) 17, at para. 53.

Solitary Confinement

Confinement in isolation is widely used as a disciplinary punishment for sentenced prisoners,³⁹⁶ but also increasingly as an administrative tool for managing specific groups of prisoners, such as prisoners on death row.³⁹⁷ Solitary confinement (or detention in conditions amounting to such) typically implies the reduction of meaningful contact with other prisoners and the outside world to an absolute minimum, aggravated by the deprivation of vocational, educational and other meaningful activities and restrictions imposed on reading and writing materials, thereby extremely limiting the availability of stimuli fundamental to human life. Prisoners confined in isolation are totally dependent on the limited human contact they have with prison staff for the provision of their basic needs and every movement is closely observed and controlled.

While it may sometimes be necessary to separate prisoners to prevent violence or criminal activity, the imposition of solitary confinement over prolonged periods of time causes severe suffering and can have very harmful (long-term) consequences for the mental and physical health of the person concerned, ranging from insomnia and confusion to hallucinations and psychosis.³⁹⁸ In light of the potentially damaging health effects and the high risk of abuse of isolation as a disproportionate punishment as well as the heightened risk of physical abuse of prisoners taken outside of the normal prison routine, international standards increasingly favour the restriction³⁹⁹ or abolition⁴⁰⁰ of solitary confinement. The Human Rights Committee stipulated that the use of prolonged solitary confinement may amount to cruel, inhuman or degrading punishment⁴⁰¹ and held in the case of *Victor Polay Campos v Peru* that the total isolation for a period of one year combined with harsh restrictions placed on correspondence with the prisoner's family constituted inhuman treatment in violation of articles 7 and 10 ICCPR.⁴⁰² In its observations on Peru, the Committee against Torture concluded with respect to the detention of political prisoners in complete isolation, that "sensorial deprivation and the almost total prohibition of communication cause persistent and unjustified suffering which amounts to torture".⁴⁰³ Under the jurisprudence of the ECtHR solitary confinement may not in and of itself amount to treatment contrary to article 3, but it is recognised that "complete sensory isolation, coupled with total social isolation, can destroy the personality and

³⁹⁶ For example, according to Danish law, solitary confinement can be imposed on convicted prisoners for inter alia to prevent escape, criminal activities or violent behavior or as punishment for disciplinary offences, see Report of the UN Special Rapporteur on Torture on his mission to Denmark, (forthcoming). See also Report of the UN Special Rapporteur on Torture to the General Assembly, UN Doc. A/63/175, 28 July 2008, at paras. 77-85.

³⁹⁷ "Istanbul statement on the use and effects of solitary confinement" (hereinafter "Istanbul Statement"), adopted on 9 December 2007 at the International Psychological Trauma Symposium in Istanbul.

³⁹⁸ For a recognition of the harmful effects of solitary confinement by international human rights bodies, see e.g. Concluding Observations of the Committee against Torture regarding Denmark, A/52/44, at paras. 181 and 189; see also CPT/Inf (92) 3, at para. 56. For a detailed overview on the health consequences of solitary confinement see the recently published "Sourcebook on Solitary Confinement" by Sheron Shalev (Mannheim Centre for Criminology/ LSE, London 2008) pp. 15-24; see also Peter Scharff Smith, "The effects of solitary confinement on prison inmates: A brief history and review of the literature." in M. Tonry (ed.), *Crime and Justice*, Vol. 34 (2006), pp. 441-528; and Peter Scharff Smith, "Solitary confinement: An introduction to The Istanbul Statement on the Use and Effects of Solitary Confinement", in *Journal on Rehabilitation of Torture Victims and Prevention of Torture*, Vol. 18 (2008), pp. 56-62.

³⁹⁹ See e.g. Rule 60(5) of European Prison Rules.

⁴⁰⁰ Principle 7 of UN Basic Principles.

⁴⁰¹ HRC, General Comment No. 20, 3. April 1992, at para. 6.

⁴⁰² HRC, *Victor Polay Campos v. Peru*, Communication No. 577/1994 (6 November 1997), at para. 8.6.

⁴⁰³ Committee against Torture, Summary account of the results of the proceedings concerning the inquiry of Peru, UN Doc. A/56/44 (18 June 2001), at para. 186.

constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason”.⁴⁰⁴

It follows from the above that the use of solitary confinement must be limited to exceptional cases as a means of last resort and of strictly limited duration;⁴⁰⁵ efforts should be made to raise the level of meaningful social contacts, in particular with family and friends outside the prison.⁴⁰⁶ As a special safeguard against detrimental health effects, prisoners punished to solitary confinement should have access to a medical doctor on a daily basis.⁴⁰⁷ In addition, the use of solitary confinement should be absolutely prohibited as a form of confinement generally applied to death row prisoners and life-sentenced prisoners by virtue of their sentence,⁴⁰⁸ for mentally ill prisoners and for children under the age of 18.⁴⁰⁹

(f) Special categories of prisoners

International human rights law and standards provide for the separation⁴¹⁰ of and special measures for particular categories of detainees, responding to the special situation and needs of such groups. Most importantly, Article 10(2) ICCPR and a number of regional and international standards call for the segregation of convicted and pre-trial, as well as adult and juvenile detainees. The ECtHR was asked several times to clarify implications arising under the ECHR for prisoners belonging to particular groups and the CPT has developed special criteria for women and juveniles deprived of their liberty.⁴¹¹

Women

Female prisoners have special needs and concerns related to family responsibilities and health issues, including sexual and reproductive health and are particularly vulnerable to abuse in prison. In order to prevent abuse of female detainees, women deprived of their liberty should be held in an accommodation which is physically separated from the one occupied by men with female staff supervising such accommodation.⁴¹² In contrast to universal rules, European standards allow mixed gender staffing - with a preponderance of female staff - since the presence of male and female staff can contribute to the normalisation of prison life.⁴¹³

⁴⁰⁴ For many others see e.g. *Van der Ven v the Netherlands*, Judgment of 4 May 2003, at para. 51; equally the CPT recognises that solitary confinement may in certain circumstances amount to inhuman and degrading treatment or punishment, see CPT/Inf (92) 3, at para. 56.

⁴⁰⁵ See also Manfred Nowak/Elizabeth Mc Arthur, *The United Nations Convention against Torture – A Commentary*, New York 2008, p. 548.

⁴⁰⁶ See e.g. Report of the UN Special Rapporteur on his mission to Denmark in May 2008 (forthcoming).

⁴⁰⁷ See e.g. CPT/Inf(92) 3, at para. 56; see also Rule 43(2) of the European Prison Rules.

⁴⁰⁸ See *infra* Section V. 2.

⁴⁰⁹ See Istanbul Statement, *op. cit.*, p. 4.

⁴¹⁰ See Article 10 (2) (a) and (b) ICCPR and Rule 8 of Standard Minimum Rules. The presumption of innocence requires that accused persons be given treatment appropriate to their status as untried detainees. See *supra* Chapter II “Human Rights in Pre-trial Detention”.

⁴¹¹ See e.g. CPT/Inf (99) 12, at paras. 20-42, and CPT/Inf (2000) 13, at paras. 21-33.

⁴¹² Rule 53 of the Standard Minimum; Rules 18(8) and 18(9) of European Prison Rules. The CPT also welcomes arrangements, which allow couples deprived of their liberty to be accommodated together or permit some degree of mixed gender association in prisons, provided always that the prisoners are carefully selected, adequately supervised and agree to participate, see CPT/Inf (2000) 13, chapter “Women deprived of their liberty” and CPT/Inf/E (2002) 1 - Rev. 2006, at para. 24; See also Report of the UN Special Rapporteur on Torture on his mission to Denmark in May 2008 (forthcoming).

⁴¹³ Rule 85 of European Prison Rules and CPT/Inf (2000) 13, at para. 23. See also Report of the UN Special Rapporteur on Torture on his mission to Denmark in May (forthcoming).

According to European standards, female detainees should be provided with access to meaningful activities (work, training, sports etc.). In order to prevent the reinforcement of outmoded gender stereotypes, female prisoners should be offered activities of a genuinely vocational nature instead of household-related activities such as sewing or handicrafts.⁴¹⁴ Specific hygiene issues and health care needs imply that access to sanitary and washing facilities and provision for necessary hygiene items as well as access to health personnel with specific training in women's health issues must be granted.⁴¹⁵ Failure to provide the basic necessities can amount to degrading treatment.⁴¹⁶ Additionally, the CPT also calls for the availability of preventive health care measures (such as screening for breast and cervical cancer) and access to medication (such as the contraceptive pill) where these would normally be available in the community outside prison.⁴¹⁷

Special accommodation for necessary pre-natal and post-natal care and treatment shall be provided in women's institutions and arrangements should be made for children to be born outside the institution.⁴¹⁸ Mother and child should be allowed to stay together for at least a certain period of time.⁴¹⁹ There is no consensus and consequently there are no international or regional rules as to whether and how long babies and young children should be allowed to remain with their mothers in prison: on the one hand, prisons do not provide an appropriate environment for children, and on the other hand, the forced separation of mothers and infants is highly undesirable. Therefore, the policies adopted regarding this issue differ from country to country.⁴²⁰

Juveniles

Deprivation of liberty of juveniles is to be used only as a measure of last resort and for the shortest appropriate period of time.⁴²¹ Juvenile offenders must be detained separately from adults.⁴²² The Standard Minimum Rules for the Administration of Juvenile Justice, the Rules for the Protection of Juveniles Deprived of their Liberty and, in Europe, the chapter on "Juveniles deprived of their liberty" of the 9th General Report of the CPT provide detailed standards for the detention of juveniles. The most important standards relate to the right to education and vocational training,⁴²³ the prohibition of corporal and capital punishment and life imprisonment without possibility of release,⁴²⁴ as well as the importance for juvenile

⁴¹⁴ CPT/Inf (2000) 13, at para. 25; Rule 34(1) of the European Prison Rules.

⁴¹⁵ CPT/Inf (2000) 13, at para. 32.

⁴¹⁶ CPT/Inf (2000) 13, at paras. 31 and 32.

⁴¹⁷ CPT/Inf/E (2002) 1 - Rev. 2006 and CPT/Inf (2000) 13, at paras. 32 and 33.

⁴¹⁸ CPT/Inf (2000) 13, at paras. 26 and 27; Rule 23 (1) of Standard Minimum; Rule 34.3 of European Prison Rules.

⁴¹⁹ CPT/Inf (93) 12, at para. 66; Rule 23 (2) of the Standard Minimum Rules: "Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers."

⁴²⁰ For a table with age limits for babies living in prisons see Quaker United Nations Office, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, by Megan Bastick and Laurel Townhead, 2008, p. 51.

⁴²¹ Article 37(b) of the Convention of the Rights of the Child (CRC), Rule 2 of the Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. A/Res/45/113 (14 December 1990); Rule 13.2 of the Standard Minimum Rules for the Administration of Juvenile Justice UN Doc. A/Res/40/33 (29 November 1985). See also CPT/Inf (93) 12, at para. 65.

⁴²² Article 10 (2) (b) ICCPR; Rules 8 (d) and 85 of Standard Minimum Rules.

⁴²³ Article 13 ICESCR; Article 28 CRC; Rules 38 and 42 of the Rules for the Protection of Juveniles Deprived of their Liberty.

⁴²⁴ Article 37(a) CRC; Rule 27 of the Standard Minimum Rules for the Administration of Juvenile Justice; Rules 64, 66 and 67 of the Rules for the Protection of Juveniles Deprived of their Liberty.

detainees to maintain contact with the outside world, especially with family members.⁴²⁵ Juveniles should never be punished to solitary confinement.⁴²⁶

Lesbian, gay, bisexual and transgender people

Lesbian, gay, bisexual and transgender people are at risk of abuse from other detainees and are also more vulnerable to violence from prison officials. They should therefore be segregated from other detainees in order to prevent further marginalization within the prison community. Transgender persons should also be detained separately from other detainees⁴²⁷ or in accommodations based on their preferred gender identity.

Prisoners convicted of sexual offences

Sexual offenders are at a particular risk of inter-prisoner violence. According to European standards, it is therefore paramount that the State acts with due diligence to protect those prisoners by either separating them from other prisoners, granting close supervision if they remain together with other prisoners, or detaining them in a detention facility offering special psychological and medical treatment.⁴²⁸ Denmark for example has established very high standards for the detention and special medical and psychological treatment of sexual offenders, even offering an anti-hormone therapy, which allows the release of prisoners punished to indefinite prison sentences.⁴²⁹

Persons with disabilities

Persons with physical or mental disabilities who are deprived of their liberty are in a situation of double powerlessness. In addition to the restriction on individual autonomy inevitably created by imprisonment, the particular disability of an individual may render him or her more likely to become completely dependent on prison staff and an easy target of abuse.⁴³⁰ States must ensure that treatment and conditions in detention do not directly or indirectly discriminate against persons with disabilities. Prisons may not be the appropriate place for persons with disabilities to serve their sentence of imprisonment; therefore, persons with disabilities may also be accommodated in special care institutions and hospitals.⁴³¹ The authorities are under the obligation to carry out appropriate modifications to the procedures and physical facilities of these detention centres in order to ensure that persons with disabilities enjoy the same rights and fundamental freedoms as others, when such adjustments do not impose a disproportionate or undue burden.⁴³² The lack of adequate accommodation and the denial of appropriate treatment for persons with disabilities may lead to discriminatory treatment inflicting severe suffering or pain and may constitute torture or other forms of ill-treatment.⁴³³ The HRC⁴³⁴ and the ECtHR⁴³⁵ have found that detention of persons

⁴²⁵ Articles 9, 10 and 37(c) CRC; Rules 13.3, 26.5 and 27.2 of the Standard Minimum Rules for the Administration of Juvenile Justice; Rule 27 of the Standard Minimum Rules for the Treatment of Prisoners; Rule 59 of the Rules for the Protection of Juveniles Deprived of their Liberty.

⁴²⁶ See Istanbul Statement, op. cit. supra Section III.5 on solitary confinement.

⁴²⁷ For a good practice, see Report of UN Special Rapporteur on Torture on his mission to Paraguay, A/HRC/7/3/Add.3, (1 October 2007), at para.70.

⁴²⁸ CPT/Inf (2000) 13, at para.27.

⁴²⁹ See Report of the UN Special Rapporteur on Torture on his mission to Denmark in May 2008 (forthcoming).

⁴³⁰ See Report of UN Special Rapporteur on Torture to the General Assembly, UN Doc. A/63/175, (28 July 2008), at paras. 37-77.

⁴³¹ See Report of the UN Special Rapporteur on Torture on his mission to Denmark in May 2008 (forthcoming).

⁴³² Article 14(2) Convention on the Rights of Persons with Disabilities (CPRD). See also CPT/Inf (93) 12, at paras. 43 and 44.

⁴³³ See Reports of UN Special Rapporteur on Torture on his mission to Nigeria, UN Doc. A/HRC/7/3/Add.4, Appendix I, (22 November 2007), para. 115; and on his mission to Togo, UN Doc. A/HRC/7/3/Add.5, (6

with disabilities under inappropriate conditions – failure to grant access to toilets and bed and to make proper arrangements for the detainee to leave the cell - amounted to disrespect of human dignity and degrading treatment.

4 Actors and Institutions

(a) Institutional responsibility for the prison system

In order to ensure that prisons are managed in accordance with international human rights law and standards as well as in accordance with domestic legislation, the penitentiary system should be part of the public services under civilian control.⁴³⁶ In many former totalitarian countries, the first step in reforming the prison system has therefore been the transfer of responsibility for the administration and management of prisons from the military or police to a civilian authority, for example to the Ministry of Justice.⁴³⁷ The demilitarisation of prisons is a condition sine qua non for ensuring the principle of rehabilitation and the protection of rights in prison: independent supervision and monitoring of prison conditions; close cooperation with services in the community to provide prisoners with adequate health services as well as educational and vocational activities; and access to prisons by civil society groups would be impossible if prisons are treated as falling within the realm of state secrets under military control.⁴³⁸

Under international human rights law, the responsibility to respect and promote prisoners' rights rests with the State authorities and cannot be ceded to private companies contracted to manage penitentiary institutions. In the words of former UN High Commissioner on Human Rights, Louise Arbour, the situation of powerlessness, in which prisoners find themselves due to the coercive loss of personal liberty, "must find their justification in a legal grant of authority and persons who enforce criminal sanctions on behalf of the State must act with scrupulous concern not to exceed their authority".⁴³⁹ States therefore remain accountable for violations of prisoners' rights in privatised penitentiary institutions and must ensure through effective monitoring that private contractors respect and protect those rights.⁴⁴⁰

January 2008), para.41; and on his mission to Georgia, UN Doc. E/CN.4/2006/6/Add.3 (23 September 2005), at para. 52.

⁴³⁴ See e.g. HRC, *Hamilton v. Jamaica*, Communication No. 616/1995, (23 March 1994) at para. 8.2., where the Committee found a violation of article 10 (1) ICCPR.

⁴³⁵ See ECtHR, *Price v. the United Kingdom*, Judgement of 10 July 2001, at para. 30, where the Court found a violation of article 3 of ECHR.

⁴³⁶ Rule 71 of European Prison Rules. On the importance in a democratic society to institutionally anchor prison services within the public services see Andrew Coyle, *A Human Rights Approach to Prison Management*, International Centre for Prison Studies, London 2002, at p. 13ff.

⁴³⁷ For example, one of the accession requirements of the Council of Europe for former Soviet countries in the early 1990s was that the administration of the penitentiary system be moved from the Ministry of Interior to the Ministry of Justice, see "Moving prisons to civilian control: demilitarisation", Guidance Note 7, International Centre for Prison Studies, London 2004, at p. 4. See also e.g. recommendations by the UN Special Rapporteur on Torture in his report on his mission to Moldova (forthcoming).

⁴³⁸ *Ibid.* p. 2; see also forthcoming Report of the UN Special Rapporteur on Torture on his mission to Equatorial Guinea.

⁴³⁹ Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, submitted by the Honourable Louis Arbour (reporting Commissioner), 8 Public Works on Government Services Canada, Ottawa 1996, at para. 3.1.1.

⁴⁴⁰ HRC, Concluding Observations on New Zealand, ICCPR/CO/75/NZL (26 July 2002) at para. 13; see also Rule 88 of European Prison Rules, stipulating that "where privately managed prisons exist, all the European Prison Rules shall apply".

(b) Prison Administration and Prison Staff

The observance of prisoners' rights depends on the prison management as well as the way prison staff in the front line treat detainees in their day to day contact.⁴⁴¹ International standards therefore emphasise the importance of

- an ethical basis of the prison management that recognises the principle of humane treatment and rehabilitation as purpose of the prison system;⁴⁴²
- the recognition of prison work as valuable public service and the provision of civil service status to prison staff with security of tenure and adequate salary;⁴⁴³
- the careful selection of prison staff and the provision of regular in-service training (including on prisoners' rights);⁴⁴⁴
- the employment of a sufficient number of specialists, such as psychiatrists, psychologists, social workers, teachers and vocational and sports instructors as part of full-time prison staff.⁴⁴⁵

The CPT routinely highlights the importance of recruitment of prison staff on the basis of well-developed inter-personal skills to ensure a positive, non-confrontational staff-prisoner relationship founded on "a spirit of communication and care".⁴⁴⁶ The promotion of constructive relations is likely to "lower the tension inherent in any prison environment and by the same token significantly reduce the likelihood of violent incidents and associated ill-treatment".⁴⁴⁷ Along the same lines, the Committee of Ministers of the Council of Europe adopted a set of European guidelines applicable to prison staff, which emphasise their responsibility to maintain constructive, non-discriminatory and respectful relations with prisoners under their care.⁴⁴⁸

In addition to adequate recruitment and training, a positive staff-prison relationship will ultimately also depend on adequate staffing. Insufficient staffing levels may not only lead to a lack of care for individual prisoners, but may also impede the proper exercise of authority and supervisory tasks in prison.⁴⁴⁹ For example, understaffing can result in a situation where prison authorities rely on internal hierarchies among prisoners for the exercise of regulatory or disciplinary functions, which is prohibited by international standards.⁴⁵⁰ In some cases, senior prisoners are "employed" to guard others (in return for special treatment)⁴⁵¹ or even carry out beatings of fellow prisoners as a form of punishment or for the purpose of

⁴⁴¹ See Coyle, *op.cit.*, pp. 13-17; see also Rule 74 of European Prison Rules.

⁴⁴² Rules 72 (1) and (2) of European Prison Rules.

⁴⁴³ Rule 46 (3) of Standard Minimum Rules; Rules 78 and 79 (1) of European Prison Rules.

⁴⁴⁴ Rules 46 and 47 (3) of Standard Minimum Rules; Rules 76 and 81 of European Prison Rules.

⁴⁴⁵ Rule 49 of Standard Minimum Rules; Rule 89 of European Prison Rules.

⁴⁴⁶ CPT/Inf (92) 3, at para. 45.

⁴⁴⁷ *Ibid.*; see also CPT/Inf (2001) 16, at para. 26.

⁴⁴⁸ Council of Europe, Committee of Ministers, Recommendation No. R (97) 12, Appendix II, 10 September 1997, at paras. 11-19.

⁴⁴⁹ CPT/Inf (2001) 16, at para. 27.

⁴⁵⁰ Rule 28 (1) of Standard Minimum Rules; Rule 62 of European Prison Rules.

⁴⁵¹ Report of the UN Special Rapporteur on Torture on his mission to Indonesia, UN Doc. A/HRC/7/3/Add.7, (10 March 2008), at para. 32.

intimidation⁴⁵². Prison authorities are under the obligation to prevent inter-prisoner violence and to protect all prisoners from discriminatory practices and physical abuse by other prisoners; failure to do so may amount to inhuman and degrading treatment.

(c) Prison Health Care Service

In order to ensure that prison health care services provide a standard of care equivalent to the one prevailing in the community at large and to promote the independence of medical staff, prison medical services should be organised in close relationship with the general health services and should ideally be placed under the same administrative authority (such as the Ministry of Health).⁴⁵³ In any case, specialised treatment must be available to prisoners if necessary, including access to specialised services in civilian hospitals without discrimination on the grounds of their legal status.⁴⁵⁴ Taking account of the high incidence of psychiatric symptoms as a result of imprisonment, international standards also stipulate that a psychiatrist should always be attached to the prison health care service.⁴⁵⁵ The state's duty of care for the physical and mental well-being of persons deprived of their liberty continues to apply in times of economic difficulty and even where the non-imprisoned population may suffer from inadequate healthcare, prisoners must be provided with adequate treatment.⁴⁵⁶

In addition to the provision of professional medical diagnosis and treatment,⁴⁵⁷ medical personnel play an important role in protecting prisoners' rights and preventing ill-treatment. Their duties include the determination of prisoners' fitness to work and participate in physical exercise; the identification, separation and treatment of prisoners with transmittable diseases; and the general inspection of prison conditions with a view to ensuring the provision of adequate food and accommodation, compliance with hygiene standards and the general impact of the prison regime on the health of prisoners.⁴⁵⁸ Prison health care services are expected to pro-actively address the detrimental health impact of imprisonment in light of the high risk prisoners face in many countries to contract transmittable and other diseases that may have fatal consequences.⁴⁵⁹ Any sign of physical abuse or ill-treatment detected by medical staff must be documented and reported to the relevant authorities.⁴⁶⁰ While members of the prison health service work within the general framework of medical ethics, in particular the principles of non-discrimination, confidentiality and consent, the conflicting demands of medical employment within a prison system may pose considerable challenges to their professional independence. Several international documents specifically addressed to medical

⁴⁵² Report of the UN Special Rapporteur on Torture on his mission to Togo, UN Doc. A/HRC/7/3/Add.5, (6 January 2008), at para. 34

⁴⁵³ Rule 22 (1) of Standard Minimum Rules; Rule 40 (1) of European Prison Rules; see also "Improving prison health care", Guidance Note 10, International Centre for Prison Studies, London 2004, at p. 5.

⁴⁵⁴ Rule 22 (1) of Standard Minimum Rules; Rule 40 (3) and 46 (1) of European Prison Rules.

⁴⁵⁵ CPT/Inf (93) 12, at para. 41; see also Rule 22 (1) of the Standard Minimum Rules, which requires that the medical officer should have some knowledge in psychiatry.

⁴⁵⁶ "Improving prison health care", *op.cit.*, at p. 3.

⁴⁵⁷ The Standard Minimum Rules require daily visits of all sick prisoners (Rule 25 (1)), while the European Prison Rules provide for visits "with a frequency consistent with general health care standards" (Rule 43 (1)).

⁴⁵⁸ Rules 24-26 of Standard Minimum Rules; Rules 40 – 44 of European Prison Rules.

⁴⁵⁹ See for example the problem of high TBC rates in Eastern European and Central Asian Prisons, Vivien Stern, *Sentenced to die? The Problem of TB in Prisons in Eastern Europe and Central Asia*, International Centre for Prison Studies, London 2005; see also Report of the UN Special Rapporteur on Torture on his mission to Moldova in July 2008 (forthcoming).

⁴⁶⁰ Rule 42 (3c) of European Prison Rules. See e.g. Michael Peel/Noam Lubell/Jonathan Beynon, *Medical Investigation and Documentation of Torture: A Handbook for Health Professionals*, Essex 2005.

personnel employed in a detention environment restate that the patient's interest must always be given priority and that any participation or complicity of health personnel in torture or other ill-treatment and any assistance in the interrogation of prisoners constitute a contravention of medical ethics.⁴⁶¹

(d) Regular Inspections by Independent Monitoring Mechanisms

Regular visits of detention facilities by independent monitoring bodies are one of the most effective measures for the prevention of torture and ill-treatment in detention. In addition, through exposing prisons to public scrutiny, prison monitoring contributes to the general improvement of prison conditions and the protection of prisoners' rights.

On the international level several bodies and experts carry out independent visits to detention facilities, including the International Committee of the Red Cross (ICRC),⁴⁶² the UN Special Rapporteur on Torture, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the UN Working Group on Enforced Disappearances, the UN Working Group on Arbitrary Detention and the recently established UN SPT⁴⁶³ as well as, on the European level, the CPT. The work of these bodies continues to be of utmost importance for drawing the attention of the international community to the practice of torture and ill-treatment, as well as the conditions of detention worldwide, as well as for the formulation of specific recommendations addressed to the respective countries. However, their work is naturally of limited effectiveness with respect to continuing follow-up.⁴⁶⁴ International monitoring bodies should therefore be complementary to monitoring bodies on the national level.

According to international standards each state should establish a system of regular inspections of penal institutions by qualified and experienced inspectors independent from the authority directly in charge of the administration of prisons.⁴⁶⁵ Such bodies can range from human rights ombudspersons to national human rights commissions or judges. With the entry into force of the OPCAT,⁴⁶⁶ States Parties are under the obligation to maintain or establish independent NPMs for the prevention of torture.⁴⁶⁷ The Protocol codifies basic principles, privileges and working methods essential to an effective independent inspection of penal institutions. These principles include the right of access to information about all persons held in detention and all places of detention, the right of regular access to all places of detention and the right to speak in private to detainees.⁴⁶⁸ NPMs must also be given the power to make recommendations with the aim of improving prison conditions and preventing torture and ill-treatment based on relevant norms of the United Nations.⁴⁶⁹ As an essential safeguard for the independence of their work and the protection of victims, States Parties must guarantee that

⁴⁶¹ UN 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, UN Doc. A/Res/37/194 (18 December 1982); see also the World Medical Association's Declaration of Tokyo, 1975, and the Declaration of Malta, 1991 (on forced feeding).

⁴⁶² The ICRC's mandate to visit places of detention in situations of armed conflict and violence is based on article 126 of the Third Geneva Convention (with respect to prisoners of war) and article 143 of the Fourth Geneva Convention (civilian detainees).

⁴⁶³ Article 11 of the OPCAT.

⁴⁶⁴ This does not apply to the work of the ICRC, which in contrast to the other monitoring bodies, is based in the country.

⁴⁶⁵ Principle 29 (1) of the Body of Principles; see also Rule 55 of Standard Minimum Rules.

⁴⁶⁶ OPCAT entered into force on 22 June 2006.

⁴⁶⁷ Article 17 and 18 OPCAT.

⁴⁶⁸ Article 20.

⁴⁶⁹ Article 19.

persons that have cooperated with the monitoring body are not subject to reprisals in any form.⁴⁷⁰

(e) Other Relevant Actors

National non-governmental organisations (NGOs) also play an important role in undertaking monitoring of detention facilities and/or keeping a watchful eye on the functioning of state monitoring procedures. They possess the necessary local knowledge of the social and political environment, can establish a broad basis in civil society networks and thus identify the best strategies to open up prison conditions to public scrutiny.⁴⁷¹

Apart from fulfilling an external monitoring function, members of the civil society and different professional groups can be engaged in many different ways in prison work, such as providing humanitarian or educational support, assisting with social reintegration or simply providing contact with the outside world, thereby contributing to a more humane prison environment.⁴⁷² While international standards emphasise that states must meet their obligations to protect prisoners' rights through the funding of appropriate full-time prison staff, including necessary specialists such as social workers and teachers, they also encourage the involvement of voluntary workers.⁴⁷³ In order to achieve the rehabilitative aim of imprisonment, penal institutions should seek the cooperation and support of services and professional, social or religious organisation in the wider community to ensure the gradual return of prisoners to a normal life in society.⁴⁷⁴ In the end, active engagement of civil society has beneficial consequences for all sides and can prepare and promote a climate conducive to reform of the penal system.

Among the professional groups that fulfil a bridging function between life inside prison and the larger community is the group of prison chaplains. Aligning 325 chaplains from 70 countries around the globe, the International Prison Chaplains' Association Worldwide (IPCA) has pointed to the important work of their members in providing pastoral care to prisoners and their families, and has called upon states to reduce the use of prison sentence instead encouraging programmes of reconciliation in communities as an alternative to imprisonment.⁴⁷⁵

5 Problems and Challenges

(a) Overcrowding and Inhuman Prison Conditions

Overcrowding is a major problem in prisons worldwide. In Europe, the most crowded prisons are in Italy with 131, 5 % of the official capacity,⁴⁷⁶ and the highest occupancy rate in South

⁴⁷⁰ Article 21.

⁴⁷¹ See "Monitoring Places of Detention: A Practical Guide to NGOs", Association for the Prevention of Torture, Geneva 2002, pp. 26-27.

⁴⁷² See "Encouraging the involvement of civil society", Guidance Note 12, International Centre for Prison Studies, London 2004.

⁴⁷³ Rule 49 (2) of Standard Minimum Rules; Rule 89 (2) of European Prison Rules.

⁴⁷⁴ Rule 61 of Standard Minimum Rules.

⁴⁷⁵ "No estamos solos", Declaration made on the occasion of the International Prison Chaplains's Association Fifth Quinquennial Conference, August 2005.

⁴⁷⁶ BBC News online, World Prison Population, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn1page1.stm>, accessed on 9 December 2008.

Asia rises to as much as 300%.⁴⁷⁷ An excessive prison population exacerbates the often already poor material conditions in prisons and makes it impossible to deliver the minimum standards of treatment and is therefore endangering the basic rights of prisoners. Overcrowding has cumulative negative effects extending to all aspects of life in prison including accommodation, health care, ventilation, floor space, bedding, personal hygiene and room temperatures. This results in a poor hygienic situation conducive to infectious diseases. Furthermore, the possibilities of vocational activities are reduced and overcrowding can give rise to tensions between prison staff and detainees and can reinforce internal hierarchies among prisoners resulting in inter-prisoner violence and fostering corruption and criminal activities.⁴⁷⁸ Overcrowding often makes separation of men from women, minor from adults and pre-trial from convicted detainees impossible. The ECtHR has in various cases found that detention in severe conditions of overcrowding amounts to degrading treatment in violation of Article 3 ECHR.⁴⁷⁹ The HRC and CAT-Committee have also expressed concern about conditions of overcrowding.⁴⁸⁰

Prison overcrowding can be a consequence of the government's response to crime and criminal justice policy as well as the slow administration of justice rather than being a reflection of actual crime rates. The construction of new prisons seldom succeeds as long-term strategy to reduce overcrowding. Therefore, international discussion on penal reform increasingly emphasise the promotion of alternative sentencing.⁴⁸¹

(b) Long-term and Life Imprisonment/Death Row

Contrary to international norms,⁴⁸² persons sentenced to a long term or life imprisonment as well as persons on death row are often held in material conditions that leave much to desire and are additionally subject to special restrictions, limiting – or in some cases even prohibiting - their activities and possibilities of contact with other detainees and the outside world. Restrictions range from permanent separation from other prisoners and the prohibition to communicate with them, to detention in solitary confinement;⁴⁸³ quasi-permanent handcuffing⁴⁸⁴ and the imposition of restricted visit entitlements.⁴⁸⁵ These measures add to

⁴⁷⁷ See Bangladesh, King's College London, World Prison Brief,

<http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/index.php?search=B>, accessed on 9 December 2008.

⁴⁷⁸ See Reports of UN Special Rapporteur on Torture, Mission to Indonesia UN Doc. A/HRC/7/3/Add.7 (10 March 2008), para.27; and on his mission to Sri Lanka, UN Doc. A/HRC/7/3/Add.6, (26 February 2008) at para.83; and on his mission to Paraguay, UN Doc. A/HRC/7/3/Add.3 (1 October 2007), at para. 65.

⁴⁷⁹ See e.g. ECtHR, *Kalashnikov v. Russia*, Judgment of 15 July 2002, at para. 97; *Novoselov v. Russia*, Judgment of 2 June 2005, at para.43; *Modârca v. Moldova*, Judgment of 10 May 2007, at paras. 68-89.

⁴⁸⁰ See e.g. CAT, Concluding Observations on the State Report of Latvia, (2004) CAT/C/CR/31/3, at para.6; Concluding Observations on the State Report of Greece (2004) CAT/C/CR/33/2, at para.5; Concluding Observations on the State Report of Nepal (2005), CAT/C/NPL/CO/2, at para.31; for the HRC, see Concluding Observations on the State Report of Thailand (2005), ICCPR/CO/84/THA, at para.15; Concluding Observations on the State Report of Greece (2005), ICCPR/CO/83/GRC, at para.12.

⁴⁸¹ See ECOSOC Res. 1998/23, International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing; Interim- Report of the UN Special Rapporteur on Torture to the General Assembly (13 August 2007) A/62/221, at paras. 55-66.

⁴⁸² Article 10(3) ICCPR; Rules 37, 60 (1), 65 and 66 of Standard Minimum Rules.

⁴⁸³ See Reports of the UN Special Rapporteur on Torture on his mission to Moldova in July 2008 (forthcoming), on his mission to Mongolia, E/CN.4/2006/6/Add.4, (20 December 2005), at para. 51.

⁴⁸⁴ See Reports of UN Special Rapporteur on Torture on his mission to China, E/CN.4/2006/6/Add.6, (10 March 2006), at para.68 in response to the UN Special Rapporteur's preliminary report, the Chinese Government explained that "such measures were necessary for the prisoners' safety, the security of others, to prevent them from fleeing, and to prevent suicide" (ibid. endnote 71); and on his mission to Mongolia, E/CN.4/2006/6/Add.4, (20 December 2005), at para. 51.

other harmful (psychological) effects inherent to long term imprisonment or death row and lead to suffering which may amount to inhuman and degrading treatment.⁴⁸⁶

Long term imprisonment can have desocialising effects; prisoners are at a high risk of developing various psychological problems including loss of self-esteem and impairment of social skills and tend to become gradually detached from society.⁴⁸⁷ Therefore, security measures should not be applied indiscriminately, but be based on an individual risk assessment and regimes for long-term prisoners should – instead of imposing additional restrictions- compensate these effects in a pro-active manner, offering the prisoners psycho-social support and access to purposeful activities aiming at their social rehabilitation.⁴⁸⁸

Prisoners on death row additionally suffer from a significant human anguish based on the fear and uncertainty as to the future generated by the death sentence in circumstances where a real possibility of the enforcement of the sentence exists.⁴⁸⁹ In some countries this suffering is increased by the fact that persons condemned to death are not informed of the date of their execution and must fear to be executed any time⁴⁹⁰ or by the rule that they are allowed to see and speak to only one person before their execution.⁴⁹¹

While the HRC has made clear that conditions of detention on death row may violate articles 10 (1) and 7 ICCPR in the same way as conditions of detention for other prisoners,⁴⁹² the Committee stated – although conceding that keeping prisoners on death row for a prolonged period of time for several years is not acceptable⁴⁹³ – that detention on death row cannot *per se* be regarded as violating article 7⁴⁹⁴ and that “each case must be considered on its own merits” taking various factors into account.⁴⁹⁵ The ECtHR in relation to the death row phenomena, recognised that “the experience of severe stress in the conditions necessary for strict incarceration are inevitable”, but ultimately held that “the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty” as well as the circumstances of the individual case,

⁴⁸⁵ See Report of UN Special Rapporteur on Torture Mission to Mongolia, E/CN.4/2006/6/Add.4, (20 December 2005), at para.51.

⁴⁸⁶ See ECtHR, *Iorgov v. Bulgaria*, Judgment of 7 July 2004, at para. 86, where the applicant had been subjected for some three and a half years to a stringent custodial regime involving solitary confinement.

⁴⁸⁷ CPT/Inf (92) 3, at para. 33.

⁴⁸⁸ CPT/Inf (2000) 13, at para. 33.

⁴⁸⁹ See ECtHR *Iorgov v. Bulgaria*, Judgment of 7 July 2004, at para. 72.

⁴⁹⁰ See Report of UN Special Rapporteur on Torture on his mission to Nigeria, A/HRC/7/3/Add.4, Appendix I, (22 November 2007), at para. 113.

⁴⁹¹ See Report of UN Special Rapporteur on Torture on his mission to Mongolia, E/CN.4/2006/6/Add.4, (20 December 2005), at para. 50; see also the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the UN Human Rights Council on Transparency and the imposition of the death penalty, where he stated that the practice of informing death row prisoners of their impending execution only moments before they die, and families only later, is “inhuman and degrading”, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), at para. 32.

⁴⁹² HRC, *Kindler v. Canada*, Communication No. 470/1991, at para. 15.3.

⁴⁹³ HRC, *Errol Johnson v. Jamaica*, Communication No. 558/1994.

⁴⁹⁴ *Ibid.*, at paras. 8.2-8.6; see also HRC *Earl Pratt and Ivan Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, at para. 13.6 and *Barett and Sutcliffe v. Jamaica*, Communications Nos. 270/1988 and 271/1988, at para. 8.4.

⁴⁹⁵ *Ibid.*, paras. 8.2 and 8.4; see also HRC, *Clive Johnson v. Jamaica*, Communication No.592/1994, 20 October 1998 (concerning a minor detained on death row); and *R.S. v. Trinidad and Tobago*, Communication No. 684/1996 (concerning the warrant for execution issued for a person suffering from mental illness).

such as age and mental well-being of the person concerned, could result in a violation of article 3.⁴⁹⁶

(c) Lack of Funding and Corruption

In many countries the chronic lack of funding clearly is a major reason for poor conditions of detention which in the worst cases may amount to inhuman and degrading treatment. While certain countries may have less financial resources than others at their disposal, the ECtHR confirmed that the “lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention” nor can they “in any way explain or excuse” the poor conditions of detention.⁴⁹⁷ Often, the amount of resources that flow in the administration of justice system is a question of priorities in the allocation of resources by the authorities. In many countries, it seems to be normal for the authorities that, contrary to international norms, food, water as well as health care is not provided by the prison authorities, but prisoners have to rely on the material support of their families in order to survive.⁴⁹⁸ Additionally, salaries of prison staff are often very low and sometimes paid with month-long delays or not at all. These factors end up by undermining the motivation and goodwill of those responsible for the well-being of detainees and provide a breeding ground for neglect and corruption. Consequently, money decides if a prisoner has access to food and water and to sanitary installations and whether he/she can receive visits by his/her family and friends (or not). Detention in poor prison conditions becomes the “privilege of the poor”.⁴⁹⁹ Further, such neglect by prison authorities may result in reinforcing the hierarchy among prison inmates bearing the risk of inter-prisoner violence and abuse of the more vulnerable detainees.

(d) Societal Attitudes to Imprisonment

Over the last twenty years, the use of imprisonment across the world has significantly increased, irrespective of a particular type of jurisdiction or political system.⁵⁰⁰ The US ranks as the country with the highest prison population rate in the world, some 738 per 100.000 of the national population, followed by Russia with a ratio of 611 per 100.000.⁵⁰¹ The majority of these prisoners are not offenders of serious crimes, but have been sentenced to prison for petty offences. In addition, prisoners are disproportionately drawn from certain poor neighbourhoods where a range of social, health and community problems are concentrated.⁵⁰² Rather than constituting an accurate reflection of actual crime rates, the continuing increase in the use of prison sentences is more telling about prevailing social attitudes towards crime and punishment around the world. The inflating prison rates entail considerable social costs: in

⁴⁹⁶ ECtHR, *Soering v. UK*, 1989, Judgment of 7 July 1989, at para.111.

⁴⁹⁷ See ECtHR, *Poltoratskiy v. Ukraine*, Judgment of 29 April 2003, at paras. 136-149.

⁴⁹⁸ See for example Reports of the UN Special Rapporteur on Torture on his mission to Nigeria, A/HRC/7/3/Add.4, Annex I, (22 November 2007), at para. 6; on his mission to Togo A/HRC/7/3/Add.5, (6 January 2008), para. 37; on his mission to Paraguay, A/HRC/7/3/Add.3, (1 October 2007), at para. 67; and forthcoming report on his mission to Equatorial Guinea.

⁴⁹⁹ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Nigeria E/CN.4/2006/53/Add.4, (7 January 2006), at para. 69.

⁵⁰⁰ Coyle, *op. cit.*, p. 151. According to estimates from the year 2006, more than 9,25 million people were held in penal institutions around the world, almost half of which were detained in the USA (2,19 m), China (1,55 m) and Russia (0,87 m); see World Prison Population List, 7th edition, International Centre for Prison Studies, London 2007.

⁵⁰¹ *Ibid.*.

⁵⁰² Rob Allen/Vivien Stern (eds.), *Justice Reinvestment – A New Approach to Crime and Justice*, International Centre for Prison Studies, London 2007, p. 5.

addition to the mere financial resources invested into the penitentiary system, high prison population rates have an impact on the wider social fabric as families are broken apart and sources of income are lost when the bread-earner is sentenced to prison; prisoners often face tremendous difficulties in social re-integration after release from long-term imprisonment, experience social ostracism or become recidivists; in addition, poor prison conditions also have considerable long-term effects on the health of prisoners after release and may even pose a health risk to the larger community with respect to the spread of transmittable diseases.

As Nelson Mandela has aptly put it, “no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”⁵⁰³ Whether a society truly commits to the principle of human dignity can be measured against how it treats those that have broken, or are accused of having broken, the criminal law.⁵⁰⁴ In many countries, prisoners continue to be treated as second class citizens that should be locked away and hidden from the surface of normal societal life. In the words of the UN Special Rapporteur on Torture, “the opacity surrounding places of detention also results in a chronic lack of awareness among the general public of what life in places of detention actually looks like. Not only are the detainees locked up, society is also locked out.”⁵⁰⁵ These attitudes however run directly counter to the rehabilitative aim of imprisonment stipulated by international standards

6 Conclusions and Recommendations

Deprivation of personal liberty in the form of the imposition of a prison sentence has long been the most common means used by State authorities to fight crime and maintain internal security. Yet, the legitimate public interest in the punishment of criminal offenders finds its limits in the human rights of the detainees and the principle to treat every person with respect for his or her human dignity. In addition, international standards for the treatment of prisoners are geared towards enhancing their rehabilitation and social reintegration. In practice however, prisoners are often held in deplorable conditions of detention and with complete disrespect for their rights, which amounts to an extra punishment, in addition to the deprivation of liberty, which in itself is afflictive by the very fact of severely limiting the right to personal autonomy.

The reality of inhuman prison conditions, overcrowding and other forms of ill-treatment in prisons around the world is a reflection of deeper social attitudes towards crime and punishment and the treatment of prisoners as second class citizens. As a consequence, insufficient funds are often allocated to the penitentiary system, the rehabilitative aim of imprisonment is neglected or disregarded all together, and prison work is generally held in low esteem. This situation entails considerable costs for a society, both in monetary terms as well as in terms of social cohesion and health related issues.

The following recommendations can serve as a starting point for discussing ways forward in advancing human rights in protection in prison.

⁵⁰³ Nelson Mandela, *A long walk to freedom*, London 1994.

⁵⁰⁴ Coyle, *op. cit.*, p. 15.

⁵⁰⁵ Statement by the UN Special Rapporteur on Torture, Manfred Nowak, 63rd Session of the UN General Assembly, 23 October 2008, p. 3.

Reforming the Penitentiary System in line with International Law and Standards

- Demilitarisation of the penitentiary system.
- Placing prisons under a separate authority, independent from the prosecution.
- Opening detention facilities to regular visits by independent monitoring mechanisms, which must be granted access to all detainees and all facilities and be allowed to submit public reports on the conditions of detention and the treatment of prisoners.
- Equip the penitentiary system with sufficient funding and adequate resources, including adequate salary for prison staff and the employment of specialised staff.
- Carefully select and train prison staff with view to enabling them to promote constructive relations with prisoners.

Preventing Inhuman Prison Conditions and Ill-treatment in Detention

- Ensuring that the prison management promotes and protects internationally recognised minimum standards for the treatment of prisoners throughout the institution.
- In particular, guaranteeing the compliance with internationally recognised minimum standards of accommodation, food, sanitation, privacy, work and recreational facilities.
- Guaranteeing to every prisoner the effective access to complaint mechanisms within and outside the prison system.
- Setting up an independent prison health service, integrated with the general health system of the community that regularly examines, and if necessary, adequately treats every prisoner and carries out regular inspections of the detention facilities.
- Taking precautionary measures for the prevention and treatment of transmittable diseases.

Promoting the Rehabilitative Aim of Imprisonment

- Promoting the rights of prisoners to contact with the outside world, in particular with family and friends.
- Providing open visiting facilities wherever possible that allow family contacts in private.
- Providing adequate educational, vocational and work programmes to facilitate reintegration into normal life after release.
- Promoting the participation of individuals and civil society organisations in rehabilitation and reintegration programmes.
- Setting up comprehensive pre-release programmes that adequately prepare prisoners to their return to life outside prison.

List of Acronyms

Art.	article
e.g.	for example
(Eds.)	editor(s)
ff.	following pages
ibid.	ibidem (reference for a source cited in the preceding footnote)
infra	see below
No.	Number
op. cit.	opere citato (In the work mentioned above)
para.	paragraph
p.	page
supra	see above
v.	versus
ACHR	American Convention on Human Rights
ACHPR	African Convention on Human and Peoples' Rights
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICESCR	International Covenant on Economic, Social and Cultural Rights
CPRD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
CPT	European Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EC-Treaty	Treaty Establishing the European Community
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention Against Torture
SPT	Subcommittee on the Prevention of Torture
UDHR	Universal Declaration of Human Rights
UN	United Nations

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