PROTECTING BRAZILIANS FROM TORTURE

A Manual for Judges, Prosecutors, Public Defenders and Lawyers

Conor Foley

INTERNATIONAL BAR ASSOCIATION
the global voice of the legal profession

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD
Tel: +44 (0)20 7842 0090
Fax: +44 (2)20 7842 0091
editor@int-bar.org
www.ibanet.org

ISBN 978-0-948711-25-1

British Library Catalogue-in-Publication Data.
A catalogue record for this book is available from the British Library.

Printed by: Ministério da Justiça, Secretaria de Reforma do Judiciário
(Ministry of Justice Secretariat of Judicial Reform), Brasília

Cover image credits: (front) Rio de Janeiro, woman runs with children during police intervention; and (back) Rio de Janeiro, trafficker is handcuffed on military policy bus © Robson Fernadjes/Estadão Conteúdo

Ministério da Justiça

José Eduardo Cardoso – Ministro de Estado da Justiça

Flávio Crocce Caetano – Secretário de Reforma do Judiciário

Kelly Oliveira Araújo – Diretora do Departamento de Polícia Judiciária

Wagner Augusto da Silva Costa – Chefe de Gabinete

Igor Lima Goettenauer de Oliveira – Coordenador Geral de Provimento e Vacância

Washington Leonardo Guanaes Bonini – Coordenador Geralde Modernização da Administração da Justiça

Author
Conor Foley

International Bar Association Project Coordinator
Alex Wilks

International Bar Association Communications, Editing and Production Team
Louise Ball
Hannah Caddick
Kath Farrell
Emily Silvester
Adam Smith

Graphic Design
Marilda Donatelli

Research and Translation
Tatiana Affini Dicenzo
Rita Lamy Freund
Cyro Isolan
Caio Túlio Ortiga
Ana Paula Pellegrino
Victoria Rebori

ACKNOWLEDGMENTS

We would like to thank the following people who contributed their time and effort reading drafts, offering comments, advice and support: Veronica Alonso, Karolina Alves Pereira Castro, Gabriel Alves Teixiera, Eugenio Aragão, Aldo Bemvindo, Fabio Cascardo, Andressa Caldas, Ophir Calvacante, Mary Cohen, Roberto Dalledone Machado Filho, Claudia Daumas, Gláucia Falserella Foley, Isabela Garcia, Michelle Graciela Morais e Silva, Juana Kweitel, Julita Lemgruber, Renata Lima, Gorete Marques, Cyro Pereira Isolan, Nayla Nobre Piam, Danielle Renée Machado de Oliveira, Carla Quieroz, Erivaldo Ribeiro dos Santos, Helena Romanach, Belisário dos Santos Junior, Andrea Sepúlveda Brito Carotti, Maria Teresa Sadek, Illona Szabo, Fernanda Pradal and Carlos Weis.

We would like to thank the following institutions for their collaboration in this project: the Federal Council of the Brazilian Bar Association, the National Justice Council, the National Prosecutor's Council, the Federal Public Defender's Office, the National Council of State Public Defenders, the Human Rights Secretariat of the Presidency of the Republic, the Secretariat for Judicial Reform of the Ministry of Justice, the National Judges' Training School, the British Embassy in Brasília, the São Paulo Public Defender's Office and the National Council of Public Defenders. We would also like to thank the following civil society organisations: CEJIL, Conectas, the Insitute for the Defence of the Right to Defence, the Innovare Institute, Justiça Global, Pastoral Carcerária and Sou da Paz.

Finally, we would like to thank Sir Nigel Rodley KBE. This manual is based on a project that he supervised at the University of Essex's Human Rights Centre and was inspired by his work on the United Nations Human Rights Committee and as the former United Nations Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment. His report on Brazil is still considered a fundamental point of reference.

The first edition of the Manual was supported by the United Kingdom's Foreign and Commonwealth Office and this second edition by the International Bar Association's Human Rights Institute Trust. We are extremely grateful to the Secretariat of the Judicial Reform and the Human Rights Secretariat of the Presidency of the Republic of Brazil for their continued support and collaboration in this project.

CONTENTS

TABLE OF CASES

Human Rights Committee

Abdelhamid Benhadj v Algeria, (2007), UN Doc CCPR/C/90/D/1173/2003
Adolfo Drescher Caldas v Uruguay, Communication No 43/1979 (11 January 1979), UN Doc Supp No 40 (A/38/40) at 192 (1983)
Alzery v Sweden, Communication No 1416/2005, 25 October 2006
Arhuacos (Villafane Chaparro et al) v Colombia, (1997), UN Doc CCPR/C/60/D/612/1995
Arutyunyan v Uzbekistan, (2004), UN Doc CCPR/C/80/D/917/2000
Blaine v Jamaica, (1997), UN Doc CCPR/C/60/D/696/1996
Blanco Abad v Spain, (1998), UN Doc CAT/C/20/D/59/1996
Bousroual v Algeria, (2006), UN Doc CCPR/C/86/992/2001
Brown v Jamaica, (1999), UN Doc CCPR/C/65/D/775/1997
Cabal and Pasini Bertran v Australia, (2003), UN Doc CCPR/C/78/D/1020/2001
Cariboni v Uruguay, (159/1983), Report of the Human Rights Committee, GAOR, 43rd Session, Supplement No 40 (1988), Annex VII A
Conteris v Uruguay, (139/1983), 17 July 1985, 2 Sel. Dec. 168 CCPR/C/25/D/139/1983
Elahie v Trinidad and Tobago, (1997), UN Doc CCPR/C/60/D/533/1993
Estrella v Uruguay, (1983) (74/1980), 29 March 1983, 2 Sel. Dec. 93 UN Doc CCPR/C/19/D/105/1981
Francesco Madaff eri v Australia, (2004), UN Doc CCPR/C/81/D/1011/2001
Gorji-Dinka v Cameroon, (2005), UN Doc CCPR/C/83/D/1134/2002
Grille Motta v Uruguay, (1980), UN Doc CCPR/C/10/D/11/1977
Hill v Spain, (1997), UN Doc CCPR/C/59/526/1993
Kelly v Jamaica, (1991) (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991 UN Doc CCPR/C/41/D/253/1987
Kennedy v Trinidad and Tobago, (2002), UN Doc CCPR/C/74/D/845/1998.
Lantsova v Russian Federation, (2002), UN Doc CCPR/C/74/D/763/1997
Lewis v Jamaica, (1997), UN Doc CCPR/C/60/D/708/1996
Lobban v Jamaica, (2004), UN Doc CCPR/C/80/D/797/1998
Mulezi v Democratic Republic of Congo, (2004), UN Doc CCPR/C/81/D/962/2001
Muteba v Zaire, (1984), UN Doc CCPR/C/22/D/124/1982
Párkányi v Hungary, Communication No 410/1990, UN Doc CCPR/C/45/D/410/1990 (1992)
Rajapakse v Sri Lanka, (2006), UN Doc CCPR/C/87/D/1250/2004
R S v Trinidad and Tobago, (2002), UN Doc CCPR/C/74/D/684/1996
Rodriguez Veiga v Uruguay, (1994), UN Doc CCPR/C/51/D/487/1992
Sendic v Uruguay, (63/1979), Report of the Human Rights Committee, GAOR, 37th Session, Supplement No 40 (1982), Annex VIII
Sextus v Trinidad and Tobago, (2001), UN Doc CCPR/C/72/D/818/1998
Torres v Finland, (1990), CCPR/C/38/D/291/1988
Vargas Mas v Peru, (2005), UN Doc CCPR/C/85/D/1058/2002
Vuolanne v Finland, (1989), UN Doc CCPR/C/35/D/265/1987
Xavier Evans v Trinidad and Tobago, (2003), UN Doc CCPR/C/77/D/908/2000

Committee against Torture

AD v Netherlands, Communication No 96/1997, UN Doc CAT/C/23/D/96/1997 (2000)
Ali Ben Salem v Tunisia, UN Doc CAT/C/39/D/269/2005 (2007)
Danilo Dimitrijevic v Serbia and Montenegro, UN Doc CAT/C/35/D/172/2000 (2005)
Dimitrov v Serbia and Montenegro, UN Doc CAT/ C/34/D/171/2000 (2005)
Dragan Dimitrijevic v Serbia and Montenegro, UN Doc CAT/C/33/D/207/2002 (2004)
Hajrizi Dzemajl v Yugoslavia, (2002), UN Doc CAT/C/29/D/161/2000
Khaled M'Barek (re: Faisal Baraket) v Tunisia, (1999), UN Doc CAT/C/23/D/60/1996
Khan v Canada, Communication No 15/1994, UN Doc CAT/C/13/D/15/1994 (1995)

MMK v Sweden, Communication No 221/2002, UN Doc CAT/C/34/D/221/2002 (2005)
Mutambo v Switzerland, Communication No 13/1993, UN Doc CAT/C/12/D/13/1993 (1994)
Nikoli and Nikoli v Serbia and Montenegro, (2005), UN Doc CAT/C/35/D/174/2000
Saadia Ali v Tunisia, (2008), UN Doc CAT/C/41/D/291/2006

Inter-American Court of Human Rights
Case of Almonacid Arellano and Others v Chile, Judgment 26 September 2006 Series C No 154
Baldeón-García v Peru, Judgment 6 April 2006, Series C no 147
Bamaca-Velasquez v Guatemala, Judgment 25 November 2000, Series C No 70
Bayarri v Argentina, Judgment 30 October 2008, Series C no 187
Bueno-Alves v Argentina, Judgment 11 May 11 2007, Series C No 164
Bulacio v Argentina, Judgment 18 September 2003, Series C No 100
Caesar v Trinidad and Tobago, Judgment 11 March 2005, Series C no 123
Cantoral-Benavides v Peru, Judgment 18 August 2000, Series C no 69
Case of Molina-Theissen v Guatemala, Judgment of 4 May 2004, Series C No 108
Case of Suárez-Rosero v Ecuador, Judgment 12 November 1997, Series C No 35
Case of the Rochela Massacre v Colombia, Judgment 28 January 2008, Series C No 163, (Interpretation of the Judgment on the Merits, Reparations and Costs)
Case of the 'Street Children' (Villagrán-Morales et al) v Guatemala, Judgment of 19 November 1999, Judgment Series C No 63 [Merits]
Case of the 'Street Children' (Villagrán-Morales et al) v Guatemala, Judgment 26 May 2001, Series C No 77
Case of the 'White Van' (Paniagua-Morales et al) v Guatemala, Judgment 8 March 1998, Series C No 37
Castillo-Petruzzi v Peru, Judgment 30 May 1999, Series C no 52
Chumbipuma Aguirre and Others (Barrios Altos) v Peru, Judgment 14 March 2001, Series C no 75
De la Cruz-Flores v Peru, Judgment 18 November 2004, Series C no 115
Escher and Others v Brazil, Judgment 6 July 2009, Series C no 208
Goiburú and Others v Paraguay, Judgment 22 September 2006, Series C no 153
Gomes Lund and Others ('Guerrilha do Araguaia') v Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment 24 November 2010, Series C No 219
Gómez-Paquiyauri Brothers v Peru, Judgment 8 July 2004, Series C no 110
Ituango Massacres v Colombia, Judgment 1 July 2006, Series C No 148, para 402
Juan Humberto Sanchez v Honduras, Judgment 7 June 2003, Series C No 99
'Juvenile Reeducation Institute' v Paraguay, Judgment 2 September 2004, Series C no 112
La Cantuta v Peru, Judgment 29 November 2006, Series C no 162
Loayza-Tamayo v Peru, Judgment 17 September 1997, Series C no 33 [Merits]
Loayza-Tamayo v Peru, Judgment 27 November 1998, Series C no 42 [Reparations and Costs]
Lori Berenson-Mejia v Peru, Judgment 25 November 2004, Series C No 119
Mapiripán Massacre v Colombia, Judgment 15 September 2005, Series C no 134
Maritza Urrutia v Guatemala, Judgment 27 November 2003, Series C no 103
Miguel Castro-Castro Prison v Peru, Judgment 25 November 2006, Series C no 160
Montero-Aranguren and others (Detention Center of Catia) v Venezuela, Judgment 5 July 2006, Series C No 150
Neptune v Haiti, Judgment 6 May 2008, Series C No 180
Nogueira de Carvalho v Brazil, Judgment 28 November 2006, Series C no 161
Pueblo Bello Massacre v Colombia, Judgment 31 January 2006, Series C no 140
Raxcaco-Reyes v Guatemala, Judgment 15 September 2005, Series C No 133
Servellón-García and others v Honduras, Judgment 21 September 2006, Series C no 152
Sétimo Garibaldi v Brazil, Judgment 23 September 2009, Series C no 203
Tibi v Ecuador, Judgment 7 September 2004, Series C no 114
Velásquez Rodríguez v Honduras, Judgment 29 July 1988, Series C no 4 (reparations and costs)
Velásquez Rodríguez v Honduras, Judgment 21 July 1989, Series C no 7 (merits)
Ximenes-Lopes v Brazil, Judgment 4 July 2006, Series C no 149

Yvon Neptune v Haiti, Judgment 6 May 2008, Series C No 180
'Habeas Corpus in Emergency Situations', Advisory Opinion OC-8/87 of 30 January 1987, Annual Report of the Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and
'Judicial Guarantees in States of Emergency', Advisory Opinion OC-9/87 of 6 October 1987, Annual Report of the Inter-American Court, 1988, OAS/Ser.L/V/III.19 doc.13, 1988

Inter-American Commission on Human Rights
Anthony Briggs v Trinidad and Tobago, Case 11.815, Report no 44/99 (15 April 1999)
Carandiru v Brazil, Case 11.291, Report no 34/00 (13 April 2000)
Gonzalez Perez v Mexico, Report No 53/01, Annual Report of the Inter-American Commission on Human Rights 2000, OAS Doc OEA/Ser.L/V/II.111 Doc 20 rev (2000)
Inter-American Commission, Second Report on the Human Rights Situation in Suriname, OEA/Ser. L/V/II.66, doc 21 rev 1 (2 October 1985)
Luis Lizardo Cabrera v Dominican Republic, Case 10832, Report no 35/96 (13 April 1998)
Mejía v Perú, Report No 5/96, Annual Report of the Inter-American Commission on Human Rights 1995, OAS Doc OEA/Ser.L/V/II.9 Doc rev 7 (1 March 1996)
Ms X v Argentina, Case 10.506, Report No 38/96, Inter-Am CHR, OEA/Ser.L/V/II.95 Doc 7 rev at 50 (1997) para 98.
Sebastian Echaniz Alcorta and Juan Victor Galarza Mendiola v Venezuela, Petition 562/03, Report No 37/06 (15 March 2006) [admissibility decision] and Case 12.55, Report No 110/06 (21 October 2006) [Friendly Settlement decision]
The Haitian Centre for Human Rights and others v United States, Case 10.675, Report No 51/96 (13 March 1997)

European Court of Human Rights
A and Others v UK, (no 3455/05), Judgment 19 February 2009
Ahmed v Austria, (no 71/1995/577/663), Judgment 17 December 1996
Akdeniz and Others v Turkey, (no 25165/94), Judgment 31 May 2001
Akkoç v Turkey, (no 22947/93), Judgment 10 October 2000
Aksoy v Turkey, (no 21987/93), Judgment 18 December 1996
Assenov and Others v Bulgaria, (no 24760/94), Judgment 28 October 1998
Aydın v Turkey, (no 23178/94), Judgment 25 September 1997
Batı and Others v Turkey, (no 57834/00), Judgment 3 June 2004
Bekos and Koutropoulos v Greece, (no 15250/02), Judgment 13 December 2005
Boicenco v Moldova, (no 41088/05), Judgment 11 July 2006
Brannigan and MacBride v UK, (nos 14553/89; 14554/89), Judgment 26 May 1993
Brincat v Italy, (no 13867/88), Judgment 26 November 1992
Cafer Kurt v Turkey, (no 56365/00), Judgment 24 July 2007
Çakici v Turkey, (no 23657/94), Judgment 8 July 1999
Carabulea v Romania, (no 45661/99), Judgment 13 July 2010
Chahal v UK, (no 22414/93), Judgment 15 November 1996
Chitayev and Chitayev v Russia, (no 59334/00), Judgment 18 January 2007
Cobzaru v Romania, (no 48254/99), Judgment 26 July 2007
Corsacov v Moldova, (no 18944/02), Judgment 4 April 2006
Cruz Varas v Sweden, (no 15576/89), Judgment 20 March 1991
D v UK, (no 30240/96), Judgment 2 May 1997
De Jong, Baljet and van den Brink, (nos 8805/79; 8806/79; 9242/81) Judgment 22 May 1984
Denizci and others v Cyprus, (nos 25316–25321/94 and 27207/95), Judgment 23 May 2001
Dikme v Turkey, (no 20869/92), Judgment 11 July 2000
Diri v Turkey, (no 68351/01), Judgment 31 July 2007
Durmus Kurt and Others v Turkey, (no 12101/03), Judgment 31 May 2007
E and Others v UK, (no 33218/96), Judgment 26 November 2002

Elci and Others v Turkey, (nos 23145/93; 25091/94), Judgment 13 November 2003
Erdogan Yılmaz and Others v Turkey, (no 19374/03), Judgment 14 October 2008
Fazıl Ahmet Tamer and Others v Turkey, (no 19028/02), Judgment 24 July 2007
Fox, Campbell and Hartley v UK, (no 18/1989/178/234-236), Judgment 30 August 1990
Gäfgen v Germany, (no 22978/05), Grand Chamber, Judgment 1 June 2010
Getiren v Turkey, (no 10301/03), Judgment 22 July 2008
HLR v France, (no 24573/94), Judgment 29 April 1997
Ilascu and Others v Moldova and Russia, (no 48787/99), Judgment 8 July 2004
Ilhan v Turkey, (no 22277/93), Judgment 27 June 2000
Ireland v UK, (no 18/01/1978), Judgment 18 January 1978
Jabari v UK, (no 40035/98), Judgment 11 November 2000
Jalloh v Germany, (no 54810/00), Judgment 11 July 2006
Kafkaris v Cyprus, (no 21906/04), Judgment 12 February 2008
Kalashnikov v Russia, (no 47095/99), Judgment 15 July 2002
Kelly and Others v UK, (no 30054/96), Judgment 4 May 2001
Kemal Kahraman v Turkey, (no 39857/03), Judgment 22 July 2008
Khashiyev and Akayeva v Russia, (nos 57942/00; 57945/00), Judgment 24 February 2005
Kismir v Turkey, (no 27306/95), Judgment 31 May 2005
Kucheruk v Ukraine, (no 2570/04), Judgment 6 September 2007
Kurt v Turkey, (no 24276/94), Judgment 25 May 1998
Labita v Italy, (no 26772/95), Judgment 6 April 2000
Mamatkulov and Askarov v Turkey, (nos 46827/99; 46951/99), Judgment 4 February 2005
Mammadov (Jalaloglu) v Azerbaijan, (no 34445/04), Judgment 11 January 2007
Maslova and Nalbandov v Russia, (no 839/02), 24 January 2008
MC v Bulgaria, (no 39272/98), Judgment 4 December 2003
Mubilanzila Mayeka and Kaniki Mitunga v Belgium, (no 13178/03), Judgment 12 October 2006
Murray v UK, (no 18731/91), Judgment 8 February 1996
Navarra v France, (no 13190/87), Judgment 23 November 1993
Nechiporuk and Yonkalo v Ukraine, (no 42310/04), Judgment 21 April 2011
Öcalan v Turkey, (no 46221/99), Judgment 12 May 2005
Osman Karademir v Turkey, (no 30009/03), Judgment 22 July 2008
Peers v Greece, (no 28524/95), Judgment 19 April 2001
Ribitsch v Austria, (no 18896/91), Judgment 4 December 1995
Saadi v Italy, (no 37201/06), Judgment 28 February 2008
Salah Sheekh v the Netherlands, (no 1948/04), Judgment 11 January 2007
Salman v Turkey, (no 21986/93), Judgment 27 June 2000
Selmouni v France, (no 25803/94), Judgment 28 July 1999
Sevtap Veznedaroglu v Turkey, (no 32357/96), Judgment 11 April 2000
Soering v UK, (no 14038/88), Judgment 7 July 1989
Tomasi v France, (no 12850/87), Judgment 27 August 1992, Series A, No 241-A
Vilvarajah v UK, (nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87), Judgment 30 October 1991
Yesil and Sevim v Turquie, (no 34738/04), Judgment 5 June 2007
Z and Others v UK, (no 29392/95), Judgment 10 May 2001
97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia, (no 71156/01), Judgment 3 May 2007

European Commission of Human Rights
The Greek Case (1969), 12 Yearbook of the European Convention on Human Rights

International Criminal Tribunal for the former Yugoslavia
Prosecutor v Delalic and Others, Case IT-96-21-T, Judgment 16 November 1998
Prosecutor v Furundzija, Case IT-95-17/1-T, Judgment 10 December 1998

Prosecutor v Kunarac and Others, Case IT-96-23-T & IT-96-23/I-T, Judgment 22 February 2001
Prosecutor v Kvocka and Others, Case IT-98-30/1-A, Judgment 28 February 2005
Prosecutor v Simic, Case IT-95-9/2-T, Judgment 17 October 2002
Prosecutor v Tadic, Case IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

African Commission on Human and Peoples' Rights
Rencontre Africaine pour la défense de droits de l'homme v Zambia, (71/92), 10th Annual Report of the African Commission, 1996–1997, ACHPR/RPT/10th

International Court of Justice
Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), Judgment of 19 December 2005
Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v Iran*), [1980] ICJ Rep 3
LaGrand, (*Germany v United States*), Judgment 27 June 2000
On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, ICJ Reports 9 July 2004

National Court Decisions
Hamdan v Rumsfeld (2006) 126 S.Ct. 2749 US Supreme Court
Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, (no 1) [2000] 1 AC 61 (HL), reprinted in 37 ILM 1302 (1998) UK
Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, (no 2) [2000] 1 AC 119 (HL), reprinted in 38 ILM 430 (1999) UK
Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, (no 3) [2000] 1 AC 147 (HL) UK House of Lords
Public Committee against Torture in Israel v State of Israel: HCI 5100/94 (1999) Israel Supreme Court

PREFACE

The Secretariat of Judicial Reform (SJR) has played a leading role in the reform of the justice system in Brazil since its creation in 2003. This reform process is a milestone in the history of Brazilian justice and has profound implications for Brazilian society. Creating a justice system that is fairer, faster and more accessible to its citizens is an enormous challenge.

The SJR works with judges, public prosecutors, public defenders, lawyers, law experts and all those committed to the improvement of the Brazilian justice system, to coordinate and replicate good practice, thereby increasing access to justice and supporting the development of the justice system. It advocates alternative dispute resolution – such as mediation and reconciliation – and promotes human rights and community justice projects to bring justice to the people. It also supports training for judges, prosecutors and public defenders – especially through provision of academic and vocational courses for law operators.

Notwithstanding Brazil's commitment to human rights, torture still persists in Brazil. In order to tackle this reality, the Brazilian government has pledged to invest in the modernisation of the criminal justice system, reducing overcrowding in prisons and improving prison conditions. These initiatives were strengthened by the prison system agreement written together with the governments of Brazilian states.

Torture, when it occurs, reflects a failure of institutions responsible for monitoring the functioning of the criminal justice. This is not a criticism of the individuals involved, who we recognise are overwhelmed by a large volume of work and have not always received sufficient resources from the state.

A well-informed and sensitised legal profession has a vital role to play in eradicating torture. This Manual aims to help the legal profession perform this function. It also recognises that efficient execution of measures protecting against torture are an element of the consolidation of the essential principles of a democratic rule of law.

As the good practice examples outlined in this Manual demonstrate, there are many cases of innovation and creativity resulting in improvement of prison conditions in Brazil. One example is the Força Nacional da Defensoria Pública para Execuções Penais (National Task Force of Public Defenders in Criminal Sentencing) – demonstrating a response to serious violations of essential human rights – in Santa Catarina prisons earlier in 2013.

Such examples have helped to guarantee the rights of groups of vulnerable prisoners, investigate alleged violations and provide reparations to victims of torture. We need to build on these examples to help the various state institutions work more efficiently together.

Brazil's experience of justice reform is of international as well as national relevance. Criminal justice reform has traditionally been one of the most difficult topics to tackle for those involved in international development. After all, without an effective justice system, all other efforts to uphold justice tend to become mere palliatives.

The SJR welcomes the current partnership with the International Bar Association's Human Rights Institute (IBAHRI), which has resulted in this Manual. The collaborators, the SJR and the IBAHRI, hope that this can be the beginning of further international cooperation and inspire future public policy aimed at eradicating torture.

FLÁVIO CROCCE CAETANO
Secretary of Judicial Reform

FOREWORD

Despite the absolute prohibition of torture in international law, it persists in many countries around the world. Although the international community is united in its condemnation of the practice, it continues unabated, often perpetrated by the very same state agents that are responsible for upholding and defending the law.

In the 1980s, the great hope during the democratic transitions in Latin America was that the consolidation of the rule of law would ensure that the human rights enshrined in its constitutions would be extended to all citizens. However, although Latin American societies experienced the transition from dictatorship to democracy and enjoyed significant developments in civil society and democratic governance, many of the institutions and political practices or attitudes have remained unchanged. The tragic rebellion in the Carandirú prison and the cases of *Urso Branco* and *Espírito Santo* before the Inter-American Court of Human Rights bear testimony to the challenges faced by the Brazilian criminal justice system. The lesson from the Latin American transitions is that, in order to abolish torture in our times, a strong commitment from governments must be accompanied by specific plans and the constant monitoring and participation of civil society.

Torture is absolutely prohibited in the Brazilian Constitution and a variety of other laws on criminal law and process. These norms enshrine international human rights law standards regarding the presumption of innocence and safeguards for the treatment of detainees. In 2007, Brazil ratified the Optional Protocol to the United Nations Convention against Torture and other forms of cruel, inhuman and degrading treatment and launched its National Action Plan for the Prevention of Torture. Various initiatives, both on federal and state levels, have demonstrated a very real commitment from the authorities to ensure Brazil's constitutional and international obligations are fulfilled.

A well-informed and sensitised legal profession plays a critical role in the fight against torture. Judges and prosecutors are obliged to uphold the rule of law and the fair administration of justice by ensuring that torture allegations are promptly investigated, that torturers are brought to justice and that victims receive reparation. Public defenders and lawyers play an equally important role in criminal cases where individuals have been deprived of their liberty. Since its creation in 1995, the International Bar Association's Human Rights Institute (IBAHRI) has worked to protect and promote the rule of law, human rights and the independence of the legal profession. Therefore it is a great pleasure to present the English translation of the second

edition of this Manual, which is intended to contribute to the efforts of the government and legal profession to protect Brazilians from torture. The first edition was launched at the Federal Council of the Brazilian Bar Association in Brasília in October 2011. Since then, over 8,000 copies have been published, distributed and used in trainings by state and federal justice institutions all over Brazil. This second edition of the Manual incorporates material from the 2012 report of the United Nations Sub-Committee on Torture in Brazil, Brazil's Universal Period Review before the United Nations Human Rights Council and updated facts and figures.

The Manual describes the fundamental duties and responsibilities of judges and prosecutors in international and national law in protecting detainees from torture and other forms of ill-treatment. It also provides practical advice for the Brazilian legal profession as to how torture can be combated, through investigations, procedures and monitoring, including examples of good practice in Brazil.

This Manual was developed in consultation with the Federal Council of the Brazilian Bar Association, the National Justice Council, the National Prosecutor's Council, the Federal Public Defender's Office, the National Council of State Public Defenders, the Human Rights Secretariat of the Presidency of the Republic, the Secretariat for Judicial Reform of the Ministry of Justice, the National Judges' Training School, the British Embassy in Brasília, the São Paulo Public Defender's Office, the National Council of Public Defenders and civil society. The project was generously funded by the United Kingdom's Foreign and Commonwealth Office. As immediate past Co-Chair and ex officio member of the IBAHRI Council, I am grateful for the cooperation and support of all of those involved in this important project.

JUAN E MÉNDEZ

UN Special Rapporteur on torture and other forms
of cruel, inhuman and degrading treatment

Immediate Past Co-Chair and ex officio member of the IBAHRI Council

CHAPTER 1

Reforming the Justice System to Protect Brazilians against Torture

Introduction

This chapter provides an overview of the work of the Secretary of Judicial Reform (SJR), located in the Ministry of Justice, and the Human Rights Secretariat of the Presidency in protecting Brazilians against torture. It describes the work of both institutions in ensuring that Brazil fulfils its requirements to combat torture under both domestic and international law. It also discusses how the reports of international monitoring bodies have helped to strengthen laws and practices that improve protection against torture.

Brazil has recently conducted two major dialogues with human rights monitoring bodies of the United Nations (UN): a visit by the UN Subcommittee for the Prevention of Torture (SPT) in 2011, and the production of a report under the UN Human Rights Council Universal Periodic Review (UPR) in 2012. A third process began in March 2013 when the Working Group on Arbitrary Detention conducted an official country visit to Brazil, following an invitation from the Government. The Working Group will present its report on the visit to the Human Rights Council in 2014.[1]

1. UN Office for the High Commissioner of Human Rights, news release, 'Working Group on Arbitration Detention statement upon conclusion of its visit to Brazil (18 to 28 March 2013)', 28 March 2013.

These processes involve ongoing reporting cycles in which Brazil has received visits from monitoring groups, presented its own reports, received recommendations from the monitoring bodies and responded to them in subsequent reports. The recommendations of the reports themselves will be discussed in more detail in subsequent chapters. This chapter places those recommendations in context by describing how Brazil has engaged with the monitoring mechanisms as part of its commitment to the protection provisions of international human rights and humanitarian law.

The final section of this chapter discusses the need for coordinated action not only to respond to acts of torture after they have been committed, but to address the roots of the problems holistically. An understanding of this context will help Brazilian judges, prosecutors, defenders and lawyers to understand the practical ways in which they can have a direct impact on combating torture and other prohibited forms of ill-treatment.

As will be discussed further below and in subsequent chapters, the Constitution of Brazil enshrines a strong separation of powers between the executive, legislative and judicial branches of the state. It is also based on a federal distribution of responsibilities in which each of Brazil's states organises its own criminal justice system. The responsibility for police work, penal administration and the execution of judicial sentences rests upon the states, although they must adhere to the same laws and basic constitutional principles. The majority of measures aimed at preventing and combating

torture are implemented by the states and the Federal District. It is therefore necessary to forge partnerships between civil society and public agencies of the legislative, executive and judicial branches of government at the federal, state and municipal levels. The work of the Secretariat of Judicial Reform and Human Rights Secretariat and engagement with international monitoring organisations can help to promote this cooperation.

The Secretariat of Judicial Reform

The Secretariat of Judicial Reform (SJR) is responsible for 'formulating, promoting, supervising and coordinating the process of reforming the administration of justice to promote dialogue between the legislative, executive and judiciary'. Its creation in 2003 represented the beginning of a reform process that was enshrined with the enactment of Constitutional Amendment 45/2004, which established the National Council of Justice and promoted great advances in the modernisation and democratisation of the Brazilian courts. The Secretariat's main task is to articulate SJR institutional cooperation among government agencies and guide the actions of public policies that can qualify adjudication, within constitutionally defined limits.

The debate on judicial reform is extensive and the SJR understands that judicial reform is a concern for everyone and not just the judiciary or executive. It is not possible to think of the development of a country, of reducing poverty and inequality or strengthening democracy without a judiciary functioning in accordance with the needs of its citizenry.

The SJR has played a leading role in the reform of the justice system in Brazil – working with public defenders, judges and public prosecutors – and has led the coordination and the replication of good practices, including the strengthening of Public Defenders Offices and other projects to increase access to justice and support the modernisation of the administration of justice in Brazil.

The main focus of the department is to increase access to justice within four pillars:

- the actions of citizenship through service networks of information about rights and citizenship training of agents to assist in guiding the local community;
- strengthening of the Public Defender's Office to expand the service of full and free legal assistance;
- rapprochement between justice and local communities and other experiences through the increased use of alternative dispute resolution such as mediation and arbitration; and
- the creation of Community Justice and Human Rights Programmes

establishing partnerships with the education system, especially through academic and vocational courses in law and training of judges, prosecutors and public defenders and with promoting the inclusion of specific subjects in the curriculum.

The Human Rights Secretariat of the Presidency

The National Secretariat of Human Rights was originally created in April 1997, within the Ministry of Justice. It was transformed into an organ within the Presidency in May 2003, and its status was further enhanced in March 2010 when it became an 'essential organ' of the Presidency. The Secretary of Human Rights has ministerial status and is charged with the articulation and implementation of public policies for the promotion and protection of human rights.[2] Brazil was one of the first countries in the world to draw up a national plan for human rights in 1994, in accordance with the recommendations of the UN World Conference on Human Rights in Vienna in 1993. This plan was revised and updated in 2002 and, again following a nationwide consultation process with civil society in December 2009.[3] The third National Human Rights Programme (PNDH-3) consolidates initiatives to promote public security, justice and combat violence, reflecting an understanding of the interdependence of these three elements.[4]

2. See, Secretaria de Direitos Humanos, homepage, http://portal.sdh.gov.br, accessed 19 March 2013.

3. Directive No 7.177, 12 May 2009.

4. See, Programa de Direitos Humanos, National, http://portal.mj.gov.br/sedh/pndh3/pndh3.pdf, accessed 19 March 2013.

One of the principal activities of the Human Rights Secretariat is in relation to combating all types of violations of human rights including torture, slavery, the sexual exploitation of children and adolescents and all forms of discrimination. It contains a Human Rights Ombudsman's Office which is tasked with receiving, analysing and processing reports of human rights violations and investigating complaints. This Office can act directly in emblematic, collective cases, as well as in the resolution of social tensions and conflicts that involve human rights violations. The Office also disseminates information about actions, programmes, campaigns, rights and care services. For example, it has helped to prepare a 'know your rights' brochure for young people who are stopped by the police.

The Human Rights Secretariat promotes a confidential Disque Direitos Humanos 100 (Dial Human Rights 100) call centre through the Ombudsman's Office. This service operates 24 hours a day, seven days a week. Calls are free of charge and may be made from anywhere in the country. The hotline has received more than 2.5 million calls since it was established in 2003 and has referred over 150,000 reports of rights violations to the appropriate authorities.[5]

5. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Brazil*, Human Rights Council, Working Group on the Universal Periodic Review, Thirteenth session, Geneva, 21 May–4 June 2012, A/HRC/WG.6/13/BRA/17 March 2012, para 105.

Between 1 January 2011 and 25 June 2012, the National Human Rights Ombudsman Office received 1,694 reports of torture and other cruel,

inhuman, and degrading treatment.[6] A special torture module was added to the hotline in 2013. The system is computerised which enables the Human Rights Secretariat to track the progress of cases, and also to identify patterns of complaints, risk and vulnerability, which enables the authorities to tailor responses. This has revealed that while, as expected, the largest number of complaints about torture came from Brazil's larger states – São Paulo, Minas Gerais, Pernambuco and Rio de Janeiro – the highest number of complaints per head of population were Brasília and the Federal District, along with the states of Mato Grosso, Mato Grosso do Sul and Pernambuco.[7]

6. *Replies of Brazil to the recommendations and request for information made by the Subcommittee*, CAT/OP/BRA/1/Add.1, 13 February 2013, para 173.

7. *Ibid.*

The Secretariat has supported the formation of a National Forum of Police Ombudspersons, which was established in 2006 and brought together 20 police ombudspersons from the states.[8] Between 2006 and 2012, the Forum promoted the creation of Police Ombudsman Offices in Alagoas, Sergipe, the Federal District and Paraíba and helped set up the state committees on controlling deaths in police custody in São Paulo and Maranhão. It has also supported the Ministry of Justice which, in 2010, issued a 'Primer on Police Action to Protect the Human Rights of Persons in a Vulnerable Situation', providing guidance on procedures for transporting people under arrest to police precincts, addressing discrimination on the basis of race, colour or gender prejudice, and stressing the need to inform prisoners of their rights.

8. Acre, Alagoas, Amapá, Amazonas, Bahia, Ceará, Espírito Santo, Federal District, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Paraíba, Pernambuco, Piauí, Rio de Janeiro, Rio Grande do Norte, Santa Catarina, São Paulo, Sergipe, Paraná and Rio Grande do Sul.

The Secretariat also works with the Public Prosecutor's Office, the Federal Police, the judiciary, public defenders and the Secretaries of Public Security and Justice as well as the Secretaries of Prison Administration at both the federal and state level, while maintaining an ongoing dialogue with civil society organisations and the State Secretaries of Human Rights. This cross-departmental and cross-sectoral work, at both the federal and state level, has involved devising methods of protection, prompt attention and establishing accountability for reports of human rights violations. As is discussed further below, over the last decade Brazil has embarked on a far-reaching reform of its justice system, to increase its speed, efficiency and accessibility, which has incorporated an understanding of the primacy of respect for human rights and gender. The Secretariat has also worked to ensure that human rights are integrated into strategies for health, education and public security.

Case study: Torture hotline

One of the actions provided for in the National Human Rights Action Plan 3 was the expansion of the Dial a Disk 100 Human Rights Hotline. This service allows people to report violations of human rights free and anonymously, anywhere in the country. It was intended to particularly help vulnerable social groups and also to provide people with basic advice about their rights. All denunciations received are also referred to the appropriate authorities for further action.

In March 2013, a new dedicated link was created within the service to specifically address complaints and allegations of torture. The intention is to give greater visibility to the issue, as well as creating a specific point to which complaints can be made, strengthening the network of organisations, including courts, public prosecutors and defenders, penal administrations and secretaries of public security and social assistance that help to provide protection against torture. In the first month in which the link functioned it received 171 denunciations referring to 319 victims.

In 2010, the federal government launched an international cooperation project to develop the components of the National System of Human Rights Indicators, in partnership with the Office of the High Commissioner of Human Rights (OHCHR), United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA). The goal of the project is to put in place modules on civil, political, economic, social and cultural rights based on OHCHR's proposed methodology. In 2009, a study on the political and administrative organisation of Brazil's 5,565 municipalities included a chapter on human rights. Similarly, the 2010 Demographic Census developed more targeted questions on people with disabilities, indigenous languages, race and colour, while collecting information on civil birth certificates.

In 2006, Brazil adopted a Plan of Integrated Actions for Preventing and Combating Torture (PAIPCT). So far, 18 states have adhered to the PAIPCT,[9] which encouraged the establishment of independent Ombudsman Offices, and specific Judicial Administrative Offices of the Police and Penitentiary Systems. It also called for the qualification of health professionals, doctors and psychologists active in the prison system, in recording cases of torture and reporting them to the judiciary authorities. A national Committee to Combat Torture was established in 2007, composed of government and civil society representatives, which is supported and serviced by the Secretariat. The Committee's task is to monitor, debate and propose government initiatives to combat torture and other forms of cruel, inhuman or degrading treatment or punishment. At the state level, there are 11 State Committees to Combat Torture, which include the participation of civil society and government representatives.[10]

9. Acre, Alagoas, Bahia, Ceará, Espírito Santo, Federal District, Goiás, Maranhão, Mato Grosso, Piauí, Pernambuco, Pará, Paraíba, Paraná, Rio Grande do Norte, Sergipe, Rio de Janeiro and Rio Grande do Sul.

10. Alagoas, Bahia, Ceará, Espírito Santo, Maranhão, Paraíba, Paraná, Pernambuco, Piauí, Rio de Janeiro and Rio Grande do Sul.

In August 2013, Congress passed a law to establish a National Committee and a National Preventive Mechanism (NPM) against torture, in accordance with the Optional Protocol of the UN Convention against Torture.[11] The mechanism will incorporate independent experts with unrestricted legal and political power to monitor detention facilities throughout the national territory. Some Brazilian states have already started creating local mechanisms for the prevention of torture and five have also established Preventive Mechanisms in accordance with the Optional Protocol: Rio de Janeiro, Alagoas, Pernambuco, Paraíba and Espírito Santo.[12]

11. Law No 12.847, 2 August 2013.

12. *Replies of Brazil to the recommendations and request for information made by the Subcommittee*, CAT/OP/BRA/1/Add.1, 13 February 2013, paras 156-62.

Brazil's engagement with international human rights monitoring mechanisms

The Human Rights Secretariat works with the Ministry of External Relations to promote human rights in Brazilian foreign policy and in interfacing on human rights issues with the UN and other intergovernmental organisations (IGOs). This involves preparing reports for consideration by UN monitoring bodies and facilitating the visits of monitoring groups, as discussed below.

The Secretariat also promotes international cooperation in the field of human rights, particularly through 'South-South' technical cooperation in justice and human rights. This includes identifying and evaluating successful experiences in promoting and defending human rights, for international cooperation, supporting the thematic areas of the Secretariat in the implementation of projects of international cooperation, and monitoring the implementation of these projects. This area of work is becoming increasingly important as Brazil's international influence is expanding in the UN, regional and South-South fora.

As is discussed further in subsequent chapters, Brazil has ratified all of the major international human rights conventions and maintains a standing invitation to special procedures in order to allow its members to visit the country and monitor compliance with its international legal obligations. Between 1998 and 2010, Brazil received visits by 11 special rapporteurs in ten different areas, in addition to a visit by the Committee against Torture (CAT). Former UN High Commissioners for Human Rights, Mary Robinson and Louise Arbour, visited Brazil in 2002 and 2007, while the current High Commissioner, Navi Pillay, visited in 2009 and 2012. The Brazilian federal government has fully cooperated with all these visits.

The three most recent occasions on which Brazil's international obligations to protect people against torture have been subject to external scrutiny were as a result of a visit by the SPT, in 2011, during Brazil's participation in the UPR process of 2012, and as a result of a visit by the UN Working Group on Arbitrary Detention ('Working Group') in March 2013. These processes

are discussed in more detail below to show how the monitoring systems work, why Brazil positively engages with them and how they can be used to strengthen practical protection measures.

The Working Group on Arbitrary Detention conducted an official country visit to Brazil in March 2013 and will present its report on the visit to the Human Rights Council in 2014,[13] which is after the publication date of this Manual. In a statement at the end of the country visit, the Working Group raised concerns regarding the excessive use of deprivation of liberty in Brazil and the lack of effective legal assistance to persons arrested and detained. The experts stressed that depriving persons of their liberty was the most common recourse both in terms of administrative detention and the criminal justice system and warned against a 'culture of using deprivation of liberty as the norm and not as an exceptional measure reserved for serious offences'.

13. See note 1 above.

The Working Group stressed that in the majority of criminal cases that it had examined, 'alternative measures to detention were not applied even in cases of minor offences', and that it was partly because people were being detained for minor offences such as theft that Brazil has one of the highest prison populations in the world.[14] Many of the points made below about the SPT and UPR processes also apply to the work of other UN monitoring bodies and working groups, which will be discussed further in subsequent chapters.

14. UN Office for the High Commissioner of Human Rights, news release, 'Brazil: UN expert group concerned about excessive use of deprivation of liberty and lack of legal assistance', 28 March 2013.

Brazil and the SPT

In September 2011, the SPT conducted an 11-day visit to Brazil.[15] The mission visited four different states – Goiás, Espírito Santo, Rio de Janeiro and São Paulo – and inspected both adult and juvenile detention facilities. In addition to visiting places of detention, the SPT held meetings with government authorities, with UN organisations in the country and with members of civil society.[16]

15. *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, CAT/OP/BRA/1, 5 July 2012.

16. *Ibid*.

The SPT is a UN treaty body established under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[17] and consists of 25 independent experts who are mandated to promote the prevention of torture through a global system of mechanisms to monitor places of detention. The SPT implements its mandate through three types of activities: direct visits to places of detention; advising and assisting in the establishment of NPMs; and cooperating with other regional and international bodies to increase the protection of persons against torture and ill-treatment.

17. For details see, *Working with the UN Subcommittee on Prevention of Torture, A practical guide for NGOs engaging with the process of SPT country visits*, International Rehabilitation Council for Torture Victims, April 2012.

Country visits are one of the main activities of the SPT. Their aim is to address the systemic problems of torture through on-site evaluation of the legislation, policy and institutions relating to places of detention, conditions of detention and measures taken to prevent torture and ill-treatment. The duration of country visits varies but is usually between one and three weeks. The SPT always aims to send members with diverse skill sets, including from the health and legal profession and those with knowledge of gendered approaches. During the visit, the SPT will meet with all relevant stakeholders including representatives from relevant ministries, police and detention officials, national human rights institutions (NHRIs), non-governmental organisations (NGOs) and relevant UN field offices, as well as visiting places of detention such as police stations, regular detention centres, detention centres for migrants and asylum seekers and mental health and social care institutions. The aim of these visits is to assess the general conditions and treatment of detainees. The SPT does not address or otherwise take up individual cases of torture or ill-treatment that it may encounter during its visits.

For organisations working on torture eradication, an SPT country visit is an excellent opportunity to bring international attention to priority issues and to use international monitoring to promote domestic change. NGOs often use such visits for advocacy activities, but governments can also use the opportunity of a visit to press for progressive change, particularly in countries such as Brazil which have a federal structure and a strong separation of powers between the executive, legislative and judiciary. In some cases, the main focus of an SPT mission is to visit places of detention to assess how the treatment of detainees and the conditions of detention can be brought into compliance with international standards. In other instances the SPT might visit a country to follow up on the implementation of previous recommendations or to provide technical support for the establishment of an NPM.

The outcome of an SPT country visit is a report analysing the country situation and providing recommendations for how to improve the conditions of detention and prevent the occurrence of torture and ill-treatment. The report will be transmitted to the government, usually within three to five months after the visit has been finalised, and the government will be requested to respond to the recommendations of the SPT within six months of receiving the report. Based on these responses, the SPT might initiate a written and oral dialogue with the government on implementation of its recommendations and, in some instances, it might request a short and focused follow-up visit. The reports are submitted to the government confidentially but the SPT encourages governments to publish them to bring the debate about protecting people from torture to a wider audience.

At the conclusion of its visit to Brazil, the SPT presented its confidential preliminary observations orally to the authorities. The government of Brazil submitted comments to those preliminary observations on 28 November 2011 and these were incorporated into an Advance Copy, which was sent to the government of Brazil in February 2012. On 14 June 2012, Brazil made public the report issued as a result of the SPT's visit. It then responded to the SPT's recommendations and request for information with its own report on 13 February 2013.[18] In its response, the government noted that:

> 'The SPT report makes recommendations that have deserved a careful analysis by the Brazilian State, performed in the course of an intense inter-sectoral dialogue involving the Secretariat for Human Rights, the Civil Cabinet at the Presidency of the Republic, the Ministry of Justice, the Ministry of Health, the Secretariat for Women's Rights, the Ministry of Foreign Affairs, the National Council of Justice, the President's Office, the Federal Public Defender's Office, The National Council of the Department of Prosecution, the Office of the Federal Attorney for Citizen Rights, and the Governments of the States whose prison facilities were visited by the SPT, specifically, Goiás, Espírito Santo, Rio de Janeiro, and São Paulo.'[19]

The conclusions and recommendations of the SPT visit will be discussed further in subsequent chapters of this Manual. Many of the comments were highly critical of Brazil's record but, nevertheless, the Brazilian government welcomed the SPT report and responded to its comments constructively. The visits of international monitoring bodies, such as the SPT, provide a valuable opportunity for the Brazilian state to evaluate its efforts and progress to improve its human rights record.

In its response to the SPT report, the Brazilian government recognised that the continuous monitoring of places of detention is essential to prevent torture. It is also necessary that a network of different actors such as judges, public defenders, prosecutors, police officers and federal and state managers work together to safeguard the rights of those deprived of their liberty and hold those responsible for any violations of these rights to account. Preventing and combating torture relies on an active collaboration between the state and society, between all three branches of the republic, as well as between all levels of government. Visits by monitoring bodies such as the SPT can help this process. Their reports are also valuable sources of information for judges, prosecutors, defenders and lawyers seeking to protect the rights of those held in detention.

18. *Replies of Brazil to the recommendations and request for information made by the Subcommittee*, CAT/OP/BRA/1/Add.1,13 February 2013.

19. *Ibid*, para 6.

Brazil and the UPR

In May 2012, Brazil presented its Second Report to the UN Human Rights Council in Geneva under the UPR process.[20] It had submitted its first report in April 2008, which resulted in it receiving 15 recommendations and two voluntary commitments that were addressed in its second report.[21] During the peer review process, Brazil received 170 recommendations of which the government was able to announce that it accepted 169. As is discussed below, the UPR process involves considerable dialogue across the various institutions of the executive, legislative and judiciary at both the state and federal level and this helps to promote cooperation in promoting and protecting human rights.

20. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Brazil*, Human Rights Council, Working Group on the Universal Periodic Review, Thirteenth session, Geneva, 21 May–4 June 2012, A/HRC/WG.6/13/BRA/17 March 2012.

21. Human Rights Council, Eighth session, *Agenda item 6, Report of the Working Group on the Universal Periodic Review*, Brazil, A/HRC/8/27, 22 May 2008.

The UPR was established when the Human Rights Council was created by the UN General Assembly in 2006.[22] This mandated the Council to 'undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States'.[23] The process was deliberately designed to involve constructive interactive dialogue on how states could improve their records. It aims to provide technical assistance to states and enhance their capacity to deal effectively with human rights challenges and to share best practices among states and other stakeholders.

22. UNGA Resolution 60/251,A/RES/60/251, 15 March 2006.

23. *Ibid*, para 5(c).

The UPR assesses the extent to which states respect their human rights obligations set out in: the UN Charter; the Universal Declaration of Human Rights; human rights instruments to which the state is party; voluntary pledges and commitments made by the state (eg, national human rights policies and/or programmes implemented); and, applicable international humanitarian law.[24] The process provides an opportunity for all states to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights.

24. UN Office for the High Commissioner of Human Rights, 'Basic facts about the UPR', www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx, accessed May 2013.

The reviews take place during the sessions of the UPR Working Group, which meets three times a year and consists of the 47 members of the Council. During the first cycle of reviews, each session dealt with 14 country reports, but this has now been increased to 16. The time for each review has also been increased from three to three-and-a-half hours. Any UN Member State can take part in the interactive discussion and dialogue with the reviewed states, along with the Working Group, and may pose questions, comments and/or make recommendations to the states under review.

During the Working Group session, half an hour is allocated to adopt each of the 'outcome reports' for the states reviewed that session. These take

place no sooner than 48 hours after the country review. The reviewed state has the opportunity to make preliminary comments on the recommendations, choosing to either accept or note them. Both accepted and noted recommendations are included in the report. After the report has been adopted, editorial modifications can be made to the report by states on their own statements within the following two weeks. The report then has to be adopted at a plenary session of the Human Rights Council. During the plenary session, the state under review can reply to questions and issues that were not sufficiently addressed during the Working Group and respond to recommendations that were raised by states during the review. Time is also allotted to member and observer states who may wish to express their opinion on the outcome of the review and for national human rights institutions, NGOs and other stakeholders to make general comments.

The documents on which the reviews are based are: information provided by the state under review, which can take the form of a 'national report'; information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; and information from other stakeholders including NHRIs and non-governmental organisations. NGOs can submit information that can be added to the 'other stakeholders' report that is considered during the review. They can also attend the UPR Working Group sessions and can make statements at the regular session of the Human Rights Council when the reviews are considered. [25]

25. For more information, see *Technical guidelines for the submission of stakeholders*, UN Office for the High Commissioner of Human Rights.

All 192 members of the UN have participated in the first UPR process. The second cycle of reviews started in May 2012 and Brazil was one of the first countries to be reviewed. During the second review, states are expected to provide information on what they have been doing to implement the recommendations made during the first review as well as on any developments in the field of human rights. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with the country concerned. The Brazilian report notes that:[26]

26. A/HRC/WG.6/13/BRA/17, March 2012, paras 3 and 4.

> 'The Secretariat for Human Rights of the Presidency of the Republic (SDH/PR), which had primary responsibility for coordinating the development of this report, in partnership with the Ministry of External Relations, invited the executive, legislative, and judicial branches of government and every state in the Union to contribute to the reporting process. It requested public agencies to identify the main challenges and advances towards the realization of human rights within their jurisdiction. A draft report was prepared based on the contributions received, which was published and made

available online for public consultation, enabling participation of civil society stakeholders, universities, councils, and government organizations from all over Brazil. The public consultation also included a public hearing convened in the Senate on 14 December 2011. All contributions received were examined and considered in the completion of the final text.

One of the democratic advances secured in the UPR Second Cycle involved engagement of the federative units and National Councils. All state and the Federal District's governors received information and an invitation to contribute to the UPR process. A total of eighteen states and the Federal District submitted recommendations. In addition, Brazil notified 39 National Councils about the UPR process, in view of their role as a channel for dialogue between the government and civil society. This engagement was part of a strategy to institutionalize public oversight of human rights in Brazil, using democratic channels that have been created and legitimized by Brazilian public administration. Through these initiatives, Brazil has sought to establish formal mechanisms to promote participation of different social actors in the UPR process, strengthening its methodology and facilitating follow-up by government and social entities.'

The conclusions and recommendations of the UPR process, as they relate to protecting Brazilians against torture, will be discussed in subsequent chapters. At the UPR Working Group Session, Brazil was represented by a plural delegation, which included representatives of 12 federal executive bodies as well as representatives of Congress, the Supreme Court and the National Council of Justice. The Human Rights Secretariat of the Presidency has also published the principal documents concerning its involvement in the UPR process, to establish a record of the process and also to share with other governments and international and national civil society organisations the good practices regarding the Brazilian experience.[27]

27. *O Brasil na Revisão Periódica Universal das Nacões Unidas*, Secretaria de Direitos Humanos, 2012.

In her presentation of the report to the Human Rights Council, Maria do Rosário de Nunes, Minister of State Head of Secretariat for Human Rights of the Presidency of the Federative Republic of Brazil, commented that:

'The consolidation of the Brazilian democracy combines political and civil rights with economic, social and cultural rights, in a process of social inclusion which ensures the indivisibility of human rights. We represent a country experiencing a national development program, which integrates economic growth and the deepening of social inclusion and human rights. Brazil has already met the commitment of accomplishing, before 2015, the majority

of the Millennium Development goals, integrating to its fulfilment the perspective of human rights. With several policies of social inclusion and income distribution, more than 28 million Brazilians have overcome poverty in the last years...

I come from a country where for centuries economic development was combined with unacceptable standards of human rights and fundamental guarantees violations. Nowadays, this country has managed to reverse the terms of this equation. We have institutional mechanisms which ensure that the undergoing development process will not represent a setback to the protection of human rights. On the contrary, the recent advances of Brazil show that human rights and development are complementary and mutually reinforce each other. Brazil is a country that grows, includes and protects, with respect to human rights. For the next few hours I expect to have an honest dialogue in which we can recognize our challenges and our achievements, looking further.'

Working together to protect Brazilians against torture

As will be discussed in subsequent chapters, the scale of the challenges to combating torture in Brazil are immense and Brazilian judges, prosecutors, defenders and lawyers have a vital role to play in this task. However, as the reports from monitoring bodies show, the main problem is not in creating new laws. The SPT noted in its report that '[t]he definition of torture in the internal legislation, as well as the existing legal safeguards against torture and ill-treatment and the rights of persons deprived of their liberty generally comply with international standards.'[28] This is in line with the findings of a number of other UN mechanisms, which have stated that the Brazilian legal framework in the field of torture prevention is to a large extent adequate.[29] The problem, which numerous reports have highlighted, is the gap between the legal framework and its application in practice. As Sir Nigel Rodley, the UN Special Rapporteur on Torture noted following his visit to Brazil in 2001, many of the recommendations would merely require the authorities to abide by existing Brazilian law.[30]

Despite recent advances, Brazil remains a deeply unequal society in which levels of poverty and violent crime remain shockingly high. Its prison population is rapidly rising, for a variety of reasons, and addressing the problem of prison overcrowding has now become a national priority. As is discussed below, there are over 550,000 people in prison in Brazil and all the reports of national and international monitoring bodies agree that conditions in prison, for both pre-trial and sentenced prisoners, are shocking. Violence, brutality and corruption are rife in the penal system and this contributes to a high rate of recidivism among former prisoners

28. Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil, CAT/OP/BRA/1, 5 July 2012.

29. Concluding observations of the Committee against Torture on Brazil, A/56/44, paras 115–120; Report on Brazil produced by the CAT under article 20 of the Convention and reply from the Government of Brazil, CAT/C/39/2, para 37; Concluding observations of the Committee on the Rights of the Child on Brazil, CRC/C/15/Add.241, paras 5 and 7, Report of Special Rapporteur on Torture, Sir Nigel Rodley, on his visit to Brazil, ECN.4/2001/66/Add.2, para 161.

30. Report of the Special Rapporteur, E/CN.4/2011/66/Add.2, para 168.

and the effective takeover of many prisons by criminal gangs. Brazil has found itself trapped in a vicious circle, where high levels of violent crime placed increasing burdens on its criminal justice system, whose flaws meant that it was unable to deal effectively with a large increase in its caseload.[31]

31. For discussion see, Conor Foley (ed), *Another system is possible: reforming Brazilian Justice* (International Bar Association and the Brazilian Ministry of Justice 2012).

Protecting Brazilians against torture must therefore involve a range of reforms that tackle a broader set of issues related to public safety and that include efforts to reduce violent crime and the numbers of people being sent to prison. As the presentation of Minister Maria do Rosário de Nunes to the UN Human Rights Council, quoted above, indicates, any strategy for reducing crime will need to include measures to tackle inequality, poverty and social exclusion as well as for strengthening access to justice. While many of these measures go beyond the scope of this Manual, the following paragraphs summarise aspects of the Brazilian government's strategy that are most closely related to strengthening the justice and public security systems as outlined in its 2012 report under the UPR. Some of the issues raised here will be discussed further in subsequent chapters.

As discussed above, in 2003, Brazil created the Judicial Reform Secretariat to promote access to justice by coordinating governmental actions to make the judiciary system more accessible.[32] This was part of a radical and wide-ranging package of reforms that have had a significant impact on the Brazilian justice system. The following year, Congress approved Constitutional Amendment 45,[33] which: created the National Council of Justice (CNJ) as an administrative oversight mechanism for the judiciary; imposed binding precedents, which has speeded up the progress of legal cases; guaranteed the autonomy of the Public Defender's Office (PDO); and federalised certain grave crimes against human rights.

32. A/HRC/WG.6/13/BRA/17 March 2012, para 91.

33. Article 109, paragraph 5 of the Brazilian Federal Constitution.

As a follow-up to Constitutional Amendment 45/2004, a series of laws were passed aimed at strengthening the justice system. Significant strides have also been made via laws relating to the activities of the PDOs, which are charged with providing legal assistance to those without the means to obtain legal services, to ensure that they continue to focus on the most vulnerable by prioritising their work in areas with the highest rates of social exclusion and population density.[34] Specialised units have also been created to provide comprehensive legal assistance free of charge.[35] Under the new law, public defenders have the right to enter police, prison and collective detention facilities freely and unannounced. Nineteen new PDOs were established in various states in 2008–2009, as well as 17 specialised legal assistance centres for prisoners and their families. Progress has also made in Santa Catarina, Paraná, Goiás and Amapá, the remaining states that do not yet have PDOs, with laws approving their establishment passed in 2011.[36] Although this represents considerable

34. Complementary Law No 132/2009.

35. Law No 12313/2010112.

36. O Mapa da Defensoria Pública no Brasil realizado pela ANADEP e pelo IPEA, www.ipea.gov.br/sites/images/downloads/mapa_da_defensoria_publica_no_brasil_impresso.pdf, accessed May 2013.

progress, the Brazilian government recognises that the number of PDOs is still far too small given that nearly 134 million Brazilians do not have the financial means to obtain private legal assistance.[37]

37. A/HRC/WG.6/13/BRA/17 March 2012, paras 92-4

A major national programme for building and refurbishing prisons was launched in 2011 with a budget of R$1.1bn. A Law on Precautionary Measures was also passed to try to prevent unnecessary detentions by giving judges the authority to adopt alternative measures to preventive detention.[38] Another important initiative has been the Mutirão Carcerário launched by the National Justice Council (CNJ), which has collectively reviewed a huge number of cases of pre-trial and sentenced prisoners to identify administrative and sentencing irregularities. Between its establishment in 2008 and 2012, a total of 334,635 case files have been reviewed, resulting in the release of 33,800 people, corresponding to nearly 11 per cent of its total caseload.[39] Between 2003 and 2010, the government invested R$296m in the juvenile justice system, and is currently funding 39 additional units in 21 states. In 2006, the National Council on the Rights of the Child and the Adolescent (CONANDA) approved the National System for Social-Educational Assistance (SINASE), which establishes essential standards and guidelines for implementation of the Statute on Children and Adolescents (ECA) and for enhancing juvenile justice in Brazil. SINASE was legally instituted, in January 2012,[40] establishing the minimum standards that each detention unit should meet, both in terms of architecture and assistance, and its aim is the effective re-socialisation of adolescents.[41]

38. Law No 12403/11.

39. A/HRC/WG.6/13/BRA/17 March 2012, paras 95-9.

40. Law No 12.594, 18 January 2012.

41. A/HRC/WG.6/13/BRA/17 March 2012, paras 100-3.

Another important initiative has been in Rio de Janeiro, where the state government has implemented a new model of public security through the deployment of Pacification Police Units (UPPs), which are based on community policing in recently pacified communities. There are currently 19 UPPs operating in selected favelas of Rio de Janeiro. A UPP Social Programme has been established alongside this to provide social development in and consolidate territorial control of pacified communities, by providing public services centred on access to citizenship and justice, including the issuance of basic civil documentation, legal assistance and the establishment of community mediation centres.[42] Although the uniqueness of the situation in Rio's favelas has required a very specific tailored response, this shows how each state can develop local models within a general framework based on respect for human rights.

42. A/HRC/WG.6/13/BRA/17 March 2012, para 89.

Since 2008, the Ministry of Justice has also developed actions to promote a culture of peace and alternative dispute resolution measures, such as the community justice initiative, which aims to stimulate locally designed strategies to ensure timely, peaceful and conciliatory justice in communities highly susceptible to violence. Since 2008, 46 Community Justice Centres have been established through investments of approximately R$15m. The

Centres sponsor, among other activities, human rights education and awareness-raising initiatives and provide community conflict mediation.[43]

43. A/HRC/WG.6/13/BRA/17 March 2012, para 90.

The federal government has also encouraged the establishment of independent Ombudsman Units and Internal Affairs Offices in law enforcement agencies to exercise oversight of federal, civil and military police forces. These measures are aimed at combating impunity for the crimes of torture, human trafficking, summary execution, abuse of power and corruption involving law enforcement and prison personnel. Despite governmental efforts, the so-called 'death squads', criminal organisations implicated in summary executions and other serious human rights violations, remain active in some states.

In recent years, the Federal Police Department launched investigations to dismantle these organisations. In 2010, the Human Rights Division of the Federal Police Department took over responsibility for investigating death squads and the creation of a specific police unit dedicated to this issue is currently under study. Another significant legal development was the approval of a law enabling cases to be moved from state jurisdiction to the federal level, where serious human rights violations are involved. The first case to which the displacement of jurisdiction was applied was in 2009 and related to death squads operating in the state of Paraíba, which set a critical legal precedent for addressing similar cases.[44]

44. A/HRC/WG.6/13/BRA/17 March 2012, paras 109–13.

In October 2011, the Law on Access to Public Information was enacted, establishing as a rule the public access to information produced and held by the state, subject to very specific exceptions, and prohibiting non-disclosure of official documents for indefinite timeframes. The Law also prohibits assigning classified status to documents relating to human rights violations.[45] Similarly, a system to provide citizens with guidance on their right to access to information will be developed. The system will provide clarifications on procedures governing public documents and protocols for accessing information. Through these measures, Brazil has made important strides toward consolidating its democratic system on the basis of full transparency and broad access to information.[46]

45. Chamber of Deputies Bill (PLC) 41/10.

46. A/HRC/WG.6/13/BRA/17 March 2012, para 121.

Another landmark achievement was the creation of the National Truth Commission ('Commission') by a Bill introduced in Congress in November 2011.[47] The Commission was formally instituted in May 2012. Its objective is to examine and bring to light the violations of human rights committed in Brazil between 1946 and 1988, the period which included the military dictatorship of 1964–1985. As well as investigating these violations, the Commission is charged with contributing to the work of preventing the recurrence of these practices within the context of Brazil's public institutions. In April 2013, the Commission launched a series of five

47. Chamber of Deputies Bill (PLC) 88/11.

'witness clinics' in major Brazilian cities to help provide psychosocial support to people who had suffered trauma as a result of their experiences under the dictatorship.[48]

48. Planalto.gov.br, 'Clínicas do Testemunho iniciam conversas públicas com vítimas da ditadura militar em 4 capitais a partir de 2ª feira', 14 April 2013, accessed May 2013.

During the dictatorship, the government passed an Amnesty Law in 1979 which covered all 'political crimes' committed between 1961 and 1979. This law allowed political exiles to return to Brazil and also re-established the civil and political rights of those public officials and members of the armed forces who had been dismissed by the dictatorship, allowing them to return to public service. In 2002, a new law was passed which replaced the Amnesty Law. This increased the scope of the amnesty granted to cover the period from 1945 to 1988 and also allowed those who had suffered during the dictatorship to apply for compensation. However, prior to the establishment of the Commission, successive governments had been reluctant to investigate the crimes and violations committed during the dictatorship.

The creation of the Commission has also led to the publication of a vast archive of documents relating to the period of the dictatorship and that has now been made available to the public in a volume entitled 'Memories Revealed'. Brazil now also officially marks 24 March as the Right to Truth Day. This was designated by the UN to mark the anniversary of Archbishop Oscar Romero, who was assassinated in El Salvador on 24 March 1980. The Commission marks a significant step in the struggle to overcome the violence and impunity that marked Brazil's recent past and to construct a new more conscientious, responsible historical national identity.

CHAPTER 2

The Prohibition of Torture in Brazilian and International Law

Introduction

This chapter provides an overview of the prohibition of torture in Brazilian and international law. Part One describes the legal and constitutional protections against torture in Brazil, the safeguards that should apply during arrest and pre-trial detention and the rights to which all people deprived of their liberty are entitled to concerning their treatment. Part Two outlines the absolute prohibition of torture in international law and the obligations that this places on Brazilian domestic law and practice.

The absolute prohibition of torture and ill-treatment as a 'peremptory norm' of general international law and its non-derogable status means that it cannot be justified in any circumstances whatsoever. The government must not only prohibit the use of torture or other ill-treatment by state agents, it must also ensure that this law is enforced, through proactive measures. One of the consistent recommendations from a variety of human rights monitoring groups is for better training of legal professionals, law enforcement officials and prison staff on the implementation of these legal norms.[1] This manual is intended to provide Brazilian legal professionals with a practical guide to combating torture and other forms of ill-treatment.

1. For example, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 Addendum Visit to Brazil, E/CN.4/2001/66/Add.2, 30 March 2001, para 90.

PART ONE: Legal and constitutional protections against torture in Brazil

Torture is absolutely prohibited by the Brazilian Constitution, which states that 'no one shall be submitted to torture or to inhuman or degrading treatment'[2] and that 'prisoners are ensured of respect to their physical and moral integrity.'[3] The Constitution also states that torture is among the most serious of crimes in Brazil and 'shall be considered by law as non-bailable and not subject to grace or amnesty, and their principals, agents, and those who omit themselves while being able to avoid such crimes shall be held liable'.[4]

2. Constituição Federal de 1988, Article 5(III).

3. *Ibid*, Article 5 (XLIX).

4. *Ibid*, Article 5 (XLIII).

In 1997, Brazil introduced a Law on the Crime of Torture, which provides for a specific offence of torture. The law punishes an individual who commits torture and anyone who knew about the act and had the duty to prevent it. Torture is punishable by a term of imprisonment which is determined in accordance with the circumstances.[5] This law also incorporates the UN Convention against Torture into Brazilian domestic law.[6] There are some differences between both the definition of torture contained in Brazilian law and the UN Convention against Torture, and the scope of who it applies to, which are discussed further in Chapter Three of this Manual. Prosecutions and sentencing for crimes of torture and other forms of ill-treatment is discussed in more detail in Chapter Seven of the Manual.

5. Law No 9.455, of 7 April 1997, Article 1.

6. The Convention was formally incorporated in the domestic system through the Legislative Decree 04, 23 May 1989 (*Decreto Legislativo No 04*) and the Decree 40, 15 February 1991 (*Decreto No 40*).

Torture is also prohibited by a variety of other Brazilian laws on criminal procedure and penal sanction. These all draw on the language of international human rights law regarding the presumption of innocence and safeguards for those being held in prison or detention. Most of these norms are contained in federal legislation, such as the Penal Code,[7] the Code of Criminal Procedure (Código de Processo Penal – CPP)[8] and the Law on the Execution of Sentences (Lei de Execução Penal – LEP).[9] These laws are applicable to the whole territory of Brazil. However they are mainly implemented by judges at the state level who will, therefore, be responsible for the police and the administration of places of detention, as well as the enforcement of judicial sentences. This can sometimes lead to inconsistencies of interpretation or confusion about the content of these laws, or even a failure to apply them in practice.

7. Decree Law No 2,848, of 7 December 1940.

8. Decree Law No 3,689 of 3 October 1941.

9 Law No 7,210 of 11 July 1984.

Safeguards during arrest and pre-trial detention

Brazil's Constitution and laws prohibit arbitrary arrest and detention, and limit arrests to those caught in the act of committing a crime (*em flagrante*) or arrested by order of a judicial authority.[10] The Constitution states that '[i]llegal arrest shall be immediately remitted by the judicial authority.'[11] The use of force during an arrest is prohibited unless the suspect attempts to escape or resists arrest.[12]

10. Constituição Federal de 1988, Article 5 (LXL).

11. Article 5 (LXV).

12. Decree-Law No 3,689 of 3 October 1941, Article 284.

Arresting officers are required to bring the suspect directly to a police precinct (*delegacia*), where the processing takes place.[13] The Constitution states that 'the arrested person is entitled to identification of those responsible for his arrest or for his police questioning'.[14] Brazilian police precincts are run by the civil police and headed by a *delegado*, who is required by law to hold a law degree. The military police have prime responsibility for public policing and patrolling so are often involved in *em flagrante* arrests. However, once the suspect has been brought to the *delegacia*, he or she should be handed over to the civil police and the military police will have no further participation in the related criminal investigation.

13. Constituição Federal de 1988, Article 304.

14. *Ibid*, Article 5 (LXIV).

Suspects must be advised of their rights at the time of arrest or before being taken into custody for interrogation. The Constitution provides that 'the arrested person shall be informed of his rights, among which is the right to remain silent, and he shall be ensured of assistance by his family and a lawyer'.[15] However, there is no specific legal provision regarding the period of time after which a person detained has access to a lawyer. All detainees should also receive a medical examination on admission into custody – although this is at the discretion of the *delegado*.

15. *Ibid*, Article 5 (LXIII), Criminal Procedure Code, article 186 and article 289 A §4°.

According to both the Constitution and the Brazilian Code of Criminal Procedure, the police are obliged to 'immediately' inform a judge of an *em*

flagrante arrest.[16] The Code of Criminal Procedure specifies that this should be done within 24 hours.[17] There is no legal provision which ensures that a person under arrest is actually seen by either a judge or a public prosecutor within the first hours of his or her detention. However, many believe that a person arrested *em flagrante* must be brought before a judge at this point.[18] A judge should, in any event, review the case and assign it to a public prosecutor who will decide whether to issue an indictment. The case should also be assigned to a defence lawyer. Once the preliminary case has been presented against the defendant, he or she should either be released on bail or transferred from police custody to a provisional (pre-trial) or remand detention facility.[19] The law states that this should occur within 24 hours, although there have been some contradictory High Court rulings on this point.[20] The role of judges is discussed further in Chapter Five of this Manual.

Pre-trial detainees should also be held separately from convicted prisoners.[21] Detainees under provisional detention should be held in pre-trial or remand prisons (*cadeias públicas*) and each circuit court should have at least one provisional detention facility in the interests of the administration of criminal justice and to ensure that detainees are held close to their family or community.[22] The law does not provide for a maximum period for pre-trial detention, although 81 days is often cited in the case law.[23] Time in detention before trial should be subtracted from the eventual sentence if the defendant is convicted and receives a prison sentence.

Defendants have a right to legal representation at their trials. The Constitution states that 'litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defence, with the means and resources inherent to it.'[24] The Constitution provides that 'the State shall provide full and free of charge legal assistance to all who prove insufficiency of funds'.[25] If a defendant cannot afford a private lawyer, the court should send the case to *Defensoria Pública* (the Public Defender's Office), a professionally structured agency, whose role is provided for in the Constitution. The Constitution also provides the right to *habeas corpus* when a person 'suffers or runs the risk of suffering violence or coercion against his/her freedom of movement, due to illegal actions or abuse of power'.[26] Anyone has *locus standi* to file a petition of *habeas corpus* in one's own defence, or to defend anyone else.[27] The role of public defenders is discussed further in Chapter Six of this Manual.

Defendants also have the right to confront and question witnesses, the right to remain silent without adverse inferences being drawn, enjoy a presumption of innocence, and a right to appeal. 'Evidence obtained

16. Constituição Federal de 1988, Article 5 (LXIII), Criminal Procedure Code, Article 306, Section 1.

17. *Ibid*, Article 306, Section 1.

18. See Carlos Weiss, Estudo sobre a obrigatoriedade de apresentação imediata da pessoa presa ao juiz: comparativo entre as previsões dos tratados de direitos humanos e do projeto de código de processo penal, Defensoria Pública do Estado de São Paulo Núcleo Especializado de Cidadania e Direitos Humanos, 30 de março de 2011. See also Roberto Delmanto Junior, As modalidades de prisão provisória e seu prazo de duração, 2 ed rev E ampl – Rio de Janeiro, Renovar, 2001 42 and 50 apud Flavia Piovesan, Direitos Humanos e o Direito Constitucional Internacional, cit, 122.

19. The laws relating to pre-trial detention are discussed further in Chapter Five.

20. E/CN.4/2001/66/Add.2, 30 March 2001, para 110.

21. LEP, Article 84.

22. *Ibid*, Articles 102 and 103.

23. This corresponds to the sum of all periods from the beginning of the establishment of the police investigation until the conclusion of criminal justice. In the case of crimes committed by criminal organisations, Law 9303/96 establishes categorically that the period should be no later than 81 days. See Article 798 CCP; Article 648 CPP e Law 9.303/96.

24. Constituição Federal de 1988, Article 5, (LV).

25. *Ibid*, Article 5 (LXXIV).

26. *Ibid*, Article 5 (LXVIII).

27. *Ibid*.

through unlawful means is inadmissible in the proceedings.'[28] If a judge or a public prosecutor is informed that a confession may have been obtained through illegal means, he or she should immediately initiate an investigation, which will be carried out by a prosecutor other than the one in charge of the case.

28. *Ibid*, Article 5 (LVI), Criminal Procedure Code, Article 157.

Treatment of prisoners and external monitoring

A fundamental concept on which Brazil's penal legislation is based is that all prisoners should be treated as individuals and their sentence should reflect their particular circumstances, with the ultimate aim being their rehabilitation and reintegration into society.[29] The laws state that the main purpose of imprisonment should be re-socialisation and rehabilitation, rather than punishment.[30] They also encourage judges to use alternative sanctions to prisons such as fines, community service and suspended sentences as often as possible.[31]

29. Penal Code, Article 59.

30. See, for example, José Henrique Pierangeli and Eugenio Raul Zaffaroni, *Manual de Direito Penal Brasileiro – Parte Geral – Vol 1* – 9ª Ed 2011 – Revista Dos Tribunais, 2011; and Rogério Greco, Código Penal Comentado (Impetus 2010).

31. For example, Lei No 12.403 da Prisão, das Medidas Cautelares e da Liberdade Provisória.

The law provides fixed sentences for different crimes, but judges should also take into account the circumstances of particular cases, any previous convictions of the defendant and other such issues which will affect their sentencing decision. If a prisoner is sentenced to a term of imprisonment, the sentencing judge should also consider the security level within which it should be served. Brazilian law states that a prison sentence should be regarded as a dynamic process, not simply a fixed term of years.[32] The judge should, therefore, continually monitor the prisoner's case, adjusting the terms of sentence according to the prisoner's conduct. Normally, a prisoner who begins a sentence in a closed prison should be transferred to a semi-open facility after a certain period and from there, to an open facility, and finally they should be released back into society. Judges are required to rule on requests for prison transfers – often from closed to semi-open facilities – and also to regularly evaluate whether prisoners should be granted furloughs, early releases or the conversion of one type of sentence to another. [33]

32. LEP, articles 110 and 112 and Penal Code Article 33, Section 2.

33. LEP, Article 66.

Brazil's prison rules *Regras Mínimas para o Tratamento do Preso no Brasil* (Minimum Rules of the Treatment of Prisoners in Brazil) 1994 are based on the UN Standard Minimum Rules, which largely reflect international best practice.[34] They contain numerous provisions mandating individualised treatment, protecting inmates' substantive and procedural rights, and guaranteeing them adequate food, medical, legal, educational, social, religious and material assistance, as well as contact with the outside world, education, work and other rights.[35] The Lei de Execução Penal contains similar provisions[36] and also provides that detainees have the right to contract the services of a medical doctor personally known to the internee or outpatient, by his or her relatives or dependents, in order to provide guidance and monitor treatment.[37]

34. Minimum Rules for the Treatment of Prisoners, 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.

35. For example, prisoners maintain their political rights, including the right to vote, up until the exhaustion of their final appeal.

36. LEP, Article 41.

37. *Ibid*, Article 43

Detainees whose sentences have to be served in a closed regime shall be held in prison (*penitenciária*).[38] Those whose sentences have to be served in an open regime are to be held in *a casa de albergado* (secure housing). Sentences to a semi-open regime must be served in industrial or agricultural colonies.[39] These different penal institutions may be accommodated in one single prison complex, but detainees should be separated within these according to their legal status (awaiting trial/convicted detainees) or the nature of the regime to which they have been sentenced (open/semi-open or closed regime).

38. *Ibid*, Article 87.

39. *Ibid*, Article 91.

The Brazilian Constitution requires that 'the prison sentence shall be served in separate establishments, according to the nature of the offence, the age and the sex of the convict'.[40] The Minimum Rules of the Treatment of Prisoners in Brazil state that prisoners belonging to different categories should be housed in different prisons or its sections according to personal characteristics such as sex, age, legal status, length of sentence, enforcement regime and specific treatment, given the principle of individualisation of punishment.[41] Women, juveniles and the elderly should be held separately from adult men in institutions appropriate to their personal situation.[42]

40. Constituição Federal de 1988, Article 5 (XLVIII).

41. Regras Mínimas para o Tratamento do Preso no Brasil, Article 7.

42. Penal Code, Article 37; LEP, Article 82 Section 1.

The National Council of Criminal and Penitentiary Policy, which is under the Ministry of Justice, has a state and federal mandate to inspect and check the penitentiaries, as well as to get information through reports of the Penitentiary Council, requisitions, visits or other means.[43] It is responsible for advising on the development of penal execution in the states, territories and federal district, proposing to the responsible authorities the necessary measures by which these could be improved.[44] It may make representations to the penal execution judge or any other administrative authority regarding the institution of an inquiry or an administrative procedure, when there is a violation of the provisions of the LEP. It also provides guidance to states on the construction and physical reform of penal establishments.[45]

43. LEP, Article 64, VIII.

44. *Ibid*.

45.*Diretrizes Básicas para arquitetura penal*, Ministry of Justice, 2011.

The LEP specifies that every state should establish a local *Conselho Penitenciário* (prison council) and a *Conselho da Comunidade* (community council). The prison councils are responsible for providing recommendations to the judges about whether individual prisoners should be paroled, pardoned or have their sentences commuted and whether and when they should be moved to lower levels of security. They must also present to the National Council on Criminal and Penitentiary Policy a report on its findings during the first trimester of each year. The duties of the community councils should include visiting every penal institution, interviewing prisoners and presenting monthly reports to both the prison council and the *juiz da vara de execução penal* (Penal execution judges).[46]

46. LEP, Article 80.

As is discussed in Chapter Nine of this Manual, judges are now required to establish *Conselhos da Comunidade* in their judicial divisions.[47]

47. Resolução Conselho Nacional da Justiça No 96 of 27 October 2009.

In some states there are specialist penal execution judges who work specifically on prison issues, either full-time or as a specific part of their workloads. In other states, the judge who sentences the prisoner remains responsible for handling his or her case during the period of imprisonment. Judges also have a role in monitoring prison conditions, carrying out inspections and interdicting prison administrations that are in breach of the prison rules or sentencing law.

Penal execution judges[48] and public prosecutors[49] must inspect penitentiaries on a monthly basis to verify that the LEP provisions are being respected. The law also specifies that the Penitentiary Department (DEPEN) should carry out prison inspections, although these are more related to administrative matters concerning the running and maintenance of prisons.

48. LEP, Article 66 (VII).

49. *Ibid*, Article 68.

The safeguards that exist to protect people deprived of their liberty against torture are discussed further in Chapter Six and Eight of this Manual, while the role of external monitoring bodies to ensure that these rights are upheld in practice is discussed in Chapter Nine.

PART TWO: The prohibition of torture in international law

Torture is absolutely prohibited under international law and cannot be justified under any circumstances.[50] The UN has condemned torture as a denial of the purposes of its Charter and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.[51] The prohibition of torture is found in a number of international human rights and humanitarian treaties and is also regarded as a principle of general international law. The prohibition of torture is also considered to carry a special status in general international law, that of *jus cogens*, which is a 'peremptory norm' of general international law.[52] General international law is binding on all states, even if they have not ratified a particular treaty. Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.[53]

50. See Nigel Rodley, *The treatment of prisoners under international law* Third Edition (Oxford University Press 2011).

51. UNGA 3452, (XXX) 9 December 1975. See also *United States of America v Iran* [1980] ICJ Rep 3, para 91.

52. Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6 (1994), para 10. See also, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Delalic and Others*, (1998), paras 452, 454; *Prosecutor v Furundzija*, (1998), paras 139, 143 and 144 (mentioning the *jus cogens* nature of torture); *Prosecutor v Kunarac and Others*, (2001) para 466; *Prosecutor v Simi*, (2002), para 34; Inter-American Court of Human Rights, *Bayarri v Argentina* (2008) para 81; *Miguel Castro-Castro Prison v Peru* (2006) para 271; *Goiburú and Others v Paraguay*, (2006), para 128; *Tibi v Ecuador*, (2004), para 143; *Gómez-Paquiyauri Brothers v Peru*, (2004), para 112; *Maritza Urrutia v Guatemala*, (2003), para 92; *Caesar v Trinidad and Tobago*, (2005), paras 70, 100.

53. Vienna Convention on the Law of Treaties 1969, Articles 53 and 64.

The absolute prohibition of torture and ill-treatment is underlined by its non-derogable status in human rights law. There are no circumstances in which states can set aside or restrict this obligation, even in times of war, terrorist threat, or other emergency threatening the life of the nation which may justify the suspension or limitation of some other rights.[54] States are also restricted from making derogations which may put individuals at risk of torture or ill-treatment – for example, by allowing

54. ICCPR, Article 4; ECHR, Article 15 and ACHR, Article 27 provide, in certain strictly defined circumstances, that states may derogate from certain specified obligations, to the extent that is strictly required by the exigencies of the situation. No derogations are permitted with respect to the articles prohibiting torture or cruel, inhuman or degrading treatment or punishment. The African Charter contains no emergency clause and therefore allows no such derogation.

excessive periods of incommunicado detention or denying a detainee prompt access to a court.[55] This prohibition operates irrespective of circumstances or attributes, such as the status of the victim or, if he or she is a criminal suspect, upon the crimes that the victim is suspected of having committed.[56]

The prohibition on torture and ill-treatment applies to all of the people, all of the time. Both the UN treaty and regional treaty monitoring bodies have firmly rejected arguments by States Parties to undermine or weaken the prohibition of torture and other ill-treatment in the name of counterterrorism measures.[57] Certain rights in the treaties, such as the right not to be subject to arbitrary detention, may under certain circumstances be restricted in a public emergency, but safeguards necessary for the prohibition of torture, such as limiting periods in which people can be held in incommunicado detention, must continue to apply.[58] The Human Rights Committee has also stated that treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule so cannot be dependent on material resources.[59]

Torture is also prohibited by most domestic legal systems in the world. Even where there is no specific crime of torture in domestic law, there are usually other laws under which the perpetrators can be held to account. Even if a country has not ratified a particular treaty prohibiting torture because the prohibition of torture is so fundamental, the country is in any event bound on the basis of general international law.

The prohibition of torture is found in Article 5 of the Universal Declaration of Human Rights (1948) and a number of international and regional human rights treaties. The vast majority of states have ratified treaties that contain provisions that prohibit torture and other forms of ill-treatment. These include: the International Covenant on Civil and Political Rights (1966),[60] the European Convention on Human Rights (1950),[61] the American Convention on Human Rights (1978)[62] and the African Charter on Human and Peoples' Rights (1981).[63]

Brazil ratified the American Convention on Human Rights in 1992 and recognised the competence of the Inter-American Court of Human Rights to give binding judgments in 1998.[64] As a result of a constitutional amendment in 2004, international human rights norms have constitutional status provided that they have been approved in a legislative proceeding by proper majority, equivalent to the one required

55. Human Rights Committee General Comment No 29, States of Emergency (Article 4), adopted at the 1950th meeting, on 24 July 2001, para 16; See also *Legal Consequences of the Construction of a Wall*, para 106, and *Democratic Republic of the Congo v Uganda*, paras 216–20 and 345(3); *Gäfgen v Germany,* ECtHR, (2010), para 87; *A and Others v UK*, ECtHR, (2009), para 126; *Saadi v Italy,* ECtHR, (2008), para 127; *Aksoy v Turkey*, ECtHR, (1996), para 62; *Brannigan and MacBride v UK*, ECtHR, (1993), *Dissenting Opinion of Judge Walsh*, para 9; *Servellón-García et al v Honduras*, IACHR, (2006) Series C No 152, para 97; *Baldeón-García v Peru* (2006) Series C No 147, para 117; *Juvenile Reeducation Institute v Paraguay,* IACHR, (2004) Series C No 112, para 157; *Maritza Urrutia v Guatemala*, (2003) Series C No 103, para 89; *Gómez-Paquiyauri Brothers v Peru,* (2004) Series C No 110, para 111; *De la Cruz-Flores v Peru*, IACHR, (2004) Series C No 115, para 125; '*Habeas Corpus* in Emergency Situations', Advisory Opinion OC-8/87 of 30 January 1987, Annual Report of the Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and 'Judicial Guarantees in States of Emergency', Advisory Opinion OC-9/87 of 6 October 1987, Annual Report of the Inter-American Court, 1988, OAS/Ser.L/V/III.19 doc.13, 1988.

56. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2. See also, The Reports of the Committee Against Torture, *Mutambo v Switzerland* (13/1993) GAOR, 49th Session Supplement No 44 (1994); *Khan v Canada* (15/1994), GAOR, 50th Session, Supplement No 44 (1995); The Greek Case (1969), 12 Yearbook of the European Convention on Human Rights; *Ireland v UK*, ECtHR, (1978), para 163; *Chahal v UK*, ECtHR, (1996), para 79; *Tomasi v France*, ECtHR, (1992), para 115; *Selmouni v France*, ECtHR, (1999), para 95; *Jalloh v Germany*, ECtHR, (2006), para 99; *Kafkaris v Cyprus*, ECtHR, (2008), para 95; *Gäfgen v Germany*, ECtHR, (2010), para 87.

57.'Concluding Observations' Canada (2005) UN Doc CCPR/C/CAN/CO/5, para 15; *Chahal v UK,* ECtHR, (1996), paras 76–80; *Aksoy v Turkey*, ECtHR, (1996), para 62; *Elci and Others v Turkey*, ECtHR, (2003), para 632; *Saadi v Italy,* ECtHR, (2008), paras 137–41. Inter-American Court of Human Rights, *Loayza-Tamayo v Peru*, (1997) Series C No 33, para 57; *Castillo-Petruzzi v Peru*, (1999), Series C No 52, para 197; *Maritza Urrutia v Guatemala*, (2003) Series C No 103, para 89. See also, *Inter-American Commission on Human Rights, Report on Terrorism and Human Rights* (2002), OEA/Ser.L/V/II.116, Doc.5 rev.1 corr, paras 201–16.

58.Human Rights Committee, General Comment No 29.

59. Human Rights Committee, General Comment No 21.

60. International Covenant on Civil and Political Rights, article 7 and 10(1).

61. European Convention on Human Rights, article 3.

62. American Convention on Human Rights, Article 5(2).

63. African Charter of Human and Peoples' Rights, Article 5.

64. The government of the federative republic of Brazil declares its recognition as binding, for an indefinite period of time, *ipso jure*, of the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention on Human Rights, according to Article 62 of that Convention, on the condition of reciprocity, and for matters arising after the time of this declaration, (Date: 10 December 1998), www.cidh.oas.org/DefaultE.htm, accessed May 2013.

for the approval of any constitutional amendment.[65] This amendment created the possibility of 'federalising' certain cases – that is taking them from the state to federal courts – where these involve serious human rights violations, although to date only one such case has been federalised.[66] The constitutional amendment also expressly recognised the jurisdiction of the International Criminal Court.

Brazil has also ratified the following international treaties, which contain provisions relating to the protection of people from torture:

- Genocide Convention (15 April 1952);
- Geneva Conventions (29 June 1957) and Protocols I and II (5 May 1992);
- Convention relating to the Status of Refugees, (16 November 1960);
- International Convention on the Elimination of All Forms of Racial Discrimination (27 March 1968);
- Convention on the Elimination of All Forms of Discrimination against Women (1 February 1984);
- Inter-American Convention to Prevent and Punish Torture, (20 July 1989);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (28 September 1989);
- Convention on the Rights of the Child, (24 September 1990);
- International Covenant on Civil and Political Rights (24 January 1992);
- International Covenant on Social, Economic and Cultural Rights (24 January 1992);
- American Convention on Human Rights (25 September 1992);
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador';
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty;
- Rome Statute of the International Criminal Court (20 June 2002); and
- The Optional Protocol to the UN Convention against Torture (2007).

Torture and other ill-treatment of any person in the power of another party are also banned as a war crime under the laws of armed conflict (humanitarian law).[67] The prohibition against torture in humanitarian law is expressly found in Common Article 3 of the Geneva Conventions and in various provisions of the four Geneva Conventions, including the grave breaches provisions[68] and the Additional Protocols of 1977.[69] Torture is also considered to be a crime against humanity when the acts are perpetrated as part of a widespread or systematic attack against a civilian population, whether or not they are committed in the course of an armed conflict.[70] Article 7 of the Rome Statute of the International Criminal Court (ICC) includes torture and rape within the Court's jurisdiction.

65. Constituição Federal de 1988, Article 5, Section 3. International human rights treaties and conventions that are approved by the National Congress in two sessions with three-fifths of the votes of the respective members are the equivalent of constitutional amendments. Since this amendment entered into force, Congress has only ratified one international convention, The UN Convention on the Rights of Disabled People.

66. Decision by the Federal Supreme Court in Grave violations of human rights taken to STJ, the federalisation of the case of Manoel Mattos, 27 October 2010.

67. War crimes include 'grave breaches' of the Geneva Conventions 1949, committed in the course of an international armed conflict against persons or property protected by the Conventions and, as confirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY), violations of Common Article 3 of the Geneva Conventions (*Prosecutor v Tadic*, 2 October 1995, para 134). Crimes against humanity are acts committed as part of a widespread or systematic attack against a civilian population, whether or not they are committed in the course of an armed conflict.

68. Geneva Convention I, Article 12 and 50; Geneva Convention II, Article 12 and 51; Geneva Convention III, Article 13, 14, 87 and 130; Geneva Convention IV, Article 27, 32 and 147.

69. Additional Protocol 1, Article 75 and Additional Protocol 2, Article 4.

70. *Prosecutor v Furundzija*, (1998); *Prosecutor v Delalic and Others*, (1998); *Prosecutor v Kunarac and Others*, (2001).

There has been considerable debate since the attacks by Al-Qaeda in the United States on 11 September 2001 as to whether all use of force by the armed forces of the United States against Al-Qaeda and other similar non-state armed groups constitutes an 'armed conflict' within the meaning of international law. The weight of international opinion has been that while certain counterterrorism operations have clearly been pursued in the context of international or internal armed conflicts, the so-called 'war on terror' as a whole is better seen as an issue of complex and transnational law enforcement, in which human rights law takes primacy. The Supreme Court of the United States in its 2006 judgment in *Hamdan v Rumsfeld* concluded that that at the very least the protections of Common Article 3 must apply to any armed conflict that was not a 'conflict between nations'.[71]

71. US Supreme Court, *Hamdan v Rumsfeld*, (2006) 126 S.Ct. 2749.

Brazil's obligations under international law

The simple obligation which international law places on states is that they abide by the provisions of all the treaties to which they have become a party, through signature, ratification or accession. International human rights law also derives from certain customary norms, on which there is such widespread agreement that they can be said to have attained the status of general international law.[72]

72. Article 38 of the Statute of the International Court of Justice lists the means for determining the rules of international law as: international conventions establishing rules; international custom as evidence of a general practice accepted as law; the general principles of law recognised by civilised nations and judicial decisions; and the teaching of eminent publicists. General international law (customary international law) consists of norms that emanate from various combinations of these sources.

International human rights law does not substitute itself for national law, but establishes a comprehensive set of standards that can be applied to all legal systems in the world. The standards take into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide. International human rights law defines the limits of a state's power over individuals, and imposes positive obligations owed by the state to individuals.

States are primarily responsible for protecting the rights and welfare of those within their jurisdiction and it is a common feature of most human rights treaties that people claiming a violation of their rights should exhaust their domestic remedies before bringing the case to an international court. States are also given some leeway in how they interpret whether or not certain restrictions of some rights might be justified in certain circumstances. States voluntarily sign and ratify treaties that recognise and ensure the rights of every person, and submit themselves to the control of judicial or quasi-judicial organs that accept complaints from individuals. Once a state has ratified or otherwise acceded to an international treaty it is bound by the provisions of this treaty. All states are additionally bound by principles of general or customary, international law.

International human rights law creates a number of distinct but interrelated obligations on states, which are often referred to as the

obligations to *respect, protect and fulfil*.[73] The obligation to respect requires the state not to do anything that would actively interfere with the realisation of a right. The obligation to protect requires the state to ensure that individuals' rights are not violated by private non-state actors. The obligation to fulfil requires the state to take positive steps to ensure the realisation of the right in question. States are responsible for safeguarding the rights of everyone within their jurisdiction[74] and may be held accountable for acts carried out by private individuals if it supports or tolerates them, or fails in other ways to provide effective protection in law against them.[75]

This distinction is important when discussing torture because Brazilian law criminalises torture committed by private individuals as well as public officials. As discussed in Chapter Three of this Manual, the legal definition of torture contained in the UN Convention against Torture requires a level of involvement or acquiescence by a state official, because part of the seriousness of the offence is that it takes place with official sanction and so represents an abuse of power by the authorities. However, there is also a growing acceptance of the importance of safeguarding people from similar treatment carried out by private groups or individuals against persons under the effective control of those groups or individuals. This means that the government must not only prohibit the use of torture or other cruel, inhuman or degrading treatment or punishment of any person by state agents or anyone else, acting in their official capacity, outside their official capacity or in a private capacity. It must also ensure that this law is enforced, through proactive measures.

All public officials who come into contact with people in detention must be aware of the law and have been properly trained about what it means in practice. Detainees also need to be made aware of their rights, including their right to complain about violations, and to have early access to a lawyer or another independent mechanism. Judges and prosecutors need to understand their own duties not to collude in oppressive questioning techniques or to rely on any statements that may have been obtained through coercion as evidence. They also have a duty to explore for signs of physical or mental distress of anyone brought before them, to take all complaints of ill-treatment seriously, to regularly inspect places of detention and to bring proceedings against perpetrators of abuse.

State officials are absolutely prohibited from inflicting, instigating or tolerating the torture or other cruel, inhuman or degrading treatment or punishment of any person. An order from a superior officer or a public authority may not be invoked as a justification for torture.[76] States are also required to ensure that all acts of torture are offences under their criminal law, establish criminal jurisdiction over such acts, investigate all such acts

73. Human Rights Committee, 'General Comment no 31 (2004); Concluding Observations' United States of America (2006), UN Doc CCPR/C/USA/CO/3/Rev.1, para 10.

74. *Ibid*, para 10. See also 'Concluding Observations' United States of America (2006), UN Doc CCPR/C/USA/CO/3/Rev.1, para 10; Legal Consequences of the Construction of a Wall (n 7) ICJ Rep.2004, paras 107s; *Democratic Republic of the Congo v Uganda*, (2005) for discussions of extraterritorial application.

75. *Velásquez Rodríguez v Honduras* (1988), paras 164–166 and 172–176; *Guerrilha do Araguaia* (2010), para 140; *Mapiripán Massacre v Colombia,* (2005), para 111; *Pueblo Bello Massacre v Colombia* (2006), para 151; *HLR v France* (1997), para 30; *D v UK*, (1997), para 49; *Z and Others v UK,* (2001), para 73; *E and Others v UK,* (2002) para 88; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, (2006), para 53; 97 Members of the Gldani Congregation *of Jehovah's Witnesses and 4 Others v Georgia,* (2007), para 96; *MC v Bulgaria,* (2003), para 149.

76. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2. This principle was also enshrined in the Charter of the Nuremberg and Tokyo Tribunals 1946, and subsequently reaffirmed by the UN General Assembly. It can also be found in the statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia and, with minor modification, in the statute of the International Criminal Court.

and hold those responsible for committing them to account.[77] The right of an individual to protection against torture and other prohibited forms of ill-treatment includes the right not to be returned to a country where there are substantial grounds for believing that he or she is at risk of suffering such treatment.[78] People have a right not to be forcibly returned where they are at risk of suffering torture – even if they have not yet been recognised as refugees. A state responding to an extradition request also needs to ensure that the other country is complying with its obligations under international law in respect of torture and ill-treatment before it may hand someone over to that jurisdiction.[79]

Individuals may be at risk of ill-treatment before they are subject to legal formalities such as arrest and charge.[80] Indeed it is during the period immediately following deprivation of liberty that the risk of torture is at its greatest.[81] The international standards cited in this Manual, therefore, apply from the moment that someone is deprived of his or her liberty.[82]

77. *Ibid*, Articles 4, 5, 7, 12 and 13. See also Human Rights Committee General Comment 20, paras 13 and 14.

78. *Ibid*, Article 3; Convention Relating to the Status of Refugees, Article 33; *Chahal v UK*, ECtHR, (1996), paras 96 and 107; *HLR v France*, ECtHR, (1997), para 30; *Salah Sheekh v the Netherlands*, ECtHR, (2007), paras 135 and 136; *AD v the Netherlands*, (2000) UN Doc CAT/C/23/D/96/1997, para 7.2; *MMK v Sweden*, (2005) UN Doc CAT/C/34/D/221/2002, para 8.1; *Alzery v Sweden*, (2006) UN Doc CCPR/C/88/D/1416/2005, para 11.3.

79. *Soering v UK*, ECtHR, (1989), para 86; *Mamatkulov and Askarov v Turkey*, ECtHR, (2005), para 67; *Salah Sheekh v the Netherlands*, ECtHR, (2007), para 136.

80. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment uses the following terms: (a) 'Arrest' means the act of apprehending a person for the alleged commission of an offence or by the action of an authority; (b) 'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence; (c) 'Imprisoned person' means any person deprived of personal liberty as a result of conviction for an offence; (d) 'Detention' means the condition of detained persons as defined above; (e) 'Imprisonment' means the condition of imprisoned persons as defined above; (f) The words 'a judicial or other authority' mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

81. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the CPT Standards, Substantive Sections of the CPT's General Reports, Council of Europe, October 2001, CPT/Inf/E (2002), 12, para 41.

82. See also Heidi Ann Cerneka, José de Jesus Filho, Fernanda Emy Matsuda, Michael Mary Nolan and Denise Blanes, Tecer Justiça: presas e presos provisórios na cidade de São Paulo, Instituto Terra, Trabalho e Cidadania e Pastoral Carcerária Nacional; coordenação de obra coletiva (São Paulo ITTC 2012).

CHAPTER 3

Defining Torture and International Mechanisms to Combat Torture

Introduction

This chapter discusses the international legal definition of torture and other forms of cruel, inhuman or degrading treatment or punishment and provides a guide to the international mechanisms that have been created to combat it. UN and regional bodies have been established by international treaties to monitor compliance with human rights standards in general and the prevention of torture in particular. There are also a number of other monitoring bodies and international standards which provide detailed guidance on how states can comply with their obligations. The most recent international development has been the creation of a new Optional Protocol to the UN Convention against Torture (OPCAT). This is an innovative proactive operational treaty which establishes a national and international system of regular preventative visits to places of detention. Brazil is currently in the process of creating the national preventive mechanisms which the Protocol envisages, and this issue is discussed further in Chapter Nine of this Manual.

Legal definitions

Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('Convention against Torture' or 'UNCAT') sets out an internationally agreed definition of acts that constitute 'torture'. This states that:

> '1. For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.'

The exact boundaries between 'torture' and other forms of 'cruel, inhuman or degrading treatment or punishment' are often difficult to identify and may depend on the particular circumstances of the case and the characteristics of the particular victim. Both terms cover mental and physical ill-treatment that has been intentionally inflicted. However,

international monitoring bodies have chosen to distinguish between them in slightly different ways. According to Article 1 of the Convention against Torture, the 'essential elements' of what constitutes torture include:

- the infliction of severe mental or physical pain or suffering;
- by or with the consent or acquiescence of the state authorities;
- for a specific purpose, such as gaining information, punishment or intimidation.

In contrast, international criminal law does not require any particular status of the perpetrator. The International Criminal Tribunal for the former Yugoslavia (ICTY) has noted that '[t]he characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it.'[1] However, torture when committed either as a war crime or a crime against humanity (a widespread or systematic attack directed against a civilian population) implicitly involves a certain degree of organisation by the perpetrators and some type of 'command and control' function by those directing the activities. Both human rights law and the laws of armed conflict, therefore distinguish 'torture' from purely private acts of cruelty in that they involve either official sanction of the crime or some link of power or control between the perpetrator and the victim.[2]

1. *Prosecutor v Kunarac and Others,* (2001), para 495.

2. See Rodley, 2011, 89–91.

Brazil's Law on the Crime of Torture (1997) does not require any level of involvement or acquiescence by a state official for an act to be classed as torture and the crime applies to private as well as public actions. As Article 1(2) of UNACT makes clear, there is nothing to prevent a state from including a broader definition of torture under its national laws than that provided for in the Convention itself. However, states are still required to report to the Committee on the frequency of and action in response to acts of torture as defined in the Convention. This means that they need to keep records that distinguish between acts of torture committed by or with the acquiescence of public officials and those committed by private actors. Torture that takes place by or with the acquiescence of public officials – acting with or without official sanction – should be considered a particularly serious offence because it represents an abuse of power by the authorities and a violation of trust by the government over the governed.

3. Human Rights Committee, 'General Comment No 31 (2004); Concluding Observations', United States of America (2006), UN Doc CCPR/C/USA/CO/3/Rev.1, para 10.

As noted in the previous chapter, international human rights law creates a number of distinct but interrelated obligations on states, which are often referred to as the obligations to *respect, protect and fulfil*.[3] This means that a state may be held accountable for acts carried out by private individuals if it supports or tolerates them, or fails in other ways to provide effective protection in law against them.[4] In 1992, the Human Rights Committee (HRC) stated in a general comment on Article 7 (freedom from torture) that

4. *Velásquez Rodríguez v Honduras,* (1988), paras 164–166 and 172–176; Guerrilha do Araguaia, (2010), para 140; *Mapiripán Massacre v Colombia*, (2005), para 111; *Pueblo Bello Massacre v Colombia*, (2006), para 151; *HLR v France*, (1997), para 30; *D v UK*, (1997), para 49; *Z and Others v UK*, (2001), para 73; *E and Others v UK*, (2002), para 88; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, (2006), para 53; 97 *Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*, (2007), para 96; *MC v Bulgaria,* (2003), para 149.

'[i]t is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.'[5] It further elaborated on this in a general comment in 2004:

> 'The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.'[6]

Neither the HRC nor the Committee against Torture has found it necessary to make stark distinctions between torture and other prohibited ill-treatment. Some regional monitoring mechanisms have tended towards a distinction based on relative severity of suffering, while the UN monitoring bodies have tended to use the existence or otherwise of a purposive element to determine whether or not the behaviour constitutes torture. *Cruel treatment,* and *inhuman* or *degrading treatment* or *punishment* can therefore be defined as ill-treatment that falls short of torture, either because it has not been inflicted for a specific purpose, or it has caused pain or suffering less severe than torture. Such treatment will also usually involve humiliation and debasement of the victim and there does have to be an intent to expose someone to that treatment.

5. Human Rights Committee, General Comment No 20, 1992, para 2.

6. Human Rights Committee, General Comment No 31, 26 May 2004.

It is often difficult to identify the exact boundaries between the different forms of ill-treatment as this requires an assessment about degrees of suffering that may depend on the particular circumstances of the case and the characteristics of the particular victim. In some cases, certain forms of ill-treatment or certain aspects of detention that would not constitute torture on their own may do so in combination with each other. For example, in *Aydın v Turkey*, the European Court of Human Rights (the 'Court') found that the accumulation of acts of physical and mental violence inflicted on the applicant in which she was raped as well as being 'blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water' amounted to torture.[7] Similarly in *Akkoç*, 'electric shocks, hot-and-cold water treatment, and blows to the head', along with 'psychological pressure' led to a European Court finding that torture had been inflicted.[8] In *Maslova and Nalbandov*, the same Court found the accumulation of various acts amounted to torture, notably, blows to the head, feet and stomach, thumb-cuffs, suffocation and electric shocks, as well as 'especially cruel acts of repeated rape'.[9] The Inter-American Court of Human Rights similarly found in *Tibi v Ecuador* that abuse cumulatively meted out over a two-month period, involving punches to the body and head, cigarette burns on the legs and electric shocks to the genitals, constituted torture without the need to analyse and categorise each individual act of abuse to which the victim was subjected.[10] In the case *Kvocka et al*, the ICTY Appeal Chamber indicated that assessing whether the threshold of severe pain and suffering has been crossed need not require a separate analysis of the effect of each individual act considered in isolation.[11]

Although the Court still tends towards a distinction based on relative severity of suffering,[12] it noted in *Selmouni v France*, in 1999, that, '[c]ertain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future... the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'[13] This judgment also contained the Court's first reference to the definition of torture in Article 1 UNCAT, emphasising the purposive element. The Court has referred to the UNCAT in several of its subsequent decisions, noting in *Ilhan v Turkey* that, 'in addition to the severity of the treatment, there is a purposive element as recognized in the United Nations Convention against Torture... which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating.'[14]

The Inter-American Court and Commission generally refrain from distinguishing between torture and other forms of ill-treatment in their

7. *Aydın v Turkey* ECtHR, (1997), para 86. The Court did not opt to separate out the rape question, affirming that 'indeed the Court would have reached this conclusion on either of these grounds taken separately'.

8. *Akkoç v Turkey,* ECtHR, (2000), para 116.

9. *Maslova and Nalbandov v Russia,* ECtHR, (2008), para 108.

10. *Tibi v Ecuador* (2004) Series C No 114, paras 148, 162. See also *Bamaca-Velasquez v Guatemala*, (2000), para 145c.

11. *Prosecutor v Kvocka and Others,* (2005), paras 285–91.

12. *Ireland v UK*, ECtHR, (1978), para 167. See also *Ilascu and Others v Moldova* and Russia, ECtHR, (2004), paras 426–7; *Chitayev and Chitayev v Russia*, ECtHR, (2007), paras 153–9; *Saadi v Italy*, ECtHR, (2008), paras 134–6; *Labita v Italy*, ECtHR, (2000) para 120; *Ocalan v Turkey*, ECtHR, (2005), para 181; *Denizci and others v Cyprus,* ECtHR, (2001) para 382; *Elci and Others v Turkey*, ECtHR, (2003), para 641; *Kemal Kahraman v Turkey*, ECtHR, (2008); *Getiren v Turkey*, ECtHR, (2008), *Osman Karademir v Turkey*, ECtHR, (2008).

13. *Selmouni v France*, ECtHR, (1999), para 101.

14. *Ilhan v Turkey*, ECtHR, (2000), para 85. See also *Salman v Turkey*, ECtHR, (2000), para 114; *Akkoç v Turkey,* ECtHR, (2000), para 155; *Bati and Others v Turkey*, ECtHR, (2004), para 122; *Mammadov (Jalalogulu) v Azerbaijan*, ECtHR, (2007), para 68; *Carabulea v Romania*, ECtHR, (2010), para 147; *Nechiporuk and Yonkalo v Ukraine*, ECtHR, (2011), para 149; *Dikme v Turkey,* ECtHR, paras 94 and 96; *Durmus Kurt and Others v Turkey*, ECtHR, (2007), para 31; *Erdogan Yılmaz and Others v Turkey,* ECtHR, (2008), para 50; *Ilascu and Others v Moldova and Russia*, ECtHR, (2004), para 426; *Kismir v Turkey,* ECtHR, (2005), para 129.

judgments, although they acknowledge the distinctions set out in the European jurisprudence.[15] In *Loayza-Tamayo v Peru*, the Court found that '[t]he violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.'[16] In *Gómez-Paquiyauri Brothers v Peru*, it stated that the 'analysis of the gravity of the acts that may constitute cruel, inhuman or degrading treatment or torture, is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and health of the victim, among others.'[17] The Court has also maintained that the distinction between torture and other prohibited acts is not rigid, but rather evolves in light of growing demands for protection of fundamental rights and freedoms. Thus, an act that in the past may have been deemed cruel, inhuman and degrading treatment or punishment, could in the future constitute torture.[18]

Some specific acts have been identified as constituting torture: notably the use of the *falanga* (beating on the soles of the feet, which is excruciatingly painful and causes swelling, but otherwise leaves no physical trace);[19] 'Palestinian' hanging (suspension by the arms, with the arms tied together behind the back);[20] suffocation in water[21] (including the practice of 'water-boarding');[22] rape (which was defined in the *Miguel Castro-Castro Prison* case as including not only 'non-consensual sexual vaginal relationship, as traditionally considered' but also 'an act of vaginal or anal penetration without the victim's consent, through the use of other parts of the aggressor's body or objects');[23] as well as crude physical battery in the form of sustained beatings.[24]

Nevertheless, the accepted approach under international law has been to avoid drawing up an exhaustive list of acts that could be considered to amount to torture or other forms of prohibited ill-treatment because of concerns that such a list may prove too limited in its scope and, thus, may fail to adequately respond to developments in technology and values within societies.[25] The HRC has stated that: 'The Covenant does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.'[26] It has, however, stated that the prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[27] For example, it found that in *Grille Motta v Uruguay,* the applicant had been subjected to 'torture and

15. *Cantoral-Benavides v Peru*, IACHR, (2000), paras 95–102. See also, *Luis Lizardo Cabrera v Dominican Republic,* IACHR, (1998), para 76; and *Gómez-Paquiyauri Brothers v Peru*, IACHR, (2004), para 116.

16. *Loayza-Tamayo v Peru*, IACHR, (1997), para 75 and 76.

17. *Gómez-Paquiyauri Brothers v Peru,* IACHR, (2004), para 113.

18. *Cantoral-Benavides v Peru*, IACHR, (2009), paras 99 and 104.

19. *The Greek Case* (1969), paras 499, 500 and 504; *Batı and Others v Turkey,* ECtHR, (2004), paras 114 and 117; *Mammadov (Jalaloglu) v Azerbaijan,* ECtHR, (2007), paras 66, 68–9; *Diri v Turkey*, ECtHR, (2007), paras 43–5.

20. *Batı v Turkey*, ECtHR, (2004), (Nos 33097/96; 57834/00) paras 114 and 117; *Mammadov (Jalaloglu) v Azerbaijan,* ECtHR, 2007, paras 66, 68–9; *Diri v Turkey,* ECtHR, (2007), paras 43–5.

21. See, for example: *Arhuacos (Villafane Chaparro et al) v Colombia* (1997), in which the Human Rights Committee found that the Villafane brothers had been tortured because of being 'blindfolded and dunked in a canal' (para 8.5); the Judgment of the International Military Tribunal for the Far East, 1 November 1948, 1057–9.

22. Immediately after assuming office, President Obama ordered that 'officers, employees, and other agents of the United States Government… may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation… issued by the Department of Justice between September 11, 2001, and January 20, 2009': Executive Order—Ensuring Lawful Interrogations, 22 January 2009, para 3(c).

23. *Miguel Castro-Castro Prison v Peru* (2006), para 311. See also *Aydın v Turkey,* ECtHR, (1997), para 86; *Mejía v Perú*, IACHR, (1996), 157, 186–7; see also *Gonzalez Perez v Mexico,* IACHR, (2000), paras 45–52; *Prosecutor v Furundzija*, ICTY, (1998), para 163.

24. *Paniagua-Morales and Others v Guatemala*, IACHR, 1998, para 134; *Ali Ben Salem v Tunisia*, (2007), paras 2.3 and 16.4; *Dragan Dimitrijevic v Serbia and Montenegro*, (2004), paras 2.1–2.2, 5.3; *Dimitrov v Serbia and Montenegro,* (2005), and *Danilo Dimitrijevic v Serbia and Montenegro*, (2005); *Saadia Ali v Tunisia* (2008) UN Doc CAT/C/41/D/291/2006, para 15.4.

25. Nigel Rodley, *The Treatment of Prisoners under International Law* (Oxford University Press 1999) 75–107.

26. Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 30 (1994), para 4.

27. *Ibid,* para 5.

inhuman treatment' after hearing that he had suffered 'the application of electric shocks, the use of the "*submarino*" (putting the detainee's hooded head into foul water), insertion of bottles or barrels of automatic rifles into his anus and forcing him to remain standing, hooded and handcuffed and with a piece of wood thrust into his mouth, for several days and nights'.[28]

28. *Grille Motta v Uruguay,* (1980), paras 2 and 16. See also *Sendic v Uruguay,* (1982), paras 16(2) and 20; *Estrella v Uruguay*, (1983), para 1.6; *Muteba v Zaire*, (1984), paras 10.2 and 12.

Neither the American Convention on Human Rights nor the Inter-American Convention to Prevent and Punish Torture defines the types of conduct that constitute torture or cruel, inhuman or degrading treatment, nor do they differentiate between the prohibited acts.[29]

29. Article 5 (2) ACHR, Article 2(1) of the Inter-American Convention to Prevent and Punish Torture defines it considerably more broadly than the UNACT definition.

The drafters of the Geneva Conventions also avoided a detailed list of prohibited acts. In its Commentary on the Geneva Conventions, the International Committee of the Red Cross has stated: 'It is always dangerous to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible, and, at the same time, precise.'[30] The Association for the Prevention of Torture has also noted that:

30. Jean Pictet, *Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, 1958, 39.

> 'The lack of a definition of "other forms of ill-treatment" is useful as it ensures that other types of abuse that may fail to meet the strict UNCAT [Convention against Torture] definition of torture as a crime, but that nevertheless cause suffering to individuals, are also absolutely prohibited. This affords the broadest possible protection against various assaults on persons' human dignity. Over the years, a broad range of forms of treatment and punishment has been recognised as cruel, inhuman or degrading; the jurisprudence of international and regional human rights bodies and experts has been particularly helpful in identifying forms of treatment and punishment that may amount to cruel, inhuman, or degrading treatment or punishment. For example, poor conditions of detention (such as over-crowding), lack of adequate sanitary provision, lack of light, lack of exercise; the use of certain forms of mechanical restraints; denigration of religious symbols and publications; and excessive use of force during riot control have, in specific circumstances, been considered by human rights bodies to amount to cruel, inhuman or degrading treatment or punishment.'[31]

31. *Optional Protocol to the UN Convention against Torture Implementation Manual* (revised edition), Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR), 2010.

Torture can also include mental suffering. For example, in *Estrella v Uruguay*, the HRC found that the applicant, a concert pianist, was subjected to: '... severe... psychological torture, including the threat that... [his] hands would be cut off by an electric saw, in an effort to force him

to admit subversive activities'.[32] The applicant was told by his torturers: 'We are going to do the same to you as Victor Jara.' After his ordeal, he suffered a loss of sensitivity in both arms and hands for 11 months, as well as discomfort that still persists in the right thumb, and severe pain in the knees.[33] In the case of *Maritza Urrutia*, the Inter-American Court of Human Rights ruled that a woman who having been 'unlawfully and arbitrarily detained', suffered torture when her head was placed in a hood and she was kept handcuffed to a bed, 'in a room with the light on and the radio at full volume... [S]he was subjected to very prolonged interrogations, during which she was shown photographs of individuals who showed signs of torture or had been killed in combat and she was threatened that she would be found by her family in the same way'. She was also threatened with physical torture.[34] The Court implicitly acknowledged that such threats had to be credible and be believed by the victim when it pointed out that the threatened treatment was 'according to the practice that prevailed at that time' in Guatemala (1992).[35]

Both the Committee against Torture and the Special Rapporteur on Torture have concluded that some of the 'enhanced interrogation' techniques practised by both the governments of Israel and the United States against terrorist suspects constituted torture or cruel, inhuman or degrading treatment or punishment.[36] The US interrogation regime included: the use of prolonged stress positions and isolation; sensory deprivation; hooding; exposure to cold or heat; sleep and dietary adjustments; 20-hour interrogations; removal of clothing and deprivation of all comfort and religious items; forced grooming; and exploitation of detainees' individual phobias.[37] The Committee against Torture has stated that:

> '[It] is concerned that in 2002 the State party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that "confusing interrogation rules" and techniques defined in vague and general terms, such as "stress positions", have led to serious abuses of detainees (arts 11, 1, 2 and 16). The State party should rescind any interrogation technique, including methods involving sexual humiliation, "water-boarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.'[38]

The Human Rights Committee also considered these techniques to violate Article 7 of the ICCPR, but consistent with its current general practice it refrained from indicating what aspect of the prohibition was involved.[39]

32. *Estrella v Uruguay,* (1983); *Maritza Urrutia v Guatemala* (2003), paras 91–5.

33. *Ibid*, para 1.6.

34. *Maritza Urrutia v Guatemala,* (2003), paras 85 and 91–5. See also, *Cariboni v Uruguay*, (1988) paras 4 and 10.

35. *Ibid*, para 194.

36. UN Doc A/52/44, para 257; UN Doc E/CN.4/1997/7, para 121; UN Doc CCPR/C/79/Add.93 (1998), para 121; UN Doc CCPR/C/USA/CO/3/Rev.1 (2006), para 13; Committee against Torture, Conclusions and Recommendations: United States of America, UN Doc CAT/C/USA/CO/2 (25 July 2006), para 24.

37. UN Doc CCPR/C/USA/CO/3/Rev.1 (2006), para 13. See also Committee against Torture, Conclusions and Recommendations: United States of America, UN Doc CAT/C/USA/CO/2 (25 July 2006), para 24.

38. Committee against Torture, Thirty-sixth session, 1–19 May 2006, Consideration of reports submitted by States Parties, under Article 19 of the convention, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July 2006, para 24.

39. UN Doc CCPR/C/79/Add.93 (1998), para 121.

These techniques have also subsequently been ruled illegal by the Israeli Supreme Court and the US government.[40]

40. *Public Committee against Torture in Israel v State of Israel*: HCI 5100/94 (1999); US Government Executive Order – Ensuring Lawful Interrogations, 22 January 2009, para 3(c).

While the legal distinction between acts of torture and other forms of ill-treatment is still significant, both are absolutely prohibited under international law at all times and preventing them requires similar measures. It is, therefore, often less useful to focus on trying to define particular abuses of the rights of people deprived of their liberty than to find ways of preventing such abuses occurring.

International supervisory machinery and complaints procedures

As discussed in the previous chapter, while international law does not substitute itself for national law, it does place states under certain obligations to comply with its provisions. The international community has developed standards to protect people against torture that apply to all legal systems in the world. The standards take into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide. Legal professionals in Brazil have a responsibility to ensure that these standards are adhered to, within the framework of the Brazilian legal system.

A number of UN bodies have been created by particular conventions to monitor compliance with human rights standards and provide guidance on how they should be interpreted. These bodies issue general comments and recommendations, review reports by States Parties and issue concluding observations on the compliance of a state with the relevant convention. Some also consider complaints from individuals who claim to have suffered violations. In this way, they can provide authoritative interpretations of the treaty provisions and the obligations that these place on States Parties. The UN has also set up a number of extra-conventional mechanisms to examine particular issues of special concern to the international community or the situation in specific countries. These monitor all states, irrespective of whether they have ratified a particular convention, and can draw attention to particular violations.

Many of the more detailed safeguards against torture are contained in 'soft law' instruments – such as declarations, resolutions or bodies of principles – or in the reports of international monitoring bodies and institutions. While not directly binding, these standards have the persuasive power of having been negotiated by governments and/or adopted by political bodies such as the UN General Assembly. Sometimes they affirm principles that are already considered to be legally binding as principles of general or customary international law. They often also spell out in more detail the

necessary steps to be taken in order to safeguard the fundamental right of all people to be protected against torture.

The various monitoring bodies also frequently refer to one another's findings and jurisprudence. This Manual, therefore, includes a discussion of the work of regional organisations, such as the Council of Europe and the European Committee for the Prevention of Torture, as these can provide important guidance for legal professionals in Brazil.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

The UN Convention against Torture was adopted by the UN General Assembly in 1984. One hundred and forty-nine states were party to the Convention by July 2011.[41] The Convention defines torture and specifies that States Parties must prohibit torture in all circumstances. Torture cannot be justified during a state of emergency, or other exceptional circumstances, or because of superior orders received by an official.[42] The Convention prohibits the forcible return or extradition of a person to another country where he or she is at risk of torture.[43] States must ensure that all acts of torture are offences under its criminal law – including complicity and participation in and incitement to such acts.[44] States must establish jurisdiction over such offences in cases of torture where the alleged offenders are not extradited to face prosecution in another state, regardless of the state in which the torture was committed or the nationality of the perpetrator or the victim ('universal jurisdiction').[45] In exercising universal jurisdiction, states are obliged to take suspected perpetrators of torture into custody, to undertake inquiries into allegations of torture and to submit suspected torturers to the prosecuting authorities.[46] States must also cooperate with one another to bring torturers to justice.[47] Statements made as a result of torture may not be invoked in evidence – except against the alleged torturer.[48] Victims of torture also have a right to redress and adequate compensation.[49]

41. United Nations Treaty Collection Database, accessed 20 July 2011.

42. UNCAT, Article 2.

43. *Ibid*, Article3.

44. *Ibid*, Article 4.

45. *Ibid*, Article 5.

46. *Ibid*, Articles 6–8.

47. *Ibid* Article 9.

48. *Ibid*, Article 15.

49. *Ibid*, Article 14.

The Convention against Torture also obliges States Parties to take effective measures to combat torture. States undertake to train law enforcement and medical personnel, and any other persons who may be involved in the custody, interrogation or treatment of detained individuals, about the prohibition of torture and ill-treatment.[50] Interrogation rules and custody arrangements are to be kept under review with a view to preventing any acts of torture and ill-treatment.[51] States must actively investigate acts of torture and ill-treatment – even if there has not been a formal complaint about it.[52] Individuals have a right to complain about acts of torture and ill-treatment, to have their complaints investigated and to be offered protection against consequent intimidation or ill-treatment.[53]

50. *Ibid*, Article 10.

51. *Ibid*, Article 11.

52. *Ibid*, Article 12.

53. *Ibid*, Article 13.

Acts of cruel, inhuman or degrading treatment or punishment that do not amount to acts of torture are also prohibited, by Article 16 of the Convention. As discussed above, not all acts of 'cruel, inhuman or degrading treatment or punishment' necessarily constitute 'torture' and the protections provided against these forms of ill-treatment in the Convention are more limited.[54] However, the Committee against Torture has interpreted this Article progressively to include elements of some of the missing articles.[55]

54. The Convention does not specify that the provisions of Article 16 shall cover Articles 14 (the right to compensation) and 15 (inadmissibility of statements made under torture) and Article 3 (non-expulsion).

55. See Committee against Torture para 3; *Hajrizi Dzemajl v Yugoslavia* (2002), which ruled that there was a duty to provide redress and compensation for other ill-treatment as well as torture.

The Convention also creates the Committee against Torture, which is a body of ten independent experts. It considers reports submitted by States Parties regarding their implementation of the provisions of the Convention and issues concluding observations. It may examine communications from individuals, if the state concerned has agreed to this procedure by making a declaration under Article 22 of the Convention. There is also a procedure, under Article 20, by which the Committee may initiate an investigation if it considers there to be 'well-founded indications that torture is being systematically practised in the territory of a State Party'. A new Optional Protocol was adopted by the UN General Assembly in December 2002, and entered into force four years later, which establishes a system of regular visits to places of detention; this is discussed further below.

The Optional Protocol to the UN Convention against Torture

The Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) entered into force in June 2006.[56] Brazil ratified it in January 2007. OPCAT establishes a system of regular visits to all places of detention and these form the basis of recommendations from international and national experts on improving measures to prevent torture and other forms of ill-treatment within the countries visited.

56. The initiative was promoted by the Mexican delegation to the UN with the backing of a number of other Latin American states. It was eventually adopted by 127 states who voted in favour, with 42 abstentions and only four states – Marshall Island, Nigeria, the United States of America and Palau Island – voting against.

OPCAT creates a new international expert body: the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('SPT'), which exists under the Committee against Torture. It also requires States Parties to establish or designate National Preventive Mechanisms (NPMs), based on a set of criteria established within its provisions, to carry out preventive work at the national level. A State Party is expected to have an NPM (or NPMs) in place one year after ratification or accession[57] and OPCAT sets out specific guarantees and safeguards in respect of national visiting bodies that must be respected in order to guarantee the effective and independent functioning.

57. OPCAT, Article 17.

The OPCAT is an operational treaty rather than a standard-setting instrument and it stands in addition to the UNCAT, its parent treaty, rather than replacing it or duplicating its provisions. When a state becomes a

party to the OPCAT it does not gain any additional reporting requirements: States Parties do not have to submit periodic reports to the SPT. Instead, the OPCAT establishes a set of obligations of a practical nature. The OPCAT is also widely viewed as an exciting and innovative development in the field of international human rights law for four main reasons: [58]

58. *Optional Protocol to the UN Convention against Torture Implementation Manual* (revised edition), Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR), 2010, 13–15.

- **It emphasises prevention.** Most human rights mechanisms monitor for reports of violations after they have occurred and may only conduct visits to countries, with the permission of the state to investigate 'well-founded allegations' of abuse. However, when a state ratifies the OPCAT it is giving its express consent to allow regular, unannounced visits by international and national experts to all types of places where people are deprived of their liberty. Preventive visits enable OPCAT bodies to identify risk factors, analyse both systemic faults and patterns of failures and propose recommendations to address the root causes of torture and other ill-treatment. The long-term objective of the OPCAT is to mitigate the risks of ill-treatment and, thus, build an environment where torture is unlikely to occur.
- **It combines complementary international and national efforts.** Both the SPT and the NPMs are expected to conduct regular visits to places of detention in order to improve the treatment and conditions of persons deprived of their liberty and the administration of places of detention in order to prevent torture and ill-treatment. They are also mandated to propose recommendations to help prevent torture and other forms of ill-treatment and to work constructively with States Parties in relation to implementing these recommendations. This combination of national and international preventative work breaks important new ground in human rights protection.
- **It emphasises cooperation, not condemnation.** The mandate of the OPCAT bodies is based on the premise of long-term, sustained cooperation and dialogue with States Parties in order to improve conditions of detention and to implement any changes necessary to prevent torture and other ill-treatment. Other human rights mechanisms also seek to establish constructive dialogue, but they are based on the public examination of states' compliance with their obligations through a reporting procedure and/or an individual complaints system. This often creates an adversarial relationship in which states seek to defend their records rather than seek to improve them.
- **It establishes a triangular relationship between the OPCAT bodies and States Parties.** The OPCAT establishes a unique set of obligations, corresponding duties and points of contact between the States Parties, the SPT and NPMs. The SPT and NPMs have the power to conduct visits to places of detention. States Parties are obligated to allow these visits. The SPT and NPMs have the power to propose

recommendations for change and States Parties are obligated to consider their recommendations. The SPT and NPMs must be able to maintain contact and States Parties are obligated to facilitate direct contact, on a confidential basis, if required.

States Parties not only have an obligation to cooperate with the SPT and NPMs, but by assisting these mechanisms in identifying the specific changes needed to improve their systems of deprivation of liberty, in the long-term states can demonstrate their commitment to preventing torture and other ill-treatment. The experience of organisations such as the International Committee of the Red Cross (ICRC) and the European Committee for the Prevention of Torture (CPT), which is discussed further below, has demonstrated that regular visits to places of detention can be extremely effective for preventing torture and other ill-treatment. The possibility of being subjected to unannounced external scrutiny can have an important deterrent effect. Moreover, visits enable independent experts to examine conditions in detention facilities at first hand. This assists them in making realistic, practical recommendations and entering into dialogue with the national authorities in order to improve the situation.

OPCAT does not dictate the form that these mechanisms must take, thereby providing the flexibility for States Parties to designate one or several bodies of their choosing, including new specialised bodies, existing human rights commissions, ombudsperson's offices and parliamentary commissions. However, each national mechanism, irrespective of the form it takes, must comply with the minimum guarantees and powers set out in the OPCAT.[59] The NPMs are currently being created in a variety of ways and at varying speed. Some states have identified existing bodies to take on the preventive NPM mandate. Others have created new bodies to take on this new role.

59. OPCAT, Articles 18–20.

The first NPM in Brazil was created by law in Alagoas in 2009;[60] the second in Rio de Janeiro in 2010; [61] and the third one in Paraíba in 2011.[62] However, at the time of publication of this Manual, only Rio de Janeiro had made institutional arrangements for these bodies and appointed its members. The Rio NPM is discussed in greater detail in Chapter Nine of this Manual.

60. Law 7141/2009 of the State of Alagoas.

61. Law 5778/2010 of the State of Rio de Janeiro.

62. Law 9413/2011 of the State of Paraíba.

The SPT began its global work in February 2007 with ten members. Its membership increased to 25 in 2010, making it the largest human rights treaty body of the UN. It has developed a programme of preventive visits and extended its relations with other actors, particularly with the NPMs. In order to build trust and a positive collaborative relationship, the SPT is mandated to work confidentially with a State Party if the state wishes. However, in ratifying OPCAT, States Parties agree to open up all places of detention under its jurisdiction and control to external scrutiny, to provide

information to its NPM(s) and the SPT on domestic detention procedures and preventive measures, to consider the recommendations of its NPM(s) and the SPT, and to publish the annual reports of its NPM(s). As well as providing recommendations and observations to improve the protection of persons deprived of their liberty, the SPT also has an important advisory role to play in the establishment, designation and functioning of NPMs. The role of the SPT in respect of NPMs has four key dimensions:

- advising States Parties on the establishment or designation of NPMs;
- advising States Parties on the functioning of NPMs;
- advising NPMs directly on their mandate and effective functioning; and
- advising on measures to protect persons.

The SPT has recognised the importance of an integrated approach to prevention and has stated that its own mandate extends beyond commenting on the situation in places of detention observed during visits to looking at 'legal and system features' within States Parties in order to identify where the gaps in protection exist and which safeguards require strengthening.[63] It is important that this broad approach is replicated by the NPMs; indeed, the OPCAT contains specific requirements for NPMs to address issues observed through visiting, and to comment on any relevant domestic legislation, as a fundamental part of their preventive mandate.

63. SPT, *First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, February 2007 to March 2008, UN Doc CAT/C/40/2, 14 May 2008, para 12.

The OPCAT also provides for the creation of a special fund to support the education and training programmes of the NPMs, and to give practical assistance to States Parties in fully implementing the recommendations of the SPT.[64] This article reinforces the importance of cooperative dialogue in assisting States Parties to implement their existing obligations (including under the UNCAT) to take measures to prevent torture and other ill-treatment. Projects to be financed could aim to improve conditions of detention, the protection of detainees against ill-treatment or programmes relating to the reform of a State Party's criminal justice and/or prison system. This could include:

64. OPCAT, Article 26.

- legislative reforms;
- training of judges, prosecutors, law enforcement officials and prison guards;
- review of interrogation methods;
- forensic examination of detainees;
- anti-torture complaints and investigations mechanisms;
- anti-corruption programmes in the context of the administration of criminal justice; and
- all other measures aimed at preventing torture in accordance with the respective provisions of the CAT and other relevant UN and regional instruments.

Making express provision for funds to be made available to assist States Parties in meeting their obligations is another novel aspect of the OPCAT and reflects its specific preventive approach. The addition of this article is widely recognised as having been a key element in ensuring the adoption of the OPCAT by Member States of the UN as many were concerned about the financial implications of the obligations to establish, designate or maintain NPMs and to implement recommendations from the SPT and NPMs. However, not all SPT recommendations necessarily have significant financial implications. Indeed, States Parties should be encouraged to take measures that do not have major financial implications, such as guaranteeing procedural safeguards. Thus, the OPCAT Special Fund is expected to prioritise projects that help to implement recommendations with significant financial implications.

The Human Rights Committee and other UN treaty-monitoring bodies

The HRC is established as a monitoring body by the International Covenant on Civil and Political Rights (ICCPR).[65] The Committee comprises 18 independent experts elected by the States Parties to the Covenant. It examines reports that States Parties are obliged to submit periodically and issues concluding observations that draw attention to points of concern and make specific recommendations to the state. The Committee can also consider communications from individuals who claim to have been the victims of violations of the Covenant by a State Party. For this procedure to apply to individuals, the state must also have become a party to the first Optional Protocol to the Covenant.[66] The Committee has also issued a series of General Comments, to elaborate on the meaning of various Articles of the Covenant and the requirements that these place on States Parties. As well as prohibiting torture and all other forms of ill-treatment in Article 7, the ICCPR also requires States Parties to ensure that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' in Article 10.

65. ICCPR, Article 28.

66. Brazil acceded to the Optional Protocol on 25 September 2009.

A number of other international human rights treaties also establish committees that monitor state compliance with their provisions and perform similar functions to the HRC. These include: the International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Social, Economic and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of the Child. All of these treaties also contain prohibitions on torture and other forms of cruel, inhuman or degrading treatment or punishment and states are required to report on what measures they are taking to combat these practices.

Regional mechanisms

A number of regional human rights treaties have also been developed within the Council of Europe (CoE), the Organization of American States (OAS) and the African Union (AU).[67] The rights protected by these treaties derive from, and are similar to, those of the Universal Declaration of Human Rights, but each treaty has developed unique approaches when seeking to implement them. The principal instruments referred to here are:

67. Formerly the Organisation for African Unity (OAU).

- the European Convention on Human Rights;
- the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment;[68]
- the American Convention on Human Rights;
- the Inter-American Convention to Prevent and Punish Torture;[69] and
- the African Charter on Human and Peoples' Rights.

68. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, CPT Doc. Inf/C (2002) Strasbourg, 26.XI, amended according to Protocols No 1 (European Treaty Series No 151) and No 2 (European Treaty Series No 152).

69. Inter-American Convention to Prevent and Punish Torture, A-51, Organization of American States, Treaty Series No 67, entered into force 28 February 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83, 1992.

The European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human Rights and the African Court on Human Rights are responsible for monitoring state-compliance with their respective treaties. These bodies examine allegations of torture on the same level as other alleged human rights violations. However, the Council of Europe has also created a specific body for preventing torture in its Member States.

The European Committee for the Prevention of Torture (CPT) was set up under the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. It is composed of as many independent and impartial members as there are States Parties to the Convention and may be assisted by ad hoc experts. Currently, all members of the Council of Europe have also ratified the European Convention for the Prevention of Torture. The CPT conducts periodic and ad hoc visits in any places under the jurisdiction of a contracting state where persons are deprived of their liberty by a public authority. States Parties are obliged to provide the CPT with access to its territory and the right to travel without restriction; full information on the places where persons deprived of their liberty are being held; unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction; and other information which is necessary for the CPT to carry out its task.[70] The CPT is also entitled to interview, in private, persons deprived of their liberty and to communicate freely with anyone whom it believes can supply relevant information. The report on the visit and detailed recommendations sent to the government are confidential unless the government concerned decides that they can be published. In practice, most reports have been made public.

70. European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, Article 8.

The Inter-American Convention to Prevent and Punish Torture (IACPPT) also entered into force in 1987[71] and, along with the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, has developed considerable jurisprudence dealing with the protection of the right to personal integrity through reports, opinions and judgments. Although the IACPPT does not name the Inter-American Court as the organ with power to oversee its application, the Court has stated that it has jurisdiction to include supervision of the IACPPT where a state has given its consent to be bound by the IACPPT, and has accepted the jurisdiction of the Inter-American Court of Human Rights as regards the ACHR.[72] The IACPPT also forms part of Inter-American body of law, and aids the Court in fixing the content and reach of the prohibition on torture and ill-treatment contained in Article 5(2) of the American Convention.[73] The IACPPT definition of torture is considerably broader than the UNACT definition:

> '...any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish'.[74]

The Inter-American Commission and Court have also been more expansive than other international instances in their approach to the purposive element of torture, perhaps reflecting the wider definition of torture given in the IACPPT. For example, the Inter-American Commission became the first international adjudicatory body to recognise rape as torture in *Raquel Martí de Mejía v Peru*.[75] The Commission noted that rape is a method of psychological torture that often has as an objective the humiliation of the victim, as well as her or his family or community. The significance of these rulings for Brazilian law and practice are discussed further in the subsequent chapters of this Manual.

71. Brazil signed on 24 January 1986, ratified on 9 June 1989 and deposited its ratification on 20 July 1989.

72. *Paniagua-Morales and Others v Guatemala*, paras 133–36; *Villagrán Morales and Others v Guatemala*, IACHR, (1999), para 247; *Maritza Urrutia v Guatemala*, (2003), paras 95, 247 and 248; *Gómez-Paquiyauri Brothers v Peru* (2004), para 114; *Miguel Castro-Castro Prison v Peru*, IACHR, (2006), para 266.

73. *Tibi v Ecuador,* IACHR (2004), para 145. See also *La Cantuta v Peru*, IACHR, (2006), and the Interpretation of this Judgment of 30 November 2007.

74. IACPPT, Article 2(1).

75. *Mejía v Perú*, (1996), at 157.

Other relevant standards

In addition to international human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people to protection against torture and other forms of ill-treatment. Although not of themselves legally binding, they represent agreed principles that should be adhered to by all states and can provide important guidance for legal professionals in Brazil. These include:

- Standard Minimum Rules for the Treatment of Prisoners (1957 as amended in 1977);
- 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);
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985);
- Basic Principles on the Independence of the Judiciary (1985);
- Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985);
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988);
- Basic Principles for the Treatment of Prisoners (1990);
- Basic Principles on the Role of Lawyers (1990);
- Guidelines on the Role of Prosecutors (1990);
- Rules for the Protection of Juveniles Deprived of their Liberty (1990);
- 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);
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991);
- Declaration on the Protection of All Persons from Enforced Disappearance (1992); and
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) (1999).

Other monitoring mechanisms

A number of other mechanisms have been developed by the UN Commission on Human Rights to look at specific types of human rights violations wherever in the world they occur. These country-specific and thematic mechanisms include special rapporteurs, representatives and independent experts or working groups. They are created by resolution in response to situations that are considered to be of sufficient concern to require an in-depth study. The procedures report publicly to the Commission on Human Rights each year and some also report to the UN General Assembly. The main thematic mechanisms of relevance for this manual are the:

- Special Rapporteur on torture;
- Special Rapporteur on extrajudicial, summary or arbitrary executions;
- Special Rapporteur on violence against women;
- Special Rapporteur on the independence of judges and lawyers;
- Working Group on Enforced or Involuntary Disappearances; and
- Working Group on Arbitrary Detention.

Numerous other thematic mechanisms also exist. The work of these bodies is not mutually exclusive and they may make either joint or separate interventions in connection with the same allegation. Chapter Four of this Manual highlights the main findings of these bodies in relation to torture in Brazil.

The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment

This mandate was established in 1985 by the UN Commission on Human Rights. It is a non-treaty, 'UN Charter-based' body, the purpose of which is to examine international practice relating to torture in any state regardless of any treaty by which the state may be bound. On the basis of information received, the Special Rapporteur can communicate with governments and request their comments on cases that are raised. He or she can also make use of an 'urgent action' procedure, requesting a government to ensure that a particular person, or group of persons, is treated humanely. The Special Rapporteur can also conduct visits if invited, or given permission, by a state to do so. The reports of these missions are usually issued as addenda to the main report of the Special Rapporteur to the UN Commission on Human Rights.

The Special Rapporteur reports annually and publicly to the UN Commission on Human Rights and to the UN General Assembly. The reports to the Commission contain summaries of all correspondence transmitted to governments by the Special Rapporteur and of correspondence received from governments. The reports may also include general observations about the problem of torture in specific countries, but do not contain conclusions on individual torture allegations. The reports may address specific issues or developments that influence or are conducive to torture in the world, offering general conclusions and recommendations.

International criminal courts and tribunals

National criminal courts are primarily responsible for the investigation and prosecution of crimes of torture and other criminal forms of ill-treatment. A number of ad hoc international criminal tribunals have been established in recent years – including the International Criminal Tribunal

for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Crimes of torture as crimes against humanity and war crimes are included in the Statute of ICTY,[76] ICTR[77] and the Rome Statute of the International Criminal Court (ICC).[78] The Statute of the ICC was agreed in 1998 and received the 60 ratifications necessary for it to come into effect in 2002.[79] The ICC is able to prosecute some crimes of torture when national courts are unable or unwilling to do so.

76. ICTY Article 5.

77. ICTR Article 3.

78. ICC Articles 7 and 8.

79. Brazil deposited its ratification on 20 June 2002.

The International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an independent and impartial humanitarian body with a specific mandate assigned to it under international humanitarian law, particularly the four Geneva Conventions. It is active in providing many forms of protection and assistance to victims of armed conflict, as well as situations of internal strife. In cases of international armed conflict between States Parties to the Geneva Conventions, the ICRC is authorised to visit all places of internment, imprisonment and labour where prisoners of war or civilian internees are held. In cases of non-international armed conflicts, or situations of internal strife and tensions, it may offer its services to the conflicting parties and, with their consent, be granted access to places of detention. Delegates visit detainees with the aim of assessing and, if necessary, improving the material and psychological conditions of detention and preventing torture and ill-treatment. The visit procedures require: access to all detainees and places of detention; that no limit be placed on the duration and frequency of visits; and that the delegates be able to talk freely and without witness to any detainee. Individual follow-up of the detainees' whereabouts is also part of ICRC standard visiting procedures. Visits and the reports made on them are confidential – although the ICRC may publish its own comments if a state publicly comments on a report or visit.

Case study: Monitoring in Rio de Janeiro

In 2008, the International Committee of the Red Cross (ICRC) took the initiative to propose to the Brazilian authorities and to the Brazilian Red Cross (BRC) the establishment of a five-year pilot Project in Rio de Janeiro (2009–2013), to try to address the humanitarian consequences of urban armed violence prevailing in many of the city's favelas, in partnership with national institutions. It operates with the consent of the respective authorities in seven of the city's neighbourhoods: Cantagalo/Pavão-Pavãozinho, Cidade de Deus, Complexo da Maré, Complexo do Alemão, Parada de Lucas, Vigário Geral and Vila Vintém, which together contain over 600,000 inhabitants.

As in many other contexts, urban armed violence dynamics not only affect communities but also generate humanitarian and security concerns within the detention system. The Civil Police of Rio de Janeiro, recognising the ICRC experience in detention activities, invited the ICRC to monitor the treatment and conditions of detention of people deprived of freedom in police lock-ups under its responsibility. The two institutions engaged in a confidential dialogue on required improvements in the areas of material and psychological conditions, as well as judicial guarantees. During 2011 and 2012, the ICRC conducted 24 visits to 1,877 detainees held in six police lock-ups (Duque de Caxias, Grajaú, Magé, Neves, Pavuna and São João de Meriti) in the state of Rio de Janeiro, according to its standard procedures as described below. These visits ended when all Rio de Janeiro police lock-ups were shut down in 2012.

Visits to persons deprived of their liberty form the basis of the ICRC's approach to detention monitoring, which is carried out as a 'protection' activity. The visits are carried out in accordance with established ICRC practice that is uniformly applied and has to be accepted beforehand by authorities and other actors concerned. There are five main preconditions governing ICRC visits:

- access to all detainees;
- access to all premises and facilities used by and for detainees;
- authorisation to repeat the visits;
- the right to speak freely and in private (without witnesses) with detainees of the ICRC's choice; and
- the assurance that the authorities will give the ICRC a list of the detainees within its field of interest or authorise it to compile such a list during the visit. The ICRC can then at any time check on the detainees' presence and monitor them individually throughout their detention.

Visits across the world follow a standard pattern: an introductory meeting with the detaining authorities in charge in order to hear from them their perspective on their place of detention and agree on the modalities for the unfolding of the visit; followed by a tour of all premises used for detention, usually together with the authorities in charge. Private and confidential talks with the person(s) deprived of liberty are undertaken thereafter in order to complement the ICRC's own observations of the place of detention with the perspective of the detainees. The visit is concluded with a second meeting with the authorities in order to share the ICRC's findings and recommendations.

The ICRC's methods guarantee professionalism and credibility and enable the ICRC to assess the situation as accurately as possible, while safeguarding the interests of detainees. They make it possible to analyse specific systemic issues, identify problems, assess conditions of detention and carry on a dialogue with detainees and detaining authorities. They can also have a dissuasive effect on the commission of violations and be of value, in psychosocial terms, to detainees. Procedures of this nature proved their worth and served as a model for several international and national mechanisms that were subsequently established, in particular the European Committee for the Prevention of Torture (CPT).

CHAPTER 4

Brazil's Record in Combating Torture

Introduction

This chapter describes Brazil's record in combating torture. It contains a summary of reports by UN human rights monitoring bodies setting out the persistence of torture in Brazil. It also outlines the Brazilian government's own efforts to combat torture and describes the various initiatives that it has taken to improve its human rights record. There is a huge gap between theory and practice when it comes to the protection of human rights in Brazil and the main challenge facing the Brazilian authorities is how to bridge this. A number of reports have concluded that the basic cause of the problem is a lack of coordination between overlapping institutions, combined with institutional inertia and a failure of political will by the national and state authorities.

The Plan of Integrated Actions for Preventing and Combating Torture (PAIPCT), adopted by Brazil in 2006, summarised the reasons for the continuing prevalence of torture as due to four main factors:

- the resistance of public officials to denounce and investigate cases of torture practiced by their colleagues;
- the resistance of directors and managers of the criminal justice system to admit to the tolerance of torture committed within their institutions;
- fear among the victims of torture and their families to publicly denounce the torture that they had suffered; and
- the perception, albeit misguided, on the part of both public officials and members of the public that the practice of torture produces immediate benefits from the point of view of obtaining information from suspected criminals and maintaining order in places of detention.

The most important step towards combating torture in Brazil is, therefore, positive political leadership, at the highest level, to show that torture will not be tolerated, to make clear that those responsible for it will be held to account and to enforce their own laws. Chapters Five, Six and Seven of this Manual provide a series of practical recommendations of the steps that can be taken by judges, prosecutors, public defenders and other legal professionals towards this goal. Chapters Eight and Nine provide guidance about how to ensure that people deprived of their liberty are held in humane conditions through regular monitoring and inspections.

The persistence of torture in Brazil

Despite its absolute prohibition in both Brazilian and international law, torture remains widespread in Brazil. In its report to the UN Human Rights Council, under the Universal Periodic Review (UPR) mechanism, in 2008 the Brazilian government noted that:

> 'The main challenges for the full eradication of torture in the country are the resistance on the part of public agents to accuse and investigate cases which involve their mates, the fear of the victims and of their relatives of accusing torture and the mistaken perception from the part of the public agents and the population in general that torture could be justified in the context of actions aimed at fighting against criminals.….The fact that the country underwent a dictatorship regime for twenty years (1964-1985) contributes to explain the difficulties that are still faced today to conciliate an effective public security with the full respect to the human rights.'[1]

Concerns about torture, the excessive use of force by police officers and penitentiary agents, as well as prison conditions and prison overcrowding are a recurring theme in numerous reports on Brazil's human rights record by UN monitoring bodies.[2] In May 2009, for example, the UN Committee on Economic, Social and Cultural Rights declared itself 'deeply concerned about the culture of violence and impunity prevalent in the State party'.[3]

In the report of its visit to Brazil in 2011, the UN Subcommittee for the Prevention of Torture (SPT) noted that '[i]mpunity for acts of torture was pervasive and was evidenced by a generalized failure to bring perpetrators to justice, as well as by the persistence of a culture that accepts abuses by public officials.[4] In many of its meetings the SPT requested, but was not provided with, the number of individuals sentenced under the crime of torture. Individuals interviewed by the SPT did not expect that justice would be done or that their situation would be considered by state institutions.' It also stated that it:

> 'was seriously concerned about the numerous and consistent allegations of corruption received. Examples included detainees bribing policemen 10,000 Brazilian reais to be freed; police officers stealing evidence; detainees paying bribes in order to satisfy basic needs, such as a sunbath; relatives having to pay in order to be able to visit detainees; payments for protection, etc. The SPT received allegations that some people were being held in a police facility pending their payment of a bribe in order to be transferred to a pre-trial detention facility'.[5]

In a report of a visit to Brazil in 2007, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated that the number of prisoners killed in custody was a 'major problem'.[6] He noted in his preliminary report that:

> 'The frequency of riots and killings in prisons is the result of a number of factors. Severe overcrowding in prisons contributes to inmate

1. National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1, Brazil,Working Group on the Universal Periodic Review, First session Geneva, 7–18 April 2008, A/HRC/WG.6/1/BRA/1, 7 March 2008, paras 56 and 57.

2. A summary of recent UN reports on Brazil has been compiled by the UN Office for the High Commissioner for Human Rights during the Periodic Review Process of previous reports. See Human Rights Council, Working Group on the Universal Periodic Review, First session, Geneva, 7–18 April 2008, *Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 5/1, Brazil*, the committee of economic social and cultural rights is referred to in paras 2 and 24 but it does not seem relevant to the context. Perhaps it would be more appropriate to refer to the original document: E/C.12/BRA/CO/2, 12 June 2009, para 8.

3. Committee on Economic, Social and Cultural Rights, forty-second session, Geneva, 4–22 May 2009, *Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights, Brazil*, E/C.12/BRA/CO/2, 12 June 2009, para 8.

4. *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, CAT/OP/BRA/1, 5 July 2012, para 52.

5. *Ibid*, para 56.

6. *Preliminary Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston Addendum, Mission to Brazil,* 4–14 November 2007, UN Doc A/HRC/8/3/Add.4, 14 May 2008, para 16.

> unrest and the inability of guards to effectively prevent weapons and cell phones from being brought into prisons. Low levels of education and work opportunities also contribute to unrest, as does the failure to ensure that inmates are transferred from closed to open prisons when they are entitled to do so. Delays in processing transfers, combined with warden violence and poor conditions, encourage the growth of gangs in prisons, which can justify their existence to the prison population at large by claiming to act on behalf of prisoners to obtain benefits and prevent violence.'[7]

7. *Ibid*.

The Special Rapporteur noted that a 'lack of external oversight permits poor conditions and abuses to continue. Requirements in some places to identify with one gang faction facilitate the growth of gang identification and gang-related activity. While some role for factions in the prison system may be unavoidable in the short term, this situation contributes to the growth of gangs and elevates crime rates more generally'.[8] He concluded that, '[t]he many institutions required by law to monitor prison conditions, most notably including judges of penal execution, are unable or fail to play this role in any adequate manner. The number of such judges must be increased, and the manner in which they work must be greatly improved.'[9]

8. *Ibid*, para 17.

9. *Ibid*, para 21.

He repeated many of these points in his full report and concluded that:

> 'In most prisons, the state fails to exert sufficient control over inmates, and lets gangs (or other prisoners in "neutral prisons") sort out amongst themselves matters of internal prison security. Selected inmates are often given more power over other prisoners' daily lives than guards. They assume control of (sometimes brutal) internal discipline and the distribution of food, medicine, and hygiene kits. This practice often results in allowing gang-leaders to run prisons.'[10]

10. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, Mission to Brazil*, A/HRC/11/2/Add.2 future, 28 August 2008, para 45.

He noted that 'a prisoner who refuses [to identify with a particular gang] is simply assigned to a gang by the prison administration. The state practice of requiring gang identification essentially amounts to the state recruiting prisoners into gangs. Ultimately, this contributes to the growth of gangs outside prison and elevates crime rates more generally.'[11] However, the underlying issue to address is prison overcrowding:

11. *Ibid*, para 46.

> 'Brazil's poor prison conditions and severe overcrowding are well-documented. The national prison population has risen sharply over the last decade, and the incarceration rate has more than doubled. The dramatic rise – caused by the slowness of the judicial system, poor monitoring of inmate status and release entitlement, increased crime rates, high recidivism rates, and the popularity of tougher law and order approaches favouring longer prison terms

over alternative sentences – has resulted in severely overcrowded prisons. The prison system was designed to hold only 60% of the inmates actually detained nationwide, and many individual prisons are two or three times over capacity.'[12]

12. *Ibid*, para 42.

The Special Rapporteur concluded that the criminal justice system is in desperate need of large-scale reform and that such reform is feasible. He also stressed that the police forces require genuine external and internal oversight as the police ombudsmen lack true independence in many states.[13] In its report to the UN Human Rights Council, under the Universal Periodic Review (UPR) mechanism, in 2008 the Brazilian government recognised 'the need to reform the country's prison system. Brazil has nearly 513,802 individuals held in penitentiary facilities and police stations. Police stations currently hold nearly 9.6% of the country's inmate population. Addressing this situation is a priority for states, with the support of the Federal Government'.[14]

13. Press release of 16 November 2007.

14. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Brazil*, Human Rights Council, Working Group on the Universal Periodic Review, Thirteenth session, Geneva, 21 May – 4 June 2012, A/HRC/WG.6/13/BRA, 17 March 2012, para 95.

The effective takeover of many Brazilian prisons by criminal gangs highlights a dramatic failure of management of the criminal justice and penal systems that has been repeatedly pointed out in the reports of monitoring bodies. For example, Amnesty International stated in a report to a UN Periodic Review Working Group on Brazil's human rights record in 2008 that:[15]

> 'Severe overcrowding, poor sanitary conditions, gang violence and riots continue to blight the prison system, where ill-treatment, including beatings and torture are commonplace. Figures released by the prison system showed that 30% of all inmate deaths were as a result of homicide – six times the rate in the wider population. In August, 25 inmates were burnt to death in the Ponte Nova in Minas Gerais after factional fighting. In Espírito Santo state, amid accusations of torture and ill-treatment, the government barred entry to prison cells to the Community Council (*Conselho Da Comunidade*), an officially mandated body, which under state law has the duty to monitor the prison system. In the Aníbal Bruno prison in Pernambuco, at least three died and 43 were injured after a riot broke out in November 2007. Chronically understaffed and three times over capacity, the prison has long been subject to allegations of torture and ill-treatment. Over 60 deaths were reported in the Pernambucan prison system in 2007, more than 20 of them in the Aníbal Bruno prison. . . . In November 2007 a 15 year old girl suffered extensive sexual abuse while held in a police cell with 20 adult men for a period of a month, in the northern state of Pará.'[16] [italics in original.]

15. *Brazil Submission to the UN Universal Periodic Review, First session of the UPR Working Group*, 7–11 April 2008 AI Index: AMR 19/023/2007, 4.

16. *Ibid*.

The SPT noted the presence of organised criminal groups in all the prisons that it visited in 2011. Inmates were kept in separate facilities or cellblocks

on the basis of the criminal faction to which they alleged to be affiliated. In one prison, the SPT observed that the inmates' personal files included a statement signed by the inmate providing that he had agreed to be assigned to a particular cellblock under the control of a particular faction, assuming responsibility for his own safety in that regard. It also noted that in almost all facilities visited, the number of inmates exceeded the facility's maximum capacity.[17]

17. CAT/OP/BRA/1, 5 July 2012, para 92.

The Special Rapporteur on torture has stressed on several occasions that the appalling overcrowding in some detention facilities and prisons needs to be brought to an immediate end.[18] In 2005, the Committee against Torture (CAT) found endemic overcrowding, filthy conditions of confinement, extreme heat, light deprivation and permanent lock-ups (factors with severe health consequences for inmates), along with pervasive violence.[19] It stated that 'tens of thousands of persons were still held in delegacias (police stations) and elsewhere in the penitentiary system where torture and similar ill-treatment continues to be meted out on a widespread and systematic basis'.[20] It expressed concern about the long periods of pretrial detention and delays in judicial procedure.[21] It also noted that judges do not apply the law on the crime of torture and prefer to classify cases as bodily harm or abuse of authority.[22] CAT recommended that the law on torture be interpreted in conformity with Article 1 of the Convention[23] and that complaints alleging torture by public officials should be promptly, fully and impartially investigated and offenders prosecuted.[24] It also recommended establishing a systematic and independent system to monitor the treatment in practice of persons arrested, detained or imprisoned,[25] including in places where juveniles are detained.[26]

18. E/CN.4/2006/6/Add.2, para 169.

19. Report on Brazil produced by the Committee against Torture under article 20 of the Convention, op cit, para 178. See also A/56/44, para 119 (b).

20. Committee against Torture, Report on Brazil produced by the Committee under article 20 of the Convention and reply from the Government of Brazil (CAT/C/39/2), advance unedited version of 23 November 2007 made public by decision of the Committee against Torture adopted on 22 November 2008, para 178.

21. A/56/44, para 119 (c).

22. A/56/44, para 120 (a).

23. A/56/44, para 120 (a).

24. CAT/C/39/2, 23 November 2007, para 196(a).

25. A/56/44, para 120 (d).

26. E/CN.4/2006/6/Add.2, para 48.

In its report of its visit to Brazil in 2011, the SPT received consistent allegations that police facilities were often in very poor conditions. Persons detained in police facilities were often held in dilapidated, filthy and stuffy cells, with inadequate or no sanitation, and inadequate or no bedding provided. The SPT furthermore received consistent allegations of deprivation of food and water, as well as the lack of access to fresh air and exercise in the case of prolonged police detention.[27] The SPT received repeated and consistent accounts of torture and ill-treatment committed by, in particular, the military and civil police. Allegations included threats, kicks and punches to the head and body, and blows with truncheons. Such beatings took place in police custody, but also on the street, inside private homes, or in secluded outdoor areas, at the moment of arrest. The torture and ill-treatment was described as gratuitous violence, as a form of punishment, to extract confessions, and as a means of extortion.[28]

27. CAT/OP/BRA/1, 5 July 2012, para 77.

28. *Ibid*, para 79.

One inmate stated that the methods of torture used during his interrogation included suffocation by placing his head in a plastic bag,

electroshocks, psychological threats and cold showers for six days. The SPT also received allegations of ill-treatment during police custody such as the obligation to sleep on the floor in a filthy cell without proper access to sanitation, water and food, and the denial of healthcare, including for children and adolescents allegedly wounded by the police.[29] The SPT furthermore received allegations of beatings and ill-treatment as a form of punishment. For example, one detainee stated that during his custody by the civil police for a period of two days he was held in a dirty cell of approximately 8m^2 holding 20 men, and deprived of food and water. When the detainees complained and requested food and water, they were beaten. Detainees also reported being kept in stress positions (for instance, assuming a posture in which the body was supported by bended knees) for prolonged periods of time during police custody.[30] In one detention centre, the SPT received consistent allegations that torture and ill-treatment was commonplace and some detainees feared for their lives. These practices were linked with the general tense atmosphere, poor material conditions and corrupt management of the facility.[31]

29. *Ibid*, para 81.

30. *Ibid*, para 82.

31. *Ibid*, para 84.

The SPT also observed the discriminatory treatment of persons deprived of their liberty needing special protection (so-called '*seguro*'). In one facility visited, the SPT found that the persons being held by the police in the *seguro* section were held in conditions far inferior to the rest of the detainees, and were allegedly subject to frequent beatings.[32] It also noted that detainees in prisons were often held in uncomfortable stress positions, handcuffed, and with no ventilation. Some complained that while they were being transported, guards would open the vehicle in which they were being held, spray them with pepper spray and then lock the doors of the vehicle again.

32. *Ibid*, para 85.

Beatings, insults and threats were also alleged. The SPT also heard allegations of ill-treatment and excessive use of force by prison guards, especially the alleged use of teargas in confined spaces, including cells.[33]

33. *Ibid*, paras 127 and 128.

The SPT also received numerous and consistent allegations from children and adolescents of torture and ill-treatment suffered upon arrest and during police custody. Children and adolescents alleged that the torture and ill-treatment committed by the military police took place upon arrest and the methods included slaps, kicking and punching on all parts of the body. A female prisoner reported that she had been raped by two police officers while in police custody.[34] The treatment of women and children in custody is discussed further in Chapter Eight of this Manual.

34. *Ibid*, para 80.

The Committee on the Rights of the Child (CRC) has expressed concern about the large number of persons below the age of 18 who are in detention, the numerous reports of ill-treatment of young inmates and the very limited

possibilities for their rehabilitation and reintegration into society. It also stated that the training of judges, prosecutors and prison staff in children's rights had been 'sporadic'.[35] While noting that the 1997 Law on Torture, the Penal Code and the Statute of the Child and Adolescent strongly prohibit torture and ill-treatment, CRC expressed deep concern regarding the gap between the law and its implementation, as a significant number of cases of torture, inhuman and degrading treatment have been reported over the last few years.[36]

The Human Rights Committee has noted its concern about the widespread use of excessive force by law enforcement officials,[37] extrajudicial execution of suspects, the use of torture to extract confessions from suspects and the ill-treatment of detainees in police custody and widespread reports of threats against and murders of witnesses, police ombudsmen and judges.[38] It has also described conditions of detention in jails as 'inhuman'[39] and noted that the widespread use of pre-trial detention called for special attention.[40] The UN Special Rapporteur on the independence of judges and lawyers stated that in one visit to a police station in Belém, he met people who had been detained for up to nine months without having the opportunity to be heard by a judge.[41]

Concerns regarding impunity were raised by CAT in 2001[42] and by the Special Rapporteur on the independence of judges and lawyers in 2005.[43] Similarly, the Human Rights Committee noted the climate of impunity regarding gross human rights violations committed by law enforcement officials.[44] The Special Rapporteur on torture recommended on several occasions the need to take vigorous measures to make clear that the culture of impunity must end.[45] He has also recommended the creation of a programme of awareness-raising within the judiciary.[46]

In 2012, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted that Brazil had taken important steps to address unlawful killings. However, extrajudicial executions remained pervasive and no measures have been adopted to address the grave problem of on-duty police killings. Importantly, most of the killings were still never investigated.[47] The Special Representative of the Secretary-General on the situation of human rights defenders strongly recommended a review of existing mechanisms for the monitoring and accountability of the state security apparatus, particularly the military police.[48] The Human Rights Committee recommended that the state ensure prompt and impartial investigations into all allegations of human rights violations committed by law enforcement officials, prosecute perpetrators and ensure that they are punished in a manner proportionate to the seriousness of the crimes committed, and grant effective remedies to the victims.[49]

35. Concluding Observations of the Committee on the Rights of the Child, Brazil, CRC/C/15/Add.241, para 68.

36. CRC/C/15/Add.241, para 40.

37. CCPR/C/BRA/CO/2, para 12.

38. *Ibid*, para 13.

39. CCPR/C/BRA/CO/2, para 16.

40. Press release of 6 December 2007.

41. *Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, Report of the Special Rapporteur on the independence of judges and lawyers*, Mr Leandro Despouy, Mission to Brazil, E/CN.4/2005/60/Add.3, 22 February 2005.

42. A/56/44, para 119 (e).

43. E/CN.4/2005/60/Add.3, para 30.

44. CCPR/C/BRA/CO/2, para 12.

45. E/CN.4/2006/6/Add.2, para 22.

46. *Ibid*, para 39.

47. A/HRC/WG.6/13/BRA/2, para 16.

48. A/HRC/4/37/Add.2, para 105.

49. CCPR/C/BRA/CO/2, para 12. See also CRC/C/15/Add.241, para 35.

A Parliamentary Commission of Inquiry (CPI) by the Brazilian Congress reported similar findings in June 2008.[50] It described conditions in the Contagem prison in Minas Gerais where 70 prisoners, confined to cells built for 12 persons, were obliged to alternate sleeping schedules and overcrowding made bathroom facilities unusable. The report stated that prison overpopulation in Bahia led to the use of 20 temporary containers to hold more than 150 prisoners at the Mata Escura facility in Salvador. The containers were infested with rats and cockroaches and not properly ventilated. It found that many states were failing to provide separate prison facilities for women and that male officers who served in women's prisons often abused the prisoners and extorted sexual favours. The Commission also found evidence of prisoners being forced to be sex slaves and engage in pornographic acts that were recorded with video cameras by prison staff. Throughout the country, adolescents were jailed with adults in prison units without bathrooms and in inhumane conditions. Insufficient capacity in juvenile detention centres was also reported to be widespread.

50. Relatório final da CPI do sistema carcerário, Câmera dos Deputados, July 2008.

A report, by the Catholic Church's Pastoral Carcerária, revealed that in some prisons inmates went for days without being given food, and that prisoners with mental health problems were being kept locked up with no appropriate treatment or examination.[51] In March 2011, the Special Rapporteur on torture published a report on prison conditions in Espírito Santo in April of the previous year.[52] The report noted that a large number of prisoners:

> 'are currently being held in 24 import-export type containers, measuring 28.2 squared meters, which have been converted into cells by opening three very small barred windows on each side. Between 20 and 30 people are held in each container, with no distinction between remandees and convicted detainees. These types of containers were also used at the Provisional Detention Centre in Novo Horizonte in 2009. However, this detention facility has since been closed down. The sleeping arrangements and bedding at the Provisional Detention Centre in Cariacica are insufficient, resulting in regular injuries due to detainees falling from improvised hammocks, which are necessary due to the overcrowding. In addition, there is no sewage system surrounding the containers, but only holes in the containers which lead urine and excrement to outside buckets. The water supply for drinking and washing is also inadequate, as detainees only have access to water for a few minutes every couple of hours. Furthermore, detainees are locked up throughout the day, even during the summer months, facing extremely hot temperatures. Finally, information was received regarding insufficient medical attention, despite reports of many illnesses among the detainees. A recent outbreak of scabies forced

51. Pastoral Carcerária, A Situação dos Direitos Humanos no Sistema Prisional dos Estados do Brasil – Contribuição e Observações da Pastoral Carcerária, 2005.

52. Human Rights Council, Sixteenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez*, 1 March 2011, A/HRC/16/52/Add.1, Addendum, Summary of information, including individual cases, transmitted to Governments and replies received, 57, No 13, Brazil.

the authorities to burn all mattresses and uniforms. Additionally, on 4 February 2010, a man called "Adoterivo", who suffered from hypertension, reportedly died due to the lack of medical attention and the poor conditions in the containers. In addition to the physical conditions at the Provisional Detention Centre in Cariacica, it is alleged that detainees have been regularly threatened or subjected to violence, including with rubber and lead bullets, as well as pepper and tear gas.'

The Brazilian government responded that it:

'views with concern the situation of the Espírito Santo State Prison System, today pervaded by systemic problems, whose solutions are difficult and costly. This scenario has prompted action from a number of Brazilian State bodies involving investigations of the nature and extent of complaints regarding the operation of Espírito Santo's prison system, and spurred, in response, the adoption of measures to overcome the problems identified. Through these efforts, the Brazilian State has sought to fulfil the fundamental rights and guarantees provided for in national law as well as the commitments undertaken by the country in the field of International Human Rights Law. Of the various Brazilian State bodies engaged on the issue the Council for the Defense of the Human Person (*Conselho de Defesa dos Direitos da Pessoa Humana* – CDDPH), National Justice Council (*Conselho Nacional de Justiça* – CNJ) and the National Council for Crime and Prison Policy (*Conselho Nacional de Política Criminal e Penitenciária* – CNPCP) have closely followed the matter. A Special Committee was revived and a monitoring, Follow-up, Enhancement, and inspection Group was established through Joint Regulatory Act 1 of 4 April 2010 of the Espírito Santo State Office of Attorney general and Espírito Santo Court of Justice to oversee the state's prison system and the execution of socio-education sentences. And both bodies have undertaken site visits and made recommendations on measures needed to address the concerned raised in the letter.'[53] [italics in original.]

Brazil and the Inter-American Court of Human Rights

Between 1999 and 2010, the Inter-American Commission of Human Rights (IACHR) received 734 complaints against Brazil.[54] The Inter-American Court of Human Rights has ruled that Brazil was in violation of the Convention on four occasions,[55] but the government accepted responsibility before the Commission in 16 other cases. These included the illegal imprisonment, torture and death of an indigenous leader, the killing of 111 prisoners in the

53. *Ibid*.

54. Analysis by the author of *Annual Reports of the Inter-American Commission on Human Rights 1999 – 2010*. Complaints received: 2010 – 76, 2009 – 83, 2008 – 64, 2007 – 80, 2006 – 66, 2005 – 42, 2004 – 29, 2003 – 42, 2002 – 30, 2001 – 28, 2000 – 22, 1999 – 13.

55. *Gomes Lund and Others ('Guerrilha do Araguaia') v Brazil*, (2010); *Sétimo Garibaldi v Brazil*, (2009), (Case No 12.478); *Escher and Others v Brazil*, (2009); *Nogueira de Carvalho and Others v Brazil*, (2006), (Case No 12.058); *Ximenes-Lopes v Brazil*, (2006), (Case No 12.237).

now-defunct prison, Carandiru,[56] and a number of summary executions perpetrated by military police against children and adolescents.[57] There were 96 complaints against Brazil in 2012.[58]

The Inter-American Commission on Human Rights has called on the Brazilian government to adopt 'precautionary measures' in relation to its detention facilities on a number of occasions. In August 2011, for example, it determined that such measures were necessary to protect the 'life, personal integrity and health of persons deprived of liberty' in Professor Aníbal Bruno prison in Recife, Pernambuco.[59] This is currently one of the largest prisons in Latin America and its present population is three times higher than its official capacity. There have been at least 55 violent deaths in the prison since 2008 and human rights groups who have visited the prison reported deplorable conditions of detention and interviewed prisoners 'who showed signs of torture, including broken bones, stab wounds and the skinning of prisoners with machetes. Many prisoners with serious health problems or diseases were not receiving medical care'.[60] The Commission expressed its serious concerns about conditions in the prison and called for an end to the practice of prisoners being used as wardens and for the authorities to ensure the provision of adequate medical care to beneficiaries, offering medical care to enable the protection of life and health of beneficiaries. Human rights groups have noted that several of the prisoners who have been designated as guards at the prison, with the power to impose disciplinary punishments on other prisoners, are known to be linked to death squads in Pernambuco.

Similar measures were issued in relation to the police department in Vila Velha in Espírito Santos in April 2010[61] and Polinter Neves in the state of Rio de Janeiro in 2009.[62] The Inter-American Commission has also issued precautionary measures in relation to a number of other detention facilities in Brazil, some repeatedly because the government has failed to comply with earlier rulings.[63]

In July 2011 the Inter-American Court ruled that the Brazilian government should attend a formal hearing, along with legal representatives of victims of violations and members of the Commission, to answer claims that it had failed to respond adequately to earlier calls for it to protect the lives and physical integrity of persons at Urso Branco, where there have been approximately 100 prison deaths and well-documented cases of torture and ill-treatment since 2002.[64] The Court finally lifted measures in August 2011 after the parties reached a settlement over the steps the state would take to prevent violence, enhance monitoring, ensure accountability and improve conditions at the prison and throughout the Rondônia state criminal justice system.[65]

56. Inter-American Commission of Human Rights Report, No 34-00, Case 11291, dated 13 April 2000.

57. *Annual Report of the Inter-American Commission on Human Rights 2010*, OEA/Ser.L/V/II. Doc. 5, rev. 1, 7 March 2011.

58. OAS, Inter-American Commission on Human Rights (IACHR), Annual Reports, 2012 Annual Report, OEA/Ser.L/V/II.147, Doc. 1, 5 March 2013.

59. Pessoas privadas da liberdade no Presídio Professor Aníbal Bruno MC-199-11.

60. Justiça Global, Press Release, 'OEA: Brasil deve proteger a vida de presos em Pernambuco', 11 August 2011.

61. MC-114-10, 28 April 2011.

62. MC-236-08, 1 June 2009.

63. *Annual Report of the Inter-American Commission on Human Rights 2010*, OEA/Ser.L/V/II. Doc. 5, rev. 1, 7 March 2011. Two precautionary measures were granted against Brazil in 2010, one provisional measure was still in force and four cases were in the compliance stage.

64. Order of the President of the Inter-American Court of Human Rights, Provisional Measures against Brazil in respect of the prison of Urso Branco, 25 August 2011.

65. *Ibid*.

Case-study: Urso Branco

In August 2011, a pact was signed between the Brazilian government, the Governor of the State of Rondônia, the Judiciary of the State of Rondônia, together with State Office of the Public Defender and Public Prosecutor aimed at improving prison conditions. The agreement was also signed by two Brazilian NGOs, the Commission for Justice and Peace in Porto Velho and Global Justice, who had petitioned the Inter-American Court of Human Rights for provisional measures, aimed at protecting prisoners, staff and visitors in the detention facility José Mário Alves, known as 'Urso Branco'.

The pact is noteworthy in several respects. First of all, it represents a willingness of the Brazilian government and civil society to work together to resolve a common problem, based on a shared diagnostic of its dimensions. Secondly, it shows a recognition by the Brazilian government that tackling the problem of prison conditions and prison violence requires a multi-dimensional approach. The government departments involved in the agreement are the Ministry of Justice – National Penitenciary Department (Departamento Penitenciário Nacional – DEPEN); the Secretariat of Human Rights in the Office of the Presidency of the Republic (Secretaria de Direitos Humanos da Presidência da República SDH); the Council for the Defence of Human and People's Rights (Conselho de Defesa dos Direitos da Pessoa Humana (CDDPH)); and the Ministry for External Relations Human Rights Division (Ministério das Relações Exteriores – Divisão de Direitos Humanos DDH). At the state level the agreement includes the Cabinet of the State Govenor (Gabinete do Governador do Rondônia), the Justice Secretary (Secretaria de Estado de Justiça), the Secretary of Public Security and Citizenship (Secretaria de Estado de Segurança Pública e Defesa da Cidadania), the Civil Police (Polícia Civil), the Department of Public Works (Departamento de Obras do Estado) and the State Attorney General (Procuradoria Geral do Estado). It also contains clear and timetabled goals and a budget for the necessary measures to be taken in each of the areas described below.

The pact was divided into five separate areas of action: i) Area I – Infrastructure: increase in the number of places and improvements in the infrastructure of jails and public prisons; ii) Area II – Training and qualification of staff: improve measures for hiring and training public agents and administrative servants and ensuring that they are properly qualified to care for inmates; iii) Area III – Fact-finding and accountability: setting deadlines for all investigations and judicial proceedings in cases involving Urso Branco, establishment of a Centre for the Support and Execution of Penal Sentences (Centro de Apoio à Execução Penal), within the Public Prosecutor's Office among other actions to establish the scope and responsibility of the state's obligations and to avoid future violations of human rights; iv) Area IV – Improving services and measures for social inclusion: improve the speed and quality of responses to demands from prisoners and their families and increase measures aimed at the rehabilitation of prisoners; and v) Area V – Countermeasures to the culture of violence: take concrete actions for the creation and consolidation of mechanisms to combat and prevent violence, ill-treatment and torture in prisons.

The Brazilian government's efforts to combat torture

In the discussion on Brazil's UPR report at a UN working group in 2008, the Brazilian government acknowledged that torture, 'while unacceptable, was still present in places of detention'.[66] It also admitted that there are 'frequent accusations of abuse of power, torture and excessive use of force, committed mainly by police officers and penitentiary agents'.[67] Its own report stated that:

> 'In June 2007, for example, an operation against drug dealing in the "*Complexo do Alemão*", a complex of slums in Rio de Janeiro left 19 dead people, among which were alleged victims of extrajudicial executions, according to civil society entities. Upon request of the Government of the State of Rio de Janeiro, which ha[s] already made the technical expert examination, the Special Department of Human of the Presidency of the Republic carried out an independent study, which confirmed signs of executions. Official data of the States of São Paulo and Rio de Janeiro – the only states of the federation that have [a] database for public consultation about accusations against police officers – appoint that 8,520 people have been killed by police officers in these states [i]n the last five years.'[68] [italics in original.]

The Brazilian government stated that it 'recognizes the seriousness of this condition'[69] and has responded to the problem with a:

> 'National Plan of Integrated Actions for Prevention and Fight Against Torture, based on the recommendations of the Special Rapporteur, Nigel Rodley, submitted in 2001 to the UN Human Rights Commission. ... Currently, 12 Brazilian States adhered to the Plan, creating State Committees intended to promote, at local level, the measures set forth therein (such as, for example, the creation of ombudsman offices for the police and prison systems and the qualification of civil society entities for monitoring jails).'[70]

It also stated that it had created a National Committee for Prevention and Fight Against Torture in Brazil on 26 June 2006 and had ratified the Optional Protocol to the UN Convention Against Torture in January 2007.[71] The government stated that '[a]rrangements are being made for the construction of a national mechanism of prevention and fight against torture, complying with the commitments established in the recently ratified Additional Protocol.'[72]

66. A/HRC/16/52/Add.1,1 March 2011, para 42.

67. National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1, Brazil, Working Group on the Universal Periodic Review, First session Geneva, 7–18 April 2008, A/HRC/WG.6/1/BRA/1, 7 March 2008, para 51.

68. *Ibid*, para 56.

69. *Ibid*, para 52.

70. *Ibid*, para 54.

71. *Ibid*, para 55.

72. *Ibid*.

The Brazilian Government also stated that:

> 'In order to guide the police action in accordance with citizenship principles and the fundamental rights, the Government is providing courses to police officers with emphasis [o]n human rights (which have already been attended by about 450 thousand people), is consolidating mechanisms of external control of the police activity (such as the Police Ombudsman) and encouraging, in the capacity building courses, the use of non-deadly weapons and of the most modern techniques of legally authorized use of force in a progressive manner.
>
> In addition to that, the Government launched, in 2007, the National Program of Public Security with respect to the Principles of Citizenship ("*Programa Nacional de Segurança Pública com Cidadania* – PRONASCI"), whose basic guideline is the articulation between the public policies in the security area and social programs, with priority to crime prevention and respect to the human rights. The challenge of the PRONASCI is to fight against the organized crime, focusing its strategies of corruption in the penitentiary system to ensure the security of citizens. The program has been elaborated aiming at reaching the violence causes without waiving the strategies of social ordering and qualified repression. Its fundamental guidelines are: (i) qualification and valuation of professionals which work in the public security sector; (ii) the re-structuring of the penitentiary system; (iii) the fight against police corruption; and (iv) the involvement of the community in violence prevention programs.'[73] [italics in original.]

73. *Ibid*, para 58.

Bridging the gap between theory and practice

Many observers have noted the contrast between Brazil's formal commitment to liberal democratic norms and the violation of the basic rights of so many of its citizens. For example, in its submission to a UN review of the Brazilian government's record Amnesty International stated that Brazil has enacted 'some of the most progressive laws for the protection of human rights in the region... [these laws] have all been recognised as essential benchmarks for the protection of human rights. However, there remains a huge gap between the spirit of these laws and their implementation'.[74]

74. AI Index: AMR 19/023/2007.

Indeed it is striking how little appears to have changed – apart from the huge increase in the number of people being sent to prison – despite the widespread agreement that the current penal system is dysfunctional. A CPI into the prison system in 1994 reached similar findings to the ones

listed above and these have been followed by similar inquiries at state level, conducted by the Human Rights Commissions of state legislatures. There is a strong sense of déjà vu from the reports of international monitoring bodies over the past two decades. The Federal Government has repeatedly stated that it accepts many of their findings and intends to take action to deal with the problems identified, yet subsequent reports show few improvements in practice. In the report of its visit to Brazil in 2011, for example, the SPT:

> 'recalls that many of the recommendations made in the present report are not being presented to the Government of Brazil for the first time, considering previous visits by United Nations human rights mechanisms. Unfortunately, the SPT noted many of the same problems identified by those preceding visits, despite progress in some specific areas. It is concerned that recurrent and consistent recommendations made over several years by different United Nations mechanisms have not been fully implemented. The SPT is hopeful that its visit and the resulting recommendations will be heeded and that they will provide a strong impulse for the current Government of Brazil to take resolute action to eradicate torture and ill-treatment for all persons deprived of their liberty'.[75]

75. CAT/OP/BRA/1, 5 July 2012, para 8.

In a report published in 2001, the UN Special Rapporteur on torture, Sir Nigel Rodley, had stressed that the appalling overcrowding in some detention facilities and prisons needed to be brought to an immediate end.[76] He noted that:

76. Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 Addendum Visit to Brazil, E/CN.4/2001/66/Add.2, 30 March 2001.

> 'torture is widespread and, most of the time, concerns persons from the lowest strata of the society and/or of African descendant or belonging to minority groups. ... The most commonly reported techniques used were beatings with hands, iron or wooden bars or a *palmatória* (a flat but thick piece of wood looking like a large spoon, said to have been used to beat the palm of hands and soles of feet of slaves); techniques referred to as *telefone*, which consists in repeatedly slapping the victim's ears alternatively or simultaneously, and pau de arara (parrot's perch), which consists in beating a victim who has been hung upside down; applying electro-shocks on various parts of the body, including the genitals; placing plastic bags, sometimes filled in with pepper, over the head of the victims. The purpose of such acts was allegedly to make persons under arrest sign a confession or to extract a bribe, or to punish or intimidate individuals suspected of having committed a crime.'[77] [italics in original.]

77. *Ibid*, para 9.

In its initial report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the previous year, the Brazilian government used almost exactly the same arguments that it made in its report under the Universal Periodic Review eight years later. It stated that the effect of the 1997 Torture Law and the 'measures of the federal Government and some state governments to curb the perpetration of this crime so as to prevent inhuman treatment from being imposed on prisoners are initiatives which are slowly changing the situation of the issue in Brazil'. However:

> 'The persistence of this situation means that police officers are still making use of torture to obtain information and force confessions, as a means of extortion or punishment. The number of confessions under torture and the high incidence of denunciations are still significant... Demands of prisoners at police stations for medical, social or legal assistance, or to change certain aspects in the prison routine are not always peacefully welcomed by police officers or agents. It must be observed that retaliation against prisoners involving torture, beatings, deprivation and humiliation are common ... Many of these crimes remain unpunished, as a result of a strong feeling of *esprit de corps* among police forces and reluctance to investigate and punish officials involved with the practice of torture. ... The lack of training of police officers and penitentiary officials to carry out their duties is another important aspect affecting the continuation of the practice of torture.'[78] [italics in original.]

78. Initial report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by the Government of Brazil (CAT/C/9/Add.16), paras 80, 82 and 83.

A Human Rights Watch report published in 1998 and an Amnesty International report in 1999 detailed almost exactly the same patterns of violations as are described above.[79] Yet although many of the practices identified are clearly illegal, it appears that little has been done to tackle them since the following report was written:

79. Human Rights Watch, *Behind Bars in Brazil*, 30 November 1998; Amnesty International, Brazil: *'No one here sleeps safely': Human rights violations against detainees*, AI Index: AMR 19/009/1999, 22 June 1999.

> 'In the course of our research, Human Rights Watch interviewed scores of prisoners who credibly described being tortured in police precincts. Inmates were typically stripped naked, hung from a "parrot's perch" and subjected to beatings, electrical shocks, and near-drownings. Many detainees remained for long periods in the precincts where they suffered the abuse, enduring continuing contact with their torturers. ... Although Brazil's national prison law mandates that prisoners have access to various types of assistance, including medical care, legal aid, and social services, none of these benefits are provided to the extent contemplated under the terms of the law ... The situation is particularly bad in police lockups, where severely ill and even dying prisoners may remain crowded together with other inmates.

> Another serious problem is inmate-on-inmate violence. In the most dangerous prisons, powerful inmates kill others with impunity, while even in relatively secure prisons extortion and other lesser forms of mistreatment are common. A number of factors combine to cause such abuses, among them, the prisons – harsh conditions, lack of effective supervision, abundance of weapons, lack of activities, and, perhaps most importantly, the lack of inmate classification. Indeed, violent recidivists and persons held for first-time petty offenses often share the same cell in Brazil. ... Unfortunately, because the national prison census ceased to compile statistics on inmate killings after 1994, the overall levels of inmate-on-inmate brutality are unknown. ... Only killings of inmates – whose dead bodies are difficult to ignore – appear to merit investigation and prosecution, and even then the conviction and subsequent incarceration of the guilty parties are exceedingly rare. In other words, public prosecutors and other justice officials share much of the blame for the high levels of official violence that prisoners face.'

The report stated that 'a substantial proportion of the incidents of rioting, hunger-striking and other forms of protest occurring in the country's penal facilities is directly attributable to overcrowding. In many instances, particularly in the state of São Paulo, inmates have rioted simply to demand that they be transferred to a less crowded facility, typically wanting to leave a cramped police lockup for a more spacious prison.' It noted that the deficit in available capacity grew 27 per cent between 1995 and 1997, and correctly predicted that this trend was likely to continue. It also drew attention to the length of time prisoners spent on remand and said that while this varied considerably from state to state, it was not unusual to find prisoners who had spent years in pre-trial detention. While many people who should not be there are being held in prison, the report also stated that the criminal justice system was failing to ensure that those who were sentenced to imprisonment actually went to prison:

> 'The federal Ministry of Justice estimated in 1994 that there were 275,000 such un-served sentences (*mandados não cumpridos*), significantly more than the number of prisoners in confinement. In Brasília alone, the public prosecutor's office announced this year that of the 15,077 prison sentences handed down in his jurisdiction over the past three years, only one third of them have actually been served; defendants in the remaining cases are fugitives. Obviously, were these missing convicts suddenly to be found and confined, the prisons would burst. The real number of fugitives from prison is difficult to estimate, however, as state and federal figures include multiple sentences for a single defendant, defendants who have died, and cases in which the statute of limitations has expired. One

> prisons expert advises that, at minimum, - the existing numbers should be divided by five - in order to take these factors in account. Even so, the number of additional inmates these sentences represent could place a significant burden on an already overwhelmed penal system.'[80] [italics in original.]

80. Human Rights Watch, 1998.

It is difficult to obtain up-to-date and accurate figures on this issue, although the most commonly cited number of *mandados não cumpridos* is 300,000. Working on the same calculation that every five cases only represent one person, this means that there are currently around 60,000 people who have been sentenced to terms of imprisonment that they have not served. The difficulties of obtaining these figures, or indeed any accurate and up-to-date information about the prison population, indicate a wider problem in Brazil's penal and criminal justice systems. No amount of new laws or new institutions can deal with inefficiencies and incompetence; indeed they could aggravate the existing situation by adding in new layers of bureaucracy and administrative confusion to what currently exists. It would seem more logical to concentrate on increasing the effectiveness of existing laws and institutions.

The Human Rights Watch report also observed that while a lack of resources may have been the cause of some of the defects, the absence of political will was of more significance than a shortage of funds. Indeed, 'some [of] the most extreme cruelties visited upon Brazilian inmates, such as summary executions by military police, can in no way be attributed to meagre public resources'. It concluded that the most important reason why such widespread and serious human rights abuses were being committed on a daily basis was 'the sense that the victims of abuse – prison inmates and, therefore, criminals – are not worthy of public concern'. The report argued that this was partly because most Brazilian prisoners came 'from the poor, uneducated, and politically powerless margins of society' and partly because of public concern about rising levels of violent crime.[81]

81. *Ibid*.

Amnesty International also noted that the main problem was not a lack of money and that there had been a significant under-spend in some areas of the prison budget:

> 'Although the federal and state governments are currently building new prisons, and prisoners are gradually being transferred out of the police stations, equal importance should be accorded to investment in human capital and to increasing the quantity, quality and accountability of the personnel working within the prison system. The federal government allocated nearly US$456 million to the prison system in 1995-1997, but spent only 57% of that budget allocation. Of the US$540,000 earmarked for staff training, reportedly none was spent.'[82]

82. AI Index: AMR 19/009/1999, 22 June 1999.

In a 2008 report on conditions in a youth detention facility in São Paulo, CASA Institution, the Brazilian human rights organisation, Conectas, noted the institution was comparatively well-funded and that lack of material resources was not the root cause of the problem:

> 'Rather, it is an institutional culture that values punishment over rehabilitation and fails to hold its personnel accountable for abusive acts. The situation is reinforced by the widely held view in Brazilian society that the young people housed in CASA are dangerous and require the most brutal methods to keep them in check. In fact, young people convicted of minor infractions are mixed in with those convicted of more serious offences; the one common denominator is that all come from poor backgrounds. Affluent youth are seldom relegated to CASA.'[83]

83. Oscar Vilhena Vieira, 'Public Interest Law. A Brazilian Perspective' (2008) 224 *UCLA Journal of International Law & Foreign Affairs*, 250.

The most recent figures for annual expenditure by the prison system are from 1995–2007 and all show significant under-spends against the allocated budget.[84] In some years the under-spends have been relatively minor. For example in 2004, out of the R$166,157,349 credit allocated, R$146,236,958 was authorised and R$110,892,208 was actually used. However, in other years the discrepancies have been much larger. For example in 2005, of the R$224,098,871 credit allocated, only R$159,074,05 was authorised and only R$78,866,439 was used, while in 2007, the latest year for which figures are available, a total of R$430,939,081 credit was allocated, but only R$201,107,529 was authorised – less than half the total – and only R$39,204,216 was actually spent – less than a tenth of the original total.[85] This clearly shows that the main problem is a lack of planning rather than a lack of available resources.

84. Ministry of Justice, website, penal execution, budget, http://portal.mj.gov.br/main asp?View={C0BE0432-C046-47D6-916A-9A3CF77E3AF5}&BrowserType=NN&LangID=pt-br&params=itemID%3D%7B248B987D-F52B-4CE9-805C 948A83B8BDA1%7D%3B&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F70F4CB26%7D, accessed 18 May 2013.

85. *Ibid.*

In a comment on Brazil's record, the then UN Special Rapporteur on torture, Manfred Nowak, again stressed that the most important failure was a lack of political will by the national authorities to enforce their own laws:

> 'First and foremost, the top federal and State political leaders need to declare unambiguously that they will not tolerate torture or other ill-treatment by public officials ... They need to take vigorous measures to make such declarations credible and make clear that the culture of impunity must end. ... In particular, they should hold those in charge of places of detention at the time abuses are perpetrated personally responsible for the abuses.'[86]

86. UN Commission on Human Rights, Addendum to the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Follow-up to the Recommendations Made by the Special Rapporteur; Visits to Azerbaijan, Brazil, Cameroon, Chile, Mexico, Romania, the Russian Federation, Spain, Turkey, Uzbekistan and Venezuela, 21 March 2006, E/CN.4/2006/6/Add.2, available at: www.unhcr.org/refworld/docid/45377b200.html, accessed May 2013.

In its report of its visit to Brazil in 2011, the SPT stressed that:

> 'all allegations of torture and ill-treatment be thoroughly investigated as a matter of routine and that perpetrators be held

accountable for their actions. The State party should issue a strong condemnation, at the highest level of authority, declaring that torture will not be tolerated under any circumstances. This message of "zero tolerance" of torture and ill-treatment should be delivered at regular intervals to all security forces and custodial staff, including through professional training'.[87]

87. CAT/OP/BRA/1, 5 July 2012, para 53.

Case study: Carandiru and the PCC

The violence in Brazilian prisons cannot be discussed without reference to the violence on Brazil's streets and there is a clear causal connection between the brutality meted out to prisoners, often with public support, and the further brutalisation of Brazilian society. In October 1991, for example, military police killed 111 prisoners in the Casa de Detenção of Carandiru Pavilhão 9. Most of these were killed by machine guns fired at point blank range from the doors of their cells. The surviving prisoners were all stripped naked and many were attacked by dogs, specially trained to bite the genitals. Some were stabbed with knives by the police. Others were forced to watch executions and then to carry the bodies of the dead to collection points and to clean up the blood because the police were afraid of contracting AIDS. Photos were published showing these scenes. However, opinion polls showed considerable support for the police's actions. The police commander responsible was subsequently included in a bloc of candidates who stood for election to São Paulo's state assembly on a platform of tougher security. Three of these candidates were elected, all of whom used the number '111' to identify themselves on the ballot paper.

The surviving prisoners formed Primeiro Comando da Capital (PCC), which soon became the most powerful crime gang in São Paulo, in response to this massacre. In May 2006 the PCC launched a series of coordinated attacks against police officers and prison staff in a protest over prison conditions, which resulted in around 450 killings. The total death toll is unknown because the authorities have failed to adequately investigate these allegations to date. The PCC murdered over 40 law enforcement officials and prison guards in the space of a few days and the police responded by killing hundreds of suspected gang members and criminals; many of whom appear to have suffered extrajudicial executions. The PCC also carried out almost 300 attacks against public establishments. Riots were organised in 71 prisons in São Paulo, which resulted in the deaths of several prisoners and prison staff. A truce ended the violence, but there were further attacks that August including the kidnapping of a journalist, which forced Brazil's main television news network to broadcast a three-minute video by the PCC.

A vicious circle has been established in Brazil in which public fear of crime leads to support for illegal methods to deal with it, which further undermines the rule of law and feeds a climate that in turn creates more violent crime.

CHAPTER 5

The Role of Judges in Protecting Prisoners from Torture in Brazil

Introduction

This chapter focuses on the role of judges in protecting those deprived of their liberty from acts of torture or other forms of ill-treatment. It provides practical advice on how they should satisfy themselves that people deprived of their liberty have not been subject to torture or other prohibited forms of ill-treatment and to take appropriate action to prevent such treatment, or punish those responsible for inflicting it. Combating torture poses particular problems for judges, and for the administration of justice in Brazil, because the crime is usually committed by the same public officials who are generally responsible for upholding and enforcing the law. This makes it more difficult to deal with than other forms of criminality. Nevertheless, judges have a legal duty to ensure that the integrity of their profession and the justice they uphold are not compromised by the continued tolerance of torture, or other prohibited forms of ill-treatment.

The chapter starts by outlining Brazil's legal and constitutional structure and then describes the role and development of the Brazilian judiciary, particularly in the decades since the restoration of democracy. It then describes how Brazilian judges can and should combat torture in Brazil by insisting that the system over which they preside fully accords with its own Constitution and laws, as well as with international law and best practices.

Constitutional and political structure

Brazil is a constitutional republic composed of a federal district (Brasília) and 26 states. These states are subdivided into approximately 5,500 municipalities (municípios), which are autonomous politico-administrative units governed by mayors (prefeitos) and municipal councillors (vereadores). The states have their own constitutions and are autonomous within the framework of the federal constitution. The judiciary is also made up of state and federal courts. The national Constitution defines the set of administrative and legislative powers for the central government as well as the states and cities. It also lists concurrent jurisdictions between central government, states, the federal district and the cities.

Brazil's first Constitution, of 1824, was modelled on that of revolutionary Portugal (1822) and France (1814) and provided a basic framework for constitutional governance, which has survived, with modifications, down to the present day. It enshrined the principle of a separation of powers and independence of the judiciary, while Brazil's first Criminal Justice Code, of 1832, provided for the election of local justices, a jury system and the right of habeas corpus. The Constitution also provided for a Congress composed

of two houses (the Senate and the Chamber of Deputies) with authority over matters coming under the jurisdiction of the union – chiefly fiscal policy, and political and administrative organisation. The states also had their own elected assemblies.

Elections for Congress and state assemblies continued to be held even during the 1964–1985 dictatorship, although these bodies were reduced to powerless debating chambers during that period. The transition from dictatorship to democracy during the 1980s is often referred to as the abertura (opening) and, although it was accompanied by popular pressure from below, the gradual nature of the process has had an impact on the way in which Brazilian society subsequently developed. Direct elections were held for the state governor positions in 1982 and a civilian president was elected – indirectly – in 1985. A National Constituent Assembly began drafting a new Constitution in 1987 and this was adopted the following year, in 1988. Direct elections for the presidency were held in 1989 and now take place every four years along with elections to both the national Congress and the state governorships and assemblies.

The courts also continued to function during the dictatorship. However, the military introduced additional legislation removing the powers of the courts to judicially review their actions, after they had declared the National Security Act 1968 unconstitutional. Legal challenges by victims of torture and arbitrary detention were also routinely unsuccessful.[1] Some argue that this created a mindset among some members of the judiciary, who became reluctant to protect the human rights of prisoners against violations by the authorities.[2]

Brazil has a civil law system in which judges have an inquisitorial role. Most trials also take place in front of a judge, although juries are used in the most serious cases, involving crimes against life. As discussed in Chapter One of this Manual, most of Brazil's laws on criminal procedure and execution of penal sanctions are contained in federal legislation and are applicable to the whole territory of Brazil. However, they are mainly implemented at the state level as each state is responsible for its own military and civil police forces, as well as the state Public Prosecutor's Office and the state judiciary and penal system. Most criminal and civil cases are dealt with at the state level, with access to the two federal courts described below as a final court of appeal. States may also have different institutions: for example, not all have Public Defenders' Offices[3] or Prison and Police Ombudsmen, so the legal procedures may vary from state to state.

1. Paulo Evaristo Arns, *Brazil: Nunca Mais* (Vozes 2003).

2. James Holston and Teresa Caldeira, 'Democracy, law and violence: disjunctions of Brazilian citizenship', in Felipe Aguero and Jerrey Stark, *Faultlines of democracy in post-transition Latin America* (North-South Center Press: 1998), 286.

3. Santa Catarina is the only remaining state with no Public Defender's Office at all. Rio Grande do Sul and São Paulo, two of Brazil's most populous states, only created the institution in 2005 and 2006 respectively. The states of Paraná and Goiás created the institution in 2012.

The Brazilian judiciary

The Federal Supreme Court (Supremo Tribunal Federal – STF), is the highest judicial authority in Brazil, charged with interpreting the Constitution. The Court has the power of judicial review and judges the constitutionality of laws. It also deals with complaints against higher authorities, such as the President or members of Congress and resolves differences between the central government and states. The STF comprises 11 judges nominated by the President of the Republic with the approval of the Senate. Immediately below the STF is the High Court of Justice (Superior Tribunal de Justiça – STJ), which consists of 33 judges who are nominated by the President of the Republic from a list drawn up by the judiciary itself, along with Ministério Público (the Public Prosecutor's Office) and the Brazilian Bar Association (Ordem dos Advogados do Brasil – OAB). The STJ is the highest appellate court for non-constitutional issues and was created in a largely unsuccessful attempt to reduce the number of cases going to the STF. A special appeal (recurso especial) can be made to the STJ when a judgment of a court of second instance offends a federal statute disposition or when second instance courts make different rulings on the same federal statute.

There are a total of 15,731 judges in Brazil, 11,108 of whom serve at the state level.[4] Brazil has five parallel court systems, each of which supports lower courts, state or regional appellate courts and supreme courts. These are: the ordinary civil and criminal courts organised at the state level; federal courts, which deal with matters of federal or constitutional relevance; and a specialised justice system, which consists of electoral courts, labour courts and military courts. Each of Brazil's 26 states and its federal district organises its own judicial system although these must adhere to the same laws and basic constitutional principles.

4. *Conselho Nacional de Justiça Departamento de Pesquisas Judiciárias, Justiça em Números 2008 Variáveis e Indicadores do Poder Judiciário* (CNJ June 2009), 209. There are a further 1,478 federal judges and 3,145 labour court judges.

The 1988 Constitution contains 43 separate articles on the role of Brazil's judiciary and the structure and powers of the courts and Public Prosecutors. After the experience of the military dictatorship, its drafters were concerned to entrench judicial independence and the ability of the courts to hold the government to account through judicial review. However, the weakness of the executive at the time of the Constitution's drafting allowed judges to maximise their influence and minimise their accountability in what has been described as 'a classic case of producer capture'.[5] The Brazilian judiciary now enjoys more political and operational independence than in any other country in Latin America, but this 'hyper-autonomy' also significantly impacts on the number of judgments that they are called upon to make.

5. Fiona Macaulay, 'Democratisation and the judiciary', in Maria DiAlva Kinzo and James Dunkerley, *Brazil since 1985: economy, polity and society* (Institute of Latin American Studies: 2003), 86.

While international human rights jurisprudence in recent years tends to regard the realisation of most social, economic and cultural rights as

progressive and incremental, Brazil's 1988 Constitution declared that all fundamental rights were to have immediate application.[6] It also established that the law cannot exclude from judicial examination any threat or violation of a fundamental right. This significantly expanded the role of the judiciary in public policy-making.[7] Fundamental rights cannot be abolished, even by constitutional amendments. People can claim a violation of fundamental rights by an action or omission of the legislative or executive branch in implementing or regulating these rights. One consequence of this has been that constitutional challenges are often brought to the federal courts over government action or inaction on fairly mundane issues.

6. Constituição Federal de 1988, Article 5 (I).

7. *Ibid*, Article 5, XXXV.

Because the Brazilian legal system relies heavily on constitutional guarantees, a large number of cases are appealed all the way to the STF. While direct challenges to the constitutionality of laws can only be made in the STF, any judge can rule on the constitutionality of a law as a matter incidental to any type of court case under consideration, and this may then be appealed all the way up to the STF. Until recently, every judge in lower-level courts was free to interpret the law regardless of previous rulings by higher-level courts. Lower courts still routinely overturn or stall legislative decisions and are free to set new precedents on civil and criminal issues and also constitutional questions. This diffusion of the power of judicial review, combined with the complicated and overlapping structure of the Brazilian judiciary, has made law and policy-making by central government difficult as the executive has to defend itself against multiple levels of judicial challenges every time it enacts a new law. This has massively increased the number of cases that the judiciary deals with and often produces conflicting and ambiguous decisions.

Between 1988 and 1991, the number of cases entering the federal justice system rocketed from 193,709 to 725,993.[8] Although the vast majority of challenges to presidential or congressional legislative initiatives are unsuccessful, each must nevertheless be dealt with by the high courts, which overloads the system. In 2005, for example, the STF was hearing around 5,000 cases every week, many of which were identical injunctions that had been filed in dozens of state courts simultaneously.[9] A report commissioned for the Brazilian Ministry of Justice showed that in 2003 there were 17.3 million cases initiated and allocated to a judge – the equivalent of one case for every ten inhabitants.[10] The courts had only managed to settle 12.5 million of these creating a back-log of 4.7 million unresolved cases for that year alone.[11] This has led to a huge back-log of pending cases and means that trials are often subject to considerable delays.

8. See note 5 above, at 88.

9. Alfredo Montero, *Brazilian Politics* (Polity 2005) 40.

10. Ministério da Justiça, *'Diagnóstico do poder judiciário'*, (Brasília 2004), 34.

11. *Ibid.*

A report by the UN Special Rapporteur on the independence of judges and lawyers, in October 2004, identified the Brazilian judicial system's

main shortcomings as: problems with access to justice; its slowness and notorious delays; and the fact that there are very few women or people of African descent or indigenous origin in top positions in the judiciary.[12] He concluded that:

> 'of all these shortcomings, the most serious is without doubt the first, since a large proportion of the Brazilian population, for reasons of a social, economic or cultural nature or social exclusion, finds its access to judicial services blocked or is discriminated against in the delivery of those services... Delays in the administration of justice are another big problem, which in practice affects the right to judicial services or renders them ineffective. Judgments can take years, which leads to uncertainty in both civil and criminal matters and, often, to impunity... Brazilian justice does not have a positive image in society at large, though it has a long tradition of functional autonomy as a branch of government'.[13]

Judicial reform has been a controversial topic in Brazil over the last two decades, with critics arguing that the government's attempts to increase its control over the judiciary weaken a fundamental constitutional safeguard and that there are better ways of making Brazilian justice fairer, faster and more accessible. However, it is generally agreed that Brazil cannot deal with its current workload without greater resources and that it suffers from a chronic lack of judges at the local level.

In May 2003, the government established the Secretariat for Judicial Reform (Secretaria de Reforma do Judiciário) within the Ministry of Justice, charged with 'formulating, fostering, supervising and coordinating the process of reforming the administration of justice and fostering dialogue between the legislative, executive and judicial branches'. On 7 July 2004, the Senate approved a bill that included Constitutional Amendment 45: Reform of Judiciary Power.[14] This established the principle that some STF decisions can have binding precedent if this is explicitly written into the judgment and supported by a two-thirds vote of its members.[15] This process is known as a súmula vinculante. In 2006, a new law, Súmula Impeditiva de Recursos, was approved, which specifies that if a lower court decision is in line with a previous decision of a higher court, appeals will not be permitted.[16] A further law, Repercussão Geral do Recurso Extraordinário, specified that extraordinary appeals to the STF will only be permitted if the person or body requesting the appeal can show the case has a 'general repercussion in society'.[17] If this test is not met then the judgment of a lower court is accepted as final.

The overall impact of these changes has been to cut the number of cases going to the STF, which fell from 97,400 between April 2007 and March

12. *Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, Report of the Special Rapporteur on the independence of judges and lawyers*, Mr Leandro Despouy, Mission to Brazil, E/CN.4/2005/60/Add.3, 22 February 2005.

13. *Ibid*, summary of conclusions.

14. See: www.v-brazil.com/government/laws/recent-amendments.html, accessed May 2013.

15. Constituição Federal de 1988, Article 103 (A).

16. Lei 11 N. 276/2006.

17. Lei 11 N. 418/2006.

2008 to 56,500 between April 2008 and March 2009.[18] Nevertheless, the *Economist* newspaper described the STF, in May 2009, as still being 'the most overburdened court in the world'.[19]

18. *Economist*, 'when less is more', 21 May 2009.

19. *Ibid*.

Constitutional Amendment 45 also established a National Council of Justice (Conselho Nacional de Justiça – CNJ) to deal with complaints against judges.[20] This consists of 15 members appointed by the President of the Republic and approved by the Senate, of which nine will be judges selected from all levels of the state and federal branches; the remaining six members will be made up of representatives from Ministério Público, the OAB and wider civil society. The CNJ's legality was challenged by the Brazilian Judges' Association (Associação dos Magistrados Brasileiros – AMB) in December 2004, who argued that it was an unconstitutional threat to judicial independence, but the challenge was unsuccessful.

20. Constituição Federal de 1988, Article 103 (B).

The role of judges in preventing and investigating acts of torture

The basic role of judges is to uphold national law – including international law when this has been incorporated into domestic legislation – and to preside independently and impartially over the administration of justice. In deciding guilt or innocence, or in weighing the merits of claims between individuals and the state, judges must have reference only to the facts, so far as they can be established; the merits of each party's position; and the relevant law. But justice also requires that judges understand all the factors relevant to the situation they are considering, including those which may affect the way that those present in the courtroom behave, or perceive the trial process. This does not just involve controlling procedures, making rulings on points of law, summing up cases, giving judgments or passing sentences, but also ensuring that their court proceedings are managed in a way that is fair and is seen to be fair.

It is the responsibility of judges to ensure that defendants, witnesses and victims are treated fairly and that those accused of having committed a criminal offence receive a fair trial. This involves ensuring that their rights are respected at all times, and that only evidence which has been properly obtained should be admissible in court. It also means ensuring that those responsible for upholding the law are themselves bound by its strictures. This may involve taking an assertive role to ensure that all testimony and evidence has been given freely and has not been obtained using coercive means. These provisions are set out in both Brazilian and international law.

However, as Chapter Four of this Manual shows, torture is still widespread in Brazil and judges need to be more alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment. In the report of its visit to Brazil in 2011, the UN Subcommittee for the

Prevention of Torture (SPT) noted that 'judges rarely asked questions about detainees' treatment during investigation. Judges should be vigilant for signs of torture and ill-treatment, and take steps to terminate and remedy such situations'.[21] It strongly recommended 'that judges refuse to accept confessions when there are reasonable grounds to believe that these have been obtained by means of torture or ill-treatment. In such cases, judges shall immediately notify the prosecution so an investigation can be initiated'.[22] It also stated that judges 'should be obliged by law to ask every detainee about his/her treatment during investigation, to record in writing any allegations of torture or ill-treatment, and to order an immediate forensic medical examination whenever there are grounds to believe that a detainee could have been subjected to torture or ill-treatment'.[23]

21. *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, CAT/OP/BRA/1, 5 July 2012, para 28.

22. *Ibid*, para 31.

23. *Ibid*, para 29.

International human rights law requires states to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, as an effective means of preventing cases of torture and ill-treatment.[24] States are also required to investigate complaints of ill-treatment of detainees and establish independent mechanisms to monitor detainees.[25] Judges should, therefore, also take a proactive role in monitoring the Brazilian legal system, to ensure that it fully complies with international standards, make recommendations for reforms where necessary and wherever they have discretion to do so, interpret the law in ways that are consistent with international human rights law and best practices from other jurisdictions.

24. Human Rights Committee, General Comment 20, para 11.

25. Concluding Observations of the Human Rights Committee: France, UN Doc CCPR/C/79/Add.80, 4 August 1997, para16.

Appearance before a judicial authority

All detained persons have the right to challenge the lawfulness of the detention. This is sometimes referred to as a habeas corpus procedure, which means the delivering of the body before the court. Brazil's first Criminal Justice Code, of 1832, provided for the right of habeas corpus and it has been reaffirmed in successive laws since that date. The right of habeas corpus can provide an important safeguard against torture as well as a means to challenge arbitrary detentions – although sometimes judges restrict this procedure to ensuring that the detention itself is lawful without giving sufficient weight as to whether the conditions of the detention also fully comply with the law. A law has been tabled in Congress proposing an amendment to the Constitution, which would ensure that anyone detained should, within 48 hours, be brought in person before a judge who has the legal authority to determine the legality of their continued detention.[26]

26. PEC-68/2011, Autor: Domingos Dutra – PT/MA, Data de apresentação: 16 August 2011, Ementa: Dá nova redação ao inciso LXII do art. 5º da Constituição federal, que dispõe sobre a prisão de qualquer pessoa, para contemplar a sua imediata apresentação em juízo. Explicação: Fixa em quarenta e oito horas o prazo para a pessoa ser conduzida à presença do juiz competente.

This issue has been extensively considered by international human rights courts and monitoring bodies. Article 9 (3) of the ICCPR states that: 'Anyone

arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.' The Human Rights Committee has stated that the right to challenge the legality of detention applies to all persons deprived of their liberty and not just to those suspected of committing a criminal offence.[27] Decisions by the Human Rights Committee, the European Court of Human Rights and the African Commission on Human and Peoples' Rights have established that the authority in question must be a formally constituted court or tribunal with the power to order the release of the detainee.[28] It must be impartial and independent from the body making the decision to detain the person and must also make its decision without delay.[29]

The right to challenge the lawfulness of detention, while primarily a safeguard against arbitrary deprivations of the right to liberty, is also a guarantee essential for the protection of other rights. The Inter-American Court of Human Rights has stated that while habeas corpus, or amparo, procedures are designed mainly to protect the derogable right to liberty, they are also an essential instrument for the protection of prisoners' non-derogable rights to life and to freedom from torture. The Court has therefore held that the right to the remedies of habeas corpus and amparo may never be suspended since they are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited.[30]

The Inter-American Court of Human Rights has stated that if a judge is not officially informed of a detention, or is informed only after significant delay, the rights of a detainee are not protected. The same conclusion was taken if the detainee is not personally brought in front of a judge. It has pointed out that such situations lend themselves to other types of abuses, erode respect for the courts and lead to the institutionalisation of lawlessness.[31] The African Commission has stated that denying detainees the opportunity to appeal to national courts violates the African Charter.[32] The European Court has stated that the review of lawfulness of the detention must ensure that the detention is carried out according to procedures established by national law, and that the grounds for detention are authorised by national law.[33] The detention must comply with both the substantive and procedural rules of national legislation. Courts must also ensure that the detention is not arbitrary according to international standards.[34] Both the Human Rights Committee and the European Court of Human Rights have stated that prompt access to a court is an essential safeguard against torture and ill-treatment even during a state of emergency.[35]

27. Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 8 (1994), para 1.

28. *Brincat v Italy*, ECtHR, (1992); *De Jong, Baljet and van den Brink*, ECtHR, (1984), 77 Ser. A 23; Concluding Observations of the Human Rights Committee: Belarus, UN Doc CCPR/C/79/Add.86, 19 November 1997, para 10; *Rencontre Africaine pour la défense de droits de l'homme v Zambia*, (71/92), 10th Annual Report of the African Commission, 1996 – 1997, ACHPR/RPT/10th.

29. *Vuolanne v Finland*, (1989), Report of the Human Rights Committee, (A/44/40); *Torres v Finland*, (1990), Report of the Human Rights Committee vol II, (A/45/40), 1990, para 7; *Chahal v UK*, (1996); *Navarra v France*, ECtHR, (1993).

30. 'Habeas Corpus in Emergency Situations', Advisory Opinion OC-8/87 of 30 January 1987, Annual Report of the Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and 'Judicial Guarantees in States of Emergency', Advisory Opinion OC-9/87 of 6 October 1987, Annual Report of the Inter-American Court, 1988, OAS/Ser.L/V/III.19 doc.13, 1988.

31. Inter-American Commission, Second Report on the Human Rights Situation in Suriname, OEA/Ser. L/V/II.66, doc. 21 rev. 1, 1985, at 24.

32. Rencontre Africaine pour la défense de droits de l'homme v Zambia, (71/92), 10th Annual Report of the African Commission, 1996–1997, ACHPR/RPT/10th.

33. *Navarra v France*, (1993), para 26.

34. *Ibid*.

35. Human Rights Committee General Comment No 29, States of Emergency (Article 4), adopted at the 1950th meeting, on 24 July 2001, para 16; *Aksoy v Turkey,* ECtHR, (1996), App No 21987/93.

The European Committee for the Prevention of Torture (CPT) recommends that:

> 'all persons detained by the police whom it is proposed to remand to prison should be physically brought before the Judge who must decide that issue... Bringing the person before the Judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the Judge will be able to take action in good time if there are other indications of ill-treatment (eg visible injuries; a person's general appearance or demeanour)'.[36]

36. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the *CPT Standards, Substantive Sections of the CPT's General Reports*, Council of Europe, October 2001, CPT/Inf/E(2002), 14, para 45.

Whenever a detainee is brought before them from custody, judges should be particularly attentive to his or her condition. Where necessary, judges should routinely carry out a visual inspection for any signs of physical injury – or order one to be carried out by a doctor. This could involve a check for physical bruising that may be hidden under clothing. Many forms of torture leave no visible marks and others are inflicted using methods that are difficult to detect. Judges should, therefore, also be alert to other clues, such as the individual's physical and mental condition and overall demeanour, the behaviour of the police and guards involved in the case and the detainee's attitude towards them. Judges should actively seek to demonstrate that they will take allegations of torture or ill-treatment seriously and will take action where necessary to protect those at risk. Judges also need to ensure that the detainee has an opportunity to report any allegation of torture or other form of ill-treatment, without putting him or herself at risk of further ill-treatment. If, for example, a detainee alleges that he or she has been ill-treated when brought before a judge at the end of a period of police custody, it is incumbent upon the judge to record the allegation in writing, immediately order a forensic medical examination and take all necessary steps to ensure the allegation is fully investigated.[37] This should also be done in the absence of an express complaint or allegation if the person concerned bears visible signs of physical or mental ill-treatment.

37. CPT/Inf/E (2002) 1, 14, para 45.

Where a suspect does not speak the language in which the trial is being conducted, the requirements of a fair trial dictate that he or she must be provided with full interpretation facilities.[38] This is also an important safeguard to ensure that all acts of torture and other forms of ill-treatment are reported.

38. International Covenant on Civil and Political Rights, Article 14 (3)(f).

Those responsible for the security of courts and for guarding detainees during court appearances should always be organisationally separate from, and independent of, those guarding detainees in custody and those conducting investigations into the crime that the detainee is suspected

of committing. Remand prisoners are at particular risk if they are being held by, or can be transferred back into, the custody of the investigating authorities. While in court, the detainee should be held in a place that is physically separate from where the police or investigating officers involved in the case are waiting. If there are any suspicions that an individual has been subjected to torture, or other forms of ill-treatment, that individual must be removed from the custody of his or her alleged torturers immediately.

In order to be alert to signs of torture or ill-treatment, judges need to give some consideration to the physical layout of their courtrooms.

- Can the judge clearly see and hear the detainee at all times while he or she is in the courtroom, sufficient to detect any visible signs of physical or mental injury?
- Is the level of security in which the detainee is being held appropriate to any real danger that he or she may pose?
- Can the detainee communicate with his or her lawyer in confidence?
- Can the detainee communicate to the court freely without any threat or intimidation?

It is crucial that in all hearings conducted by a judge related to the lawfulness and conditions of the detention, the prisoner should be assisted by her or his lawyer or by an official public defender in order to bring the necessary legal assistance and request the legal remedies applicable to the circumstances, whether they concern the security of the detainee when denouncing any abuse suffered while under police control, or to claim her or his immediate release according to the possibilities granted by law.

Legal assistance

Judges should ensure that all defendants are aware of their right to call upon the assistance of a lawyer of their choice or to be assisted by an official public defender. Defence lawyers and official public defenders should be able to perform their professional functions without intimidation, hindrance, harassment or improper interference, including the right to consult with their clients freely.[39] They should not be identified with their clients or their clients' causes as a result of discharging their functions. Nor should they suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with their professional duties, standards and ethics. Where the security of lawyers or public defenders is threatened as a result of discharging their functions, they should be adequately safeguarded and protected by the authorities.[40]

39. Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 14 (1994), para 9; Basic Principles on the Role of Lawyers, principles 16–18.

40. *Ibid.*

The Brazilian Constitution stipulates that 'the State has to provide full and free legal assistance to whoever proves not to have sufficient funds'.[41] It also provides for the enactment of legislation to establish Defensoria Pública (Public Defenders' Offices) in Brazil's various states.[42] This was established by Lei Complementar No 80 de 12 de janeiro 1994 (Complementary Law No 80 of 12 January 1994), which laid down general provisions for the creation of Public Defenders' Offices in every state. This issue is discussed further in Chapter Six of this Manual.

41. Constituição Federal de 1988, Article 5 (LXXIV).

42. Constituição Federal de 1988, Article 134.

Admissibility of evidence

Brazilian judges play a crucial role in deciding what evidence should be heard in the main trial, or before a jury, and what evidence should be deemed inadmissible. As discussed in Chapter Two of this Manual, national and international law clearly specify that evidence obtained through torture or other forms of ill-treatment must be deemed inadmissible.[43]

43. *Kelly v Jamaica*, (1991); *Conteris v Uruguay,* (1985); *Estrella v Uruguay,* (1983).

This is enshrined in Brazilian law and the Constitution.[44] It is also contained in Article 15 of the UN Convention against Torture, which requires States Parties to ensure that 'any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'.[45] The prohibition on use of such statements is based in part on the unreliable nature of information obtained by such methods and in turn the implications for the fairness of any proceeding in which such information is admitted, and also on the premise that prohibiting the use of statements extracted through torture removes one of the most important incentives to torture in the first place.

44. Constituição Federal de 1988, Article 5 (LVI), CPP, Article 157.

45. General Comment 20, para 12.

The Human Rights Committee has stated that it 'is important for the discouragement of violations under Article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment'. It has further emphasised that 'domestic law must ensure that statements or confessions obtained in violation of Article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will'.[46] The Special Rapporteur on torture has also addressed the issue repeatedly over the years in his standing General Recommendations: '[w]here allegations of torture or other forms of ill treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment'.[47]

46. General Comment 32: 'Right to equality before courts and tribunals and to a fair trial' (2007).

47. UN Doc A/56/156 (3 July 2001), para 39(j); General Recommendations (n 28), para 26(k);[earlier version para 926 (a)(b) and (d)].

In *Jalloh v Germany*, the European Court reasoned that to allow such evidence would 'legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe and afford brutality the cloak of law'.[48] In *Gafgen v Germany*, dealing with a case in which inhuman treatment (in the form of threats of torture) had led to confessions the Court stated that use of statements obtained as a result of torture or other ill-treatment as part of the evidence in criminal proceedings had rendered the proceedings as a whole unfair, 'irrespective of whether the admission of the evidence was decisive in securing the applicant's conviction'.[49]

48. *Jalloh v Germany,* [GC] (No 54810/00) ECHR, 11 July 2006.

49. *Gäfgen v Germany,* (No 22978/05) ECHR, 1 June 2010 (referred to Grand Chamber, 1 December 2008). In this case it concluded that the state's recognition of the treatment as a violation of Article 3, the conviction of the perpetrators, together with the exclusion of all confessions and statements made by the accused at his criminal trial, had provided adequate redress for the Article 3 violation.

It is the duty of the court to ensure that evidence produced is admissible. It is, therefore, incumbent on the judge to satisfy herself or himself that any confession or other evidence has not been obtained through torture or other forms of ill-treatment. Even if no complaint is made by the accused, the judge must be prepared to ask the prosecution to prove beyond reasonable doubt that the confession was obtained voluntarily. The risk of torture and ill-treatment under interrogation is all the greater because the Brazilian legal system allows for convictions based mainly or substantially on confessions and on evidence obtained in pre-trial detention – and allows interrogations to be conducted without a detainee's lawyer being present. In all circumstances, strict procedures should be followed to ensure that interrogations are properly conducted and that abuses are not inflicted while a detainee is being questioned.

Chapter Six of this Manual contains a checklist of good practice for the conduct of interrogations. It is particularly important that the details of all interrogations are recorded and the interrogation itself is transcribed. This information should also be available for the purposes of judicial or administrative proceedings.

Evidence may be deemed admissible in a trial even though there is an allegation that it was obtained through coercive means – as not all such claims will necessarily be accepted as genuine. In some cases, judges may hold a separate hearing – or a 'trial within a trial' – into such claims before deciding whether this evidence can be presented before the main court. Where a trial is conducted with a jury, it may be excluded from this part of the proceedings. However, there may also be cases where evidence is heard in the main trial that the defence alleges was obtained through torture or other prohibited forms of ill-treatment. In any case where such an allegation has been made, judges have a particular responsibility to ensure that witnesses are properly examined about the allegation and that sufficient weight is given to this during their deliberations and when summing up the case.

According to Article 156 of the Brazilian Code of Criminal Procedure, 'the burden of proving an allegation lies upon whoever has made it, but the Judge may, at the evidentiary phase or before delivering the sentence, issue an ex officio order for the performance of any actions he may deem appropriate in order to clarify any doubts on a relevant issue'. In his report on Brazil in 2001, the Special Rapporteur on torture noted that:

> 'According to the President of the Federal Supreme Court, in case of torture allegations made by a defendant during a trial, there is a reversion of the burden of proof. The public prosecutor would have to prove that the confession was obtained by lawful means and the burden of proof would not lie with the defendant having made the allegations. According to public prosecutors from the Nucléo contra Tortura of the Federal District of Brasília, if a judge or a public prosecutor is informed that a confession may have been obtained through illegal means, he/she should initiate an investigation, which will be carried out by a prosecutor other than the one in charge of the case. According to their interpretation, as long as investigations are ongoing on the matter, the confessions must be removed from the file. The President of the Federal Court of Appeal confirmed this interpretation of the law. He indicated that when there is prima facie evidence that a defendant has confessed under torture and if his/her allegations are consistent with other evidence, such as forensic evidence, the trial must be suspended by the judge and the public prosecutor's office must require the opening of an investigation regarding the torture allegations. If the judge intends to pursue the prosecution of the suspect, the confession concerned, as well as other evidence obtained through this confession, should not be part of the body of evidence in the original trial. If a confession is the only evidence against a defendant, the judge should decide that there is no basis for conviction. The Prosecutor General of the Republic said that the prosecutor in charge on the initial criminal investigation may sometimes also be in charge of the one regarding allegations that the confessions had been obtained unlawfully. He admitted that, even though there might be a conflict of interest, this situation often occurs in small places.[50]

In a follow-up report published in 2010, the Special Rapporteur on torture questioned whether all judges were following this principle. He stated that according to 'Non-governmental sources: There is no information to suggest that this is being implemented. Allegations of torture are regularly dismissed by authorities at all stages of the criminal justice system.'[51] In an alternative report submitted to the Rapporteur by a group of Brazilian human rights NGOs, they cited a judge in a court in Santa Catarina stating that an 'allegation of torture, not accompanied by proof and originating

50. Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 Addendum Visit to Brazil, E/CN.4/2001/66/Add.2, 30 March 2001, paras 101–102.

51. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Brazil, Cameroon, China (People's Republic of), Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal, Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo, A/HRC/13/39/Add.6, 26 February 2010, 16.

from a prisoner escaped from the penitentiary and considered as very dangerous, offers no credibility'.[52]

Nevertheless, it is clear that the interpretation of the President of Brazil's highest court is consistent with international human rights law on where the burden of proof on torture allegations should lie. For example, the European Court of Human Rights has stated that 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation as to the cause of the injury'.[53] The presumption that the injuries a detainee has suffered were the result of torture or other prohibited forms of ill-treatment may be rebutted if a plausible alternative explanation exists, but it is for the authorities and alleged perpetrators to demonstrate convincingly that allegations are unfounded. Given the difficulties of proving allegations of torture, in the circumstances of detention, appropriate weight should also be given to corroborative evidence. Judges should not make the standard of proof so high that it cannot be realistically discharged.

Factors that should be taken as corroborative evidence that an allegation of torture is well-founded may include:

- where a detainee has been held at an unofficial or secret place of detention;
- where a detainee has been held incommunicado for any period of time;
- where a detainee has been held for a long period in isolation or solitary confinement;
- where proper custody records have not been maintained or where significant discrepancies exist in these records;
- where a detainee has not been fully informed of his or her rights at the start of the detention and before any interrogation;
- where a detainee has been denied early access to a lawyer or an official public defender;
- where a foreign national detainee has been denied consular access;
- where a detainee has not been subject to an immediate medical examination and regular examinations thereafter;
- where medical records have not been fully kept or have been improperly interfered with or falsified;
- where statements have been taken by the investigating authorities without a lawyer or an official public defender being present;
- where the circumstances in which statements were taken have not been properly recorded and the statements themselves were not fully transcribed contemporaneously;
- where statements have been subsequently improperly altered;

52. TJSC-HC 9.695-SC-1a C Crim. Rel. Des Nauro Colaço- DJSC 25.03.1991-9) (Unofficial Translation), Cited in Global Justice Center et al, Alternative Report on Compliance by the State of Brazil with the Obligations Imposed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 20 April 2001.

53. *Ribitsch v Austria*, ECtHR, (1995); *Aksoy v Turkey* ECtHR, (1996); *Assenov and Others v Bulgaria*, ECtHR, (1998); *Kurt v Turkey*, ECtHR, (1998); *Çakici v Turkey*, ECtHR, (1999), *Akdeniz and Others v Turkey*, ECtHR, (2001); *Bulacio v Argentina* (2003) IACHR Series C No 100, para 127; Human Rights Committee, *Bousroual v Algeria* (2006) UN Doc CCPR/C/86/992/2001, para 9.4.

- where a detainee has been blindfolded, hooded, gagged, manacled or subject to other physical restraint, or been deprived of their own clothes, without reasonable cause, at any point during the detention; or
- where independent visits to the place of detention by bona fide human rights organisations, established visitor schemes or experts have been blocked, delayed or otherwise interfered with.

Examining witnesses

Particular attention should be paid to any witness who appears to have suffered or witnessed physical injuries or mental trauma while in custody. Such injuries or trauma may not necessarily be the result of torture or other forms of ill-treatment and not all claims of such ill-treatment can be taken at face value. Nevertheless, appropriate allowance should be made for the fact that a witness testifying about such acts may be particularly vulnerable, frightened or disorientated. Care should be taken to ensure that the witness is not re-traumatised during questioning and that the quality of his or her evidence suffers as little as possible because of any particular vulnerabilities. Allowance should also be made for the fact that the witness may be suffering from post-traumatic stress, or from a mental disability unrelated to the alleged ill-treatment, and that this may affect his or her memory, communication skills and responses to perceived aggression during questioning. Therefore, discrepancies in the accounts given by a witness to a torture allegation should not automatically discredit the evidence.

The following practices should be adhered to during questioning and the reasons for this explained to the court, where necessary:

- **Repeating questions.** Questions may need to be repeated or rephrased as some people can take longer to absorb, comprehend and recall information.
- **Keeping questions simple.** Questions should be kept simple as some people may experience difficulty in understanding and answering them. They may also have a limited vocabulary and find it difficult to explain things in a way that others find easy to follow.
- **Keeping questions non-threatening and open.** Questions should be non-threatening as some people may respond to rough questioning either by excessive aggression or by trying to please the questioner. Questions should also be kept open as some people are prone to repeating information provided to them or suggested by the interviewer.

Judges should also be aware that physical and mental torture and other forms of ill-treatment may have been carried out within a particular social,

cultural or political specificity that the witness might find difficult to explain to the court. An action that might seem trivial or harmless in one context could be deeply demeaning or traumatic in another. A comment that might seem completely innocuous when repeated could easily have been understood – and have been intended to be – a dangerous implied threat when it was first made. For example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions estimated in 2008 that approximately 70 per cent of the homicides in the state of Pernambuco were committed by death squads, which are widely believed to be linked to the police.[54] A federal parliamentary commission of inquiry found that these extermination groups are mostly composed of government agents (police and prison guards), and that 80 per cent of the crimes caused by extermination groups involve police or ex-police.[55] Given the extremely high number of people who are also killed by the police, supposedly 'while resisting arrest', it is easy to see how coded threats can be made against a witness, or a member of his or her family, by the police, which the witness has difficulty in explaining to the court. The judge should actively draw out such nuances if the lawyers have failed to do so during their own questioning of witnesses.

54. *Preliminary report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston Addendum, Mission to Brazil, 4–14 November 2007*, UN Doc A/HRC/8/3/Add.4, 14 May 2008, para 6.

55. *Relatório Final da Commissão Parlamentar de Inquérito do Extermínio no Nordeste*. Criada por meio do Requerimento No 019/2003 – destinada a 'Investigar a ação criminosa das milícias privadas e dos grupos de extermínio em toda a região nordeste' – (CPI – extermínio no nordeste), 25.

Brazilian law allows defence and prosecution lawyers to request information about any previous convictions of witnesses, but they must provide reasoned arguments for this.[56] Where it is within their discretion to do so, judges should always ensure that the previous disciplinary or criminal offences on the record of a law enforcement officer appearing as a prosecution witness are disclosed to the defence. This will be particularly important in any case where there is an allegation of torture or ill-treatment if the officer has previously been disciplined or convicted of such behaviour. It can also act as a disincentive to individual officers to engage in such practices, as their value as prosecution witnesses in subsequent cases will be undermined.

56. *Código de Processo Penal* 1941, Article 214.

When a judge sums up, concludes a trial or delivers his or her reasoning, it is important to ensure that adequate weight has been given to allegations of torture and ill-treatment and to the testimony of those who allege that it has taken place. Where the trial is being held before a jury, it should be carefully explained why all forms of torture and ill-treatment are prohibited, irrespective of the nature of the person who alleges that he or she has been subjected to this, or any crime that he or she may be suspected of committing. This will be particularly important in cases where the person making the allegation is of a different race, sex, sexual orientation or nationality; has a different political or religious belief; or comes from a different social, cultural or ethnic background from the majority of the jurors. It will also be important if the person making the allegation is accused of a particularly serious or obnoxious crime.

Fear of violent crime remains pervasive throughout Brazilian society, leading to support for 'tough' policing, sentencing and penal policies. In one opinion poll conducted in São Paulo in 2004, 24 per cent of those interviewed thought that torture was an acceptable means of criminal investigation, a rise of four per cent over a similar poll conducted in 1997.[57] Recent research from the Human Rights Secretariat, conducted and published by the Centre for the Study of Violence, University of São Paulo, about attitudes, cultural norms and values in relation to human rights violations and violence, indicates a widespread acceptance of the use of violence as a means of conflict resolution in Brazil. The survey reported that only 52 per cent now disagreed with the view that courts should accept evidence obtained through torture and around half said that they disagreed with, but could understand, that the extrajudicial killing of someone was a threat to the community.[58]

There is also widespread prejudice towards particular social groups – such as poor, young, black or mulato, favela residents – who are generally perceived negatively and identified with particular types of crime. Juries must be discouraged from following their prejudices that lead them to conclude that the victim 'deserved' the torture or ill-treatment that he or she is alleged to have suffered. Equally where other evidence in the trial points to the guilt of a particular defendant, juries must be dissuaded from regarding allegations of torture or other forms of ill-treatment in a less serious light – or concluding that the police were merely trying to 'improve' their case. In providing direction as to the law to jurors, judges must always point out the total unacceptability of torture and other forms of ill-treatment under all circumstances.

Judges should, however, also instruct the jury to give due weight to 'cultural' factors when applying their 'common sense' to such allegations. While not applying prejudicial stereotypes to particular groups – or instinctively finding the evidence of some more credible than that of others – jurors should be guided towards attempting to understand the impact that various forms of physical and mental ill-treatment might have on a victim from a different background to their own. For example, as described above, certain social and political groups believe that the police routinely behave in ways that others might find it very difficult to comprehend.

57. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Brazil, Cameroon, China (People's Republic of), Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal, Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo,* A/HRC/13/39/Add.6, 26 February 2010, 19.

58. Nancy Cardia, *Nationwide Survey by Household Sampling on attitudes, cultural norms and values in relation to human rights violations and violence* (University of São Paulo 2012).

Case-study: Visit of the Special Rapporteur I

'On 27 August, the Special Rapporteur visited at night the 2nd district police station where detainees were said to be taken before being brought to court. It consisted of a long corridor 1.5 metres wide and 40 metres long around an open square. As it was raining, the corridor was literally packed with people, many of them half dressed, since they had allegedly been ordered to strip. The delegada in charge said that there were 188 detainees, but that sometimes there were more than 220. The air in the corridor was suffocating. Rubbish was lying on the floor and in the courtyard and the four toilets, consisting of holes blocked by excrement, were open to the corridor. The Special Rapporteur could not fail to notice the nauseating smell. According to information received before his visit, the station was cleaned once a week and was allegedly cleaned the day before the visit. The walls were covered with bullet holes. According to information received, shots were fired from time to time by guards to frighten detainees. Detainees said that it was therefore too dangerous to enter the yard, where the only water tap was located. The delegada confirmed that detainees were forbidden to enter the yard as she believed there was too great a risk that detainees would escape by the semi-open roof by forming a human pyramid. Authorities indicated that detainees were transferred to this police station in order for them to be closer to the court.

It is the belief of the Special Rapporteur that detainees waiting to appear in court in such subhuman conditions could only look to the judge to be unwholesome and dangerous. A large number of detainees expressed their shame at being seen in such a dirty and foul-smelling state when they were brought to court. They did not understand why they had to be brought to the station before being taken to court, instead of being taken directly from their respective police lock-ups. They understandably believed that their humiliation was perpetuated on purpose in order to erode any sympathy on the part of the judges. The Special Rapporteur notes with concern the comment of a guard who, when told that the prisoners feared reprisals for talking to the Special Rapporteur and his team, told the detainees that, as they had behaved properly that night, it would not be necessary to "do anything to them".'

Presumption in favour of liberty

Brazil's Constitution specifies that the judiciary is duty-bound to treat pre-trial prisoners as innocent, which means that they should only be detained as a last resort.[59] The Código de Processo Penal gives judges the power to impose 'precautionary measures' (including imprisonment) on suspects, which may be decreed during police investigations or the discovery stage of criminal proceedings.[60] Preventative imprisonment can only be decreed in three circumstances: to 'uphold the public or economic order'; to allow a criminal investigation to proceed without inhibition; and to guarantee the future application of criminal law.[61]

The first of these grounds is obviously extremely wide-ranging and subjective and many believe it to be unconstitutional.[62] It has been

59. Constituição Federal de 1988, Article 5, (LVII).

60. Código de Processo Penal 1941, Article 312.

61. *Ibid*, Articles 312, 282 and 301. See also Law 7.960/89.

62. Rogerio Schietti Machad Cruz, *Prisão Cautelar: dramas, princípios e alternativas* (Lumen Juris Editora 2006).

argued that the lengthy and drawn-out nature of Brazil's judicial trials and appeals has led to increasing public pressure for the imprisonment of people suspected of criminal activity even before they have been tried and sentenced. This, it is further argued, has caused some judges to abandon the presumption of innocence, despite its protection within Brazil's Constitution as a cornerstone of the criminal justice system.

One analysis of the pattern of pre-trial detention in five Brazilian cities, found that judges were routinely imprisoning large numbers of people who had been accused of larceny (petty theft), even though this is an extremely minor offence.[63] In some courts, over a third of those detained on this charge had spent more than 100 days in custody and many spent longer on remand than the custodial sentences that they eventually received. The study showed that the use of pre-trial detention varied significantly in different parts of the country and seemed to be related to a number of subjective factors, such as the attitude of particular judges. While in Porto Alegre, in the south, the incarceration rate for people arrested em flagrante for this crime was around 30 per cent. It rose to 90 per cent in the northern city of Belém.

63. Fabiana Costa Oliveira Barreto, *Flagrante e Prisão Provisória em casos de furto, da presunção de inocência à antecipação de pena* (Instituto Brasileiro de Ciencias Criminais 2007).

The law spells out the factors that judges should consider in detail when deciding to remand a defendant in pre-trial detention. These include the type of crime that the defendant is accused of – and the maximum punishment prescribed for it – and the particular circumstances of the defendant. Judges are required to take into account whether the defendant has any previous convictions, and also the person's overall social situation which, although this is not actually specified, might include things such as whether he or she has a steady job, a fixed address and other factors, which might make him or her more or less likely to abscond. Similar provisions can be found in the criminal procedure codes of many other countries and are not inconsistent with international human rights law. However, the high levels of homelessness in Brazil together with the huge numbers of people living in informal settlements, such as favelas, which do not have legally recognised addresses, means that this provision has a massive impact on the prevalence and social impact of pre-trial detention in Brazil. The concern is that the broad discretionary powers that Brazilian law gives judges may lead them to order the pre-trial detention of certain categories of people, in response to societal prejudices and anxieties about certain types of crime.

The preliminary case against the defendant should be presented by the prosecution at the first judicial hearing. After this the law does not provide for a maximum period for pre-trial detention, which is defined on a case-by-case basis. However, the Inter-American Court and Commission of Human Rights have established that two or three years in pre-trial

detention can violate the American Convention on Human Rights, to which is Brazil is a party.[64] However, the long delays that take place in the conduct of trials means that people may end up spending longer in prison than their final sentence, taking into account the provisions of the law on prison sentencing in Lei de Execução Penal (Law of the Execution of Sentences).[65] The courts are also being overwhelmed with the number of cases that they have to deal with.

64. For example, *Anthony Briggs v Trinidad and Tobago*, Case 11.815 Report No 44/99; *Neptune v Haiti* Series C No 180 (Judgment of 6 May 2008).

65. 7209/84 English version.

In May 2011, Brazil introduced a new law that amended the Código de Processo Penal to ensure that pre-trial detention really is only used as a last resort.[66] According to the new law, preventative detention can only be used for crimes in which the maximum sentence is more than four years' imprisonment or if the person has been convicted of another crime involving domestic violence, or violence against women, a child, adolescent, elderly, sick or disabled person. The law sets out nine specific measures that judges must consider using as alternatives to imprisonment. These include: electronic tagging; curfews; 'house arrest'; restrictions of movement, or contact with certain people. The judge can also impose prisão domiciliar (house arrest) when the accused is very elderly, extremely sick, about to give birth or it is essential for childcare duties. The law is consistent with the fundamental principle that judges should base all decisions regarding pre-trial detention on the principle in favour of liberty and the presumption of innocence. It can also contribute to the reduction of prison overcrowding, which is clearly at crisis levels.

66. Lei No 12.403, de 4 de maio de 2011.

Since the coming into force of this law, judges are required to show that the alternatives to pre-trial detention provided for in Article 319 of the Penal Code are insufficient to guarantee the three circumstances mentioned above. This is intended to ensure that pre-trial detention really is only used as a last resort. Judges should also ensure that bail is set at a reasonable level, given the circumstances of the defendant. Setting bail limits too high effectively denies it to many poor defendants who lack the means to post such sums and effectively means that they remain in pre-trial detention.

Alternatives to imprisonment

There are now more than half a million prisoners in Brazil and that number is growing rapidly. Brazil's prison population has more than doubled in the last ten years and prison overcrowding is now a national crisis.[67] There is no evidence that a rise in prison numbers helps to reduce crime or increases public safety and many observers believe that it has the opposite effect.[68] Even supporters of imprisonment agree that it is, at best, a necessary evil. Imprisoning people is expensive and the money spent on building and maintaining prisons is often diverted from alternative programmes that

67. *Consultor Jurídico*, 'População carcerária dobra em dez anos', 23 July 2011.

68. See *Making Law and policy that work: a handbook for Law and policy-makers on reforming criminal justice and penal legislation, policy and practice* (Penal Reform International, 2010).

may be more effective at reducing crime in the long term. If its objectives can be met more effectively in ways that involve fewer infringements on an individual's human rights and are less expensive, than the argument against imprisonment, except as a last resort, is very powerful.

The UN has developed a set of Standard Minimum Rules for Non-custodial Measures (the 'Tokyo Rules') which stress that custodial sentences should only be imposed for the most serious of crimes. In its 2011 visit to Brazil, the SPT was informed that judges seem to avoid imposing alternative sentences, even for first offenders and that this was contributing to prison overcrowding. It recommended that Brazil should promote the application of non-custodial measures by the judiciary, in accordance with international standards.[69]

69. CAT/OP/BRA/1, 5 July 2012, paras 96 and 98.

While imprisonment aims to incapacitate offenders, thus ensuring that they are unable to commit crimes while they are actually in prison, the vast majority of prisoners will be released eventually and so the supposed gains of this policy are only short term. Prison overcrowding also increases the negative effects of imprisonment, endangering the lives of both prisoners and prison staff, and making it harder to implement programmes aimed at helping the rehabilitation and resettlement of former prisoners. This, in turn, makes it more likely that they will reoffend in the future, creating a vicious cycle that puts more pressure on the overall prison population. Since most studies agree that imprisonment makes it hard for offenders to adjust to life after release and may contribute to their reoffending in the future, community-based alternative punishments that often make reoffending less likely must be preferable.

Not all socially undesirable conduct needs to be classified as a crime. Various societies have decriminalised vagrancy, in whole or in part, over the years, which has significantly reduced rates of imprisonment. Different societies also take different attitudes towards issues such as the consumption of alcohol, drug use or prostitution and all of this could impact on the number and type of people who get sent to prison. For example, between 1892 and 1916, misdemeanours (vagrancy, disorder and drunkenness) accounted for nearly 80 per cent of all arrests in São Paulo, while crimes against property made up 11 per cent of the arrest rate and crimes of violence only around eight per cent.[70] Attitudes towards certain practices can also change over time. For example, capoeira (an African dance ritual that also draws on martial arts) was formally banned between 1890 and the 1930s, and, since it was mainly practised by poor, black Brazilians, the police and courts used their powers of arrest and imprisonment disproportionately against this group.[71]

70. Boris Fausto, *Crime e cotidiano: a criminalidade em São Paulo 1880 - 1924* (Brasiliense, 1984) 46.

71. Thomas Holloway, *Policing Rio de Janeiro: repression and resistance in a nineteenth century city* (Stanford University Press, 1993) 284.

One of the biggest increases in Brazil's prison population in recent years has been due to an increase in arrests for 'drug-trafficking'. In 2003, there were 31,000 people imprisoned for this offence while in 2010, this number had more than tripled to 100,000. In August 2006, a new law was introduced to distinguish more clearly between drug users and drug traffickers.[72] Drug users could no longer be sent to prison and were instead to receive warnings, community service, health education courses or fines. They would still have to receive these sentences in criminal courts and the new law basically reflected existing judicial practice, since few people were actually being sent to prison for this offence. Many observers, at the time, believed that it had effectively decriminalised possession of drugs for personal use. Although this was not in fact the case, it did mean that drug users could no longer be imprisoned when arrested em flagrante, since the offence no longer carried a prison sentence.

72. Law No 11.276/2006.

However, unlike similar laws in other countries, the new law does not specify the distinction between drug users and dealers in terms of the quantity of drugs that they are in possession of when arrested. Instead, judges are given discretion to consider 'all the circumstances' of the case, including the social profile of the defendant. Many argue that this means that young, poor, black or mulato men and women from favelas are far more likely to be considered drug dealers than drug users by the police and courts and to be targeted accordingly. Young men from this social group have traditionally been targeted for arrests. However, the conviction rate of women is now rising even more rapidly. From 2007 to 2010, the number of people imprisoned for drug-trafficking increased by 62 per cent. Research carried out in Rio de Janeiro and Brasília in 2009 showed that 60 per cent of prisoners convicted as 'drug-traffickers' had only been in possession of small quantities of drugs and had been unarmed and alone when they were arrested.[73] The current law has been criticised for giving judges too much discretion in allowing drug users to be classified as traffickers.

73. *Tráfico de drogas e Constituição, Um estudo jurídico-social do tipo do art. 33 da Lei de Drogas diante dos princípios constitucionais-penais* (Universidade Federal do Rio de Janeiro e Universidade de Brasília, Março de 2009).

The UN Office on Drugs and Crime (UNODC) believes that the general rule for sentencing convicted offenders should be 'parsimony', that is, 'the imposition of imprisonment as sparingly as possible, both less often and for shorter periods'. It argues that a careful case-by-case examination is necessary to determine whether a prison sentence is required and, where imprisonment is considered to be necessary, to impose the minimum period of imprisonment that meets the objectives of sentencing.[74] Judges should always use their discretion to consider alternative sentences to imprisonment except as a last resort for the most serious crimes.

74. United Nations Office on Drugs and Crime, *Handbook of basic principles and promising practices on Alternatives to Imprisonment, Criminal justice handbook series* (UNODC 2007), 25.

Case study: Reducing reincarceration through education

In November 2008, the Office of the Judge in the Second Criminal Court in Manaus, with the support of the state public defender, created a multidisciplinary team of psychologists, social workers and defence lawyers to actively promote alternatives to detention, through cautions, warnings and education projects. More than 200 beneficiaries were enrolled on the programme in its first year of operation. They are offered vocational courses and work placements, through partnership agreements with local employers, to boost their future employability. They are also required to attend weekly meetings, presided over by a judge, which include lectures and videos designed to boost participants' self-esteem and create space for discussion on the dangers of recidivism. The team also conducts regular one-to-one interviews, with both the defendants and their families, along with home visits and monitoring of the progress of their work placements and professional training. The project initially encountered considerable resistance from other judges, who were reluctant to release defendants from prison in order to enrol in the programme. However, it has now been widely recognised a considerable success, with no incidents of reoffending recorded among the initial group of participants.

Duty to protect in cases of expulsion

Judges may also, on occasion, be required to make decisions regarding the sending or return of an individual to a situation where he or she faces a real risk of being tortured. This might arise, for example, because of an extradition request or a challenge to a decision regarding an impending deportation.

The right of a person not to be sent to a country where there are substantial grounds for believing that he or she would face a real risk of being subject to treatment that amounts to torture or cruel, inhuman or degrading treatment or punishment is also well established in human rights law. This right applies to all people and at all times. This right is recognised as forming a part of the right to be protected against acts of torture and other prohibited forms of ill-treatment contained in the International Covenant on Civil and Political Rights 1966, the European Convention on Human Rights 1950, the American Convention on Human Rights 1978, the African Charter on Human and Peoples' Rights 1981, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987.

Both the Human Rights Committee and the European Court have stated that exposing someone to a 'real risk' of suffering inhuman or degrading treatment would violate their right to protection against such acts.[75] The

75. *Soering v UK*, ECtHR, (1989), Series A, No 161. See also *Cruz Varas v Sweden*, ECtHR, (1991), Series A no 201; *Vilvarajah v UK*, ECtHR, (1991), Series A, No 215; *HLR v France*, ECtHR, (1997), Series A; *D v UK*, (1997); *Jabari v UK*, ECtHR, (2000). UN Human Rights Committee decision on the communication *Ng v Canada*, (469/1991), Report of the Human Rights Committee, Vol II, GAOR, 49th Session, Supplement No 40 (1994), Annex IX CC; and Human Rights Committee, General Comment 2, Reporting guidelines (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 3 (1994) para 3.

Human Rights Committee has stated that 'States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.'[76] The European Court has stated that the absolute prohibition of torture and other forms of ill-treatment applies irrespective of the victim's conduct and cannot be overridden by a state's national interest or in dealing with suspected terrorists.[77] Even if the threat emanates from private groups, such as armed insurgents or criminals, if the state concerned is unable or unwilling to protect the individual from such treatment this would amount to a violation.[78] In exceptional circumstances, the European Court has also found that the lack of adequate medical facilities in the country to which someone is threatened with return could amount to a violation of Article 3.[79]

The Committee against Torture (CAT) has also requested States Parties to the Convention not to expel someone who can show a 'real and personal risk' of being exposed to such treatment.[80] CAT has stressed that this protection is absolute, 'irrespective of whether the individual concerned has committed crimes and the seriousness of these crimes.'[81] CAT's General Comment on the issue explains that 'the burden is upon the author to present an arguable case' in the sense that 'there must be a factual basis for the author's position sufficient to require a response from the State party'.[82] At that point, the burden of proof may shift to the state to disprove such risk.[83] As to the degree of risk, CAT has interpreted the language of Article 3 of the UN Convention as 'the risk of torture must be assessed on grounds that go beyond mere theory or suspicion' while emphasising that 'the risk does not have to meet the test of being highly probable'.[84]

The Inter-American Commission on Human Rights (IACHR) has also recognised a prohibition against transfer to real risk of violations of the right to life or right to security of the person under Article I of the American Declaration of the Rights and Duties of Man,[85] and a general prohibition against transfer to risk of torture or other cruel, inhuman or degrading treatment more specifically.[86] In a case involving the return by Venezuela of an individual to Spain without due process, where the petitioners alleged he was at risk of political prosecution and, they claimed, had in fact been tortured on return, the IACHR approved a 'friendly settlement' agreed between the petitioners and the state, whereby Venezuela accepted its international responsibility for violations of, among other provisions, the right to humane treatment under Article 5 of the American Convention and Article 13(4) of the Inter-American Convention to Prevent and Punish Torture.[87] The IACHR has also requested precautionary measures over the risk of transfer to torture or other ill-treatment in relation to detentions in Guantánamo Bay.[88]

76. Human Rights Committee, General Comment 20, para 9.

77. *Chahal v UK*, ECtHR, (1996).

78. *Ahmed v Austria*, ECtHR, (1996); *HLR v France*, ECtHR, (1997).

79. *D v UK*, ECtHR, (1997).

80. See, for example, The Reports of the Committee Against Torture, *Mutambo v Switzerland*, (13/1993) GAOR, 49th Session Supplement No 44 (1994); *Khan v Canada*, (15/1994), GAOR, 50th Session, Supplement No 44 (1995).

81. *Ibid*.

82. Committee against Torture, General Comment No 1 (n 131), para 5.

83. See, for example, Committee against Torture, *AS v Sweden* (2001) UN Doc CAT/C/25/D/149/1999, para 8.6. See also Human Rights Committee, *Byahuranga v Denmark* (n 136), paras 11.1–11.4.

84. See also Committee against Torture, concluding observations on Switzerland (2005), UN Doc CAT/C/CR/34/CHE, para 4(d); Human Rights Committee, Concluding Observations on USA (2006) (n 169), para 16.

85. *The Haitian Centre for Human Rights and others v United States*, case 10.675, Report No 51/96 (13 March 1997), paras 164–171, and citing *Soering* and *Ng* above.

86.Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc 5 rev 1 corr (22 October 2002), paras 392–4; Resolution No 2/06 On Guantanamo Bay Precautionary

87. *Sebastian Echaniz Alcorta and Juan Victor Galarza Mendiola v Venezuela,* Petition 562/03, Report No 37/06 (15 March 2006) [admissibility decision] and case 12.55, Report No 110/06 (21 October 2006) [Friendly Settlement decision], para 33.Measures (28 July 2006).

88. See note 86 above.

The Convention relating to the Status of Refugees 1951 and the 1967 Protocol make specific provision for refugees and these principles should also be upheld by domestic courts. The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement – the right of a person not to be returned to a country where his or her life or freedom would be threatened – which is widely accepted by states. The principle of non-refoulement has been set out in a number of international instruments relating to refugees, both at the universal and regional levels and is widely agreed to be a principle of general international law.[89]

89. Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-refoulement' in Feller, Turk, and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 155-64.

The Convention Relating to the Status of Refugees provides, in Article 33(1), that: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' The principle of non-refoulement constitutes one of the basic Articles of the 1951 Convention. It is also an obligation under the 1967 Protocol to this Convention. Unlike various other provisions in the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a contracting state. The principle also applies irrespective of whether or not the person concerned has been formally recognised as a refugee – if this status has yet to be determined. Because of its wide acceptance at universal level, it is being increasingly considered as a principle of general or customary international law, and even jus cogens, and so is binding on all states. Therefore no government should expel a person in these circumstances.

CHAPTER 6

The Right to a Legal Defence and Safeguards Against Torture for those Deprived of their Liberty

Introduction

This chapter outlines the safeguards that exist in international law to protect people in detention from torture and other forms of ill-treatment. In particular it focuses on the role of the public defenders in Brazil, who are constitutionally mandated to provide 'full and free legal assistance' to people who could not otherwise afford to defend themselves.

One of the most effective safeguards to prevent torture taking place is to ensure that all people deprived of their liberty receive access to legal advice and representation as early as possible. Where statements have been taken by the investigating authorities without a lawyer or an official public defender being present, then there is a serious risk that these will have been obtained through torture or other prohibited forms of ill-treatment. As is discussed in Chapter Five of this Manual, other factors may increase the risk of detainees being subject to torture – and should be treated as corroborative evidence if an allegation is made. These include where:

- a detainee has been held in incommunicado detention or in an unofficial or secret place of detention;
- he or she has been held for a long period in isolation or solitary confinement;
- effective custody and medical records have not been maintained at all times;
- he or she has not been fully informed of his or her rights at the start of the detention;
- he or she has not been subject to immediate and regular medical examinations;
- the circumstances in which statements taken have not been properly recorded or the statements themselves are not fully transcribed contemporaneously;
- a detainee has been subject to any physical restraint without reasonable cause; or
- independent visits to the place of detention have been blocked, delayed or interfered with.

It is the primary duty of the defence lawyer or public defender to ensure that the rights of the defendant are fully respected at all times, and that only evidence which has been properly obtained should be admissible in court. In order to fulfil this function, the defence needs adequate resources and a repeated criticism of Brazil's record in this regard has been a failure to properly fund its public defenders.

The Public Defender's Office in Brazil

The Brazilian Constitution stipulates that 'the State has to provide full and free legal assistance to whoever proves not to have sufficient funds'.[1] It also provides for the enactment of legislation to establish Defensoria Pública (Public Defenders' Offices) in Brazil's various states and at the federal level.[2] This was established by Lei Complementar No 80 de 12 de janeiro 1994 (Complementary Law No 80 of 12 January 1994), which laid down general provisions for the creation of Public Defenders' offices in every state and at the federal level.

1. Constituição Federal de 1988, Article 5.

2. Constituição Federal de 1988, Article 134.

The idea of providing legal assistance to the poor is long established within the Brazilian legal system and there have been various attempts to establish some form of pro bono representation by its Ministry of Justice and Bar Associations.[3] A constitutional right to legal assistance appeared in Brazil's short-lived 1934 Constitution, but the organisation of public legal assistance services only started in the 1950s, when a federal law set out the structure and principles by which states should organise this. The first offices of Defensoria Pública were established in Rio de Janeiro in 1954 (originally entitled Assistência Judiciária) followed, considerably later, by Minas Gerais and Bahia in 1981 and 1985 respectively. Most other states did not create offices of Defensoria Pública until after the passage of the 1994 law.

3. Oscar Vilhena, 'Public Interest law, a Brazilian perspective', (2008) 228 UCLA Journal of International Law and Foreign Affairs, 250

The basic function of Defensoria Pública is to provide free legal assistance to people who are not able to afford private lawyers. This covers around 70 million Brazilians and so the need is obviously considerable. There are just over 4,000 public defenders in the whole of Brazil, compared to 12,000 Public Prosecutors and almost 16,000 judges. This means that there are 1.48 public defenders for every 100,000 inhabitants, a much lower ratio than that of judges and Public Prosecutors – which are 4.22 and 7.7 respectively.[4] Defensoria Pública provides legal assistance in civil as well as criminal cases and many of its offices have specialist units dealing with general human rights, consumers' rights and the rights of women, children and the elderly. This means that their work is very thinly spread and reduces the resources that can be devoted to criminal justice work.[5]

4. Defensoria Pública, Diagnostic II, Ministry of Justice, 2006, 106

5. See Tatiana Whately de Moura, Rosier Batista Custódio, Fábio de sá e Silva and André Luis Machado de Castro, *O Mapa da Defensoria Pública no Brasil* (ANADEP e IPEA 2013)..

The Ministry of Justice has estimated that 85 per cent of the half a million prisoners in Brazil cannot afford a lawyer and so need to be provided with the service of either a public defender or a private attorney at public expense.[6] Yet, in practice, there are too few public defenders to perform this task effectively. Both the 1988 Constitution and the 1994 law give individual states considerable leeway in deciding when and how to establish offices of Defensoria Pública, which has raised concern about both their independence and whether they would be provided with adequate resources.

6. *Ibid*.

The Constitution specifies that the office of Defensoria Pública shall be independent of the Brazilian state, which implies that it should be financially and administratively autonomous. However, as is discussed below, Defensoria Pública is a much smaller and weaker organisation than Ministério Público, with which it is often compared. Two of Brazil's most populous states, Rio Grande do Sul and São Paulo, did not establish offices of Defensoria Pública until 2005 and 2006, respectively. Goiás and Paraná only enacted the legislation to establish a Defensoria Pública in 2011 and these bodies did not begin functioning until 2012. The state of Santa Catarina has not yet passed the legislation to create a Public Defender's Office, although a case requiring it to do so is currently being considered by the Supreme Court.[7]

7. ANADEP, 'Santa Catarina debate criação da Defensoria Pública', Associação Nacional dos Defensores Públicos, 11 July 2011.

The right to legal advice and representation

The general right of those who have been arrested and detained to have access to legal advice is recognised in a variety of human rights instruments relating to the right to a fair trial. The promptness of access to a lawyer is also most important from the point of view of preventing torture and ill-treatment.

The Human Rights Committee has stressed that the protection of the detainee requires prompt and regular access be given to doctors and lawyers[8] and that 'all persons arrested must have immediate access to counsel' for the more general protection of their rights.[9] The accused must have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing. Facilities must include access to documents and other evidence that the accused requires to prepare his/her case, as well as the opportunity to engage and communicate with counsel and counsel must be able to communicate with the accused in conditions giving full respect for the confidentiality of their communications.[10] The authorities must also ensure that lawyers advise and represent their clients in accordance with professional standards, free from intimidation, hindrance, harassment or improper interference from any quarter.[11] The European Court of Human Rights has expressed concern that the denial of access to legal advice during an extended detention may violate the right to a fair trial.[12] It has also specified that access to a lawyer is a 'basic safeguard against abuse' during periods of extended detention[13] and that the absence of such safeguards during an extended detention would leave a detainee 'completely at the mercy of those detaining him'.[14]

8. Human Rights Committee, General Comment 20, para 11.

9. Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 14 (1994), para 9.

10. Concluding Observations of the Human Rights Committee: Georgia, UN Doc CCPR/C/79/Add.74, 9 April 1997, para 28.

11. *Ibid*.

12. *Murray v UK*, ECtHR, (1996) para 72.

13. *Brannigan and MacBride v UK*, ECtHR, (1993), para 66.

14. *Aksoy v Turkey*, ECtHR, (1996), para 83.

The Inter-American Commission on Human Rights considers that in order to safeguard the rights not to be compelled to confess guilt and to freedom from torture, a person should be interrogated only in the presence of his or her lawyer and a judge.[15] It has also concluded that the right to counsel

15. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev 3, 1983, at 100.

applies on the first interrogation.[16] The CPT considers that this is a right which must exist from the very outset of detention; that is from the first moment that a person is obliged to remain with the police, and that this includes, 'in principle, the right for the person concerned to have the lawyer present during interrogation'.[17] Where access to a particular lawyer is prevented on security grounds, the CPT recommends that access to another independent lawyer who can be trusted not to compromise the interests of the criminal investigation should be arranged.[18]

16. Annual Report of the Inter-American Commission, 1985–1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, 154, El Salvador.

17. CPT/Inf/E (2002) 1, 6, para 38.

18. *Ibid*, 9, para 15.

The Basic Principles on the Role of Lawyers states that 'all persons arrested or detained, with or without a criminal charge, shall have prompt access to a lawyer'[19] and that such persons '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'.[20]

19. Principle 7.

20. Principle 8.

The Principles further state that it is the responsibility of the state to ensure that lawyers '(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) 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'.[21] Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.[22] Lawyers must not be identified with their clients or their clients' causes as a result of discharging their functions.[23] The Special Rapporteur on torture has stated that: 'In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns, and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.'[24]

21. Principle 16.

22. Principle 17.

23. Principle 18.

24. Report of the Special Rapporteur on Torture, UN Doc A/56/156, July 2001, para 39(f).

The UN Special Rapporteur on the independence of judges and lawyers has recommended that 'it is desirable to have the presence of an attorney during police interrogation as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse'.[25] In his visit to Brazil, the Special Rapporteur noted that:

25. Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/add.4, para 47, 5 March 1998.

> 'a country in which over half the population (70 million people) lives below the poverty line and in which there are glaring inequalities needs the Office of the Public Defender to be more dynamic than the rather limited, though commendable, present one. . . . Notwithstanding the enormous amount of work done by this institution, it is unable to meet all needs. Wherever it works,

it is short of the budget resources, staff and support structures (eg information technology, of which it has little if any) it needs to perform its huge task'.[26]

26. Despouy, E/CN.4/2005/60/Add.3, 22 February 2005, para 38.

During its visit to Brazil in 2011, the UN Subcommittee on the Prevention of Torture (SPT) was informed that lack of institutional autonomy and lack of financial and human resources, in particular when compared to the office of the prosecutor, curtailed the public defenders' work. The SPT recommended that Public Defenders' Offices be granted autonomy and that they be provided with enough financial and material resources so as to enable them to offer adequate legal defence to all persons deprived of their liberty. It further recommended that Brazil expedites the creation and effective implementation of a public defence system in those states that do not yet have one. The SPT also recommended that Public Defenders' Offices keep a central register of allegations of torture and ill-treatment, including information provided in confidence to them and that public defenders cooperate and coordinate with the national and/or local preventive mechanisms, in particular to avoid reprisals following monitoring visits.[27]

27. *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, CAT/OP/BRA/1, 5 July 2012, paras 25–7.

An effective criminal justice lawyer or public defender needs to gain access to his or her client immediately after arrest, provide advice during interrogation and ensure that his or her client's constitutional safeguards are not violated in custody. He or she also needs time to review police reports and other evidence against his or her client, interview all witnesses presented by the prosecution and seek out additional evidence and witnesses. He or she needs time to consult with the accused and discuss the details of the alleged offence and all the evidence that is likely to be presented. The lawyer or public defender also needs to be able to prepare and present pre-trial motions as well as preparing the case itself for trial. If the case is a jury trial then the defence lawyer needs to take part in jury selection. As well as representing their client at the actual trial, defence lawyers or public defenders also need time to determine and pursue the appropriate basis for appeal, present written arguments at appeal and pursue such appeals for as long as is necessary to obtain justice for their clients. These are time-consuming and potentially expensive procedures, but are the basic minimum necessary in order to uphold the right to a fair trial as guaranteed by the international human rights commitments Brazil has committed to.

However, the offices of Defensoria Pública have nothing like the resources to fulfil these functions. Public defenders are rarely able to visit police stations due to time constraints and usually only get to meet their clients – and read their case files – a few minutes before their initial court hearings. This often gives them barely enough time for introductions and a cursory

study of the evidence. It is clearly not sufficient time for them to present a proper defence, prepare an application of habeas corpus or move that charges be dismissed. In practice it means that the influence of judges and prosecutors in determining the conduct of a particular case will largely go unchallenged by the defence.

There has been a noticeable effort to change this situation, especially with regard to taking local criminal cases to the STJ or the STF. According to the State of São Paulo Public Defender's Office, in the first semester of 2011 4,662 habeas corpuses were presented to the STJ and 52 to the STF. In 42 per cent of those cases, the order was completely granted and in eight per cent of the cases the appeal was partially successful.[28] Nevertheless, the situation is far from satisfactory. In 2001, the UN Special Rapporteur on torture commented after his visit to Brazil that:

> 'Free legal assistance, especially at the stage of initial deprivation of liberty, is illusory for most of the 85 per cent of those in that condition who need it. This is because of the limited number of public defenders. Moreover, in many states public defenders (São Paulo is a notable exception) are paid so poorly in comparison with prosecutors that their level of motivation, commitment and influence are severely wanting, as are their training and experience. Thus vulnerable, the suspects are at the mercy of police, prosecutors and judges many of whom are only too glad to allow charges to be brought and sustained under legislation allowing little scope for removal from custody for long periods of often petty criminals, numbers of whom have been coerced into confessing to having committed more serious crimes than they may have actually committed, if they have committed any at all.' [29]

There has been some progress since then. An analysis carried out by the Secretariat for Judicial Reform in 2009 shows that there has been a steady increase in the number of public defenders. However, there remain considerable variations in the size, budgets, caseloads, salaries and recruitment patterns between different offices across the country.[30] In 2009, there were an estimated 4,398 public defenders working in Brazil.[31] This is an increase from 3,624 in 2006 and 3,520 in 2003. Nevertheless, while the coverage of the offices of Defensoria Pública is increasing, it still only reached 39.7 per cent of all the courts and tribunals in the country. In much of the country the offices remain chronically under-resourced and are weakest in the poorest states, where the need for them is probably greatest. In 2006, an earlier survey found that while there were a total of 6,575 positions for public defenders in the country, only 3,624 of these positions had actually been filled, which meant that around 45 per cent were vacant at the time the survey was carried out.[32] Salaries of public

28. Defensoria Pública, Diagnostic II, Ministry of Justice, 2006, 106.

29. Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 Addendum Visit to Brazil, E/CN.4/2001/66/Add.2, 30 March 2001, para 162.

30. Defensoria Pública, Diagnostic III, Ministry of Justice, 2009, 122. See also Tatiana Whately de Moura, Rosier Batista Custódio, Fábio de sá e Silva and André Luis Machado de Castro, *O Mapa da Defensoria Pública no Brasil* (ANADEP e IPEA 2013).

31. Defensoria Pública, Diagnostic III, Ministry of Justice, 2009, 106–7.

32. Defensoria Pública, Diagnostic II, Ministry of Justice, 2006, 106.

defenders have traditionally been considerably lower than for judges and public prosecutors. Although these have risen closer to the level of public prosecutors more recently, a considerable gap still remains. The central importance of public defenders to a functioning criminal is also becoming increasingly accepted. For example, in 2011 the General Assembly of the Organization of American States adopted a resolution recognising the role of public defenders in guaranteeing access to justice.[33]

33. AG/RES. 2656 (XLI-O/11) 7 June 2011.

Notifying people of their rights

Everyone deprived of liberty has the right to be given a reason for the arrest and detention. Article 9(1) of the ICCPR states that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' Article 9(2) of the ICCPR states that: 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for arrest and shall be informed promptly of any charges against him.' The Human Rights Committee has stated that it is not sufficient simply to inform a detainee that he or she has been arrested without any indication of the substance of the complaint against him or her.[34] Even in 'national security cases', police and security officials are required to provide written reasons for a person's arrest, which should be made public and subject to review by the courts.[35]

34. *Adolfo Drescher Caldas v Uruguay,* Communication No 43/1979, 11 January 1979.

35. Concluding Observations of the Human Rights Committee: Sudan, UN Doc CCPR/C/79/Add.85, 19 November 1997, para 13.

The European Court of Human Rights has stated that every person arrested should 'be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness'.[36] The European Committee for the Prevention of Torture (CPT) has recommended that everyone who is deprived of his/her liberty should be informed of their right to notify a person of their choice, their right to have access to a lawyer and their right to have access to a doctor, including a doctor of their choice. These rights should apply from the very outset of their custody (ie, from the moment when they are obliged to remain with the police).[37] The CPT has also recommended that: 'a form setting out these rights be given systematically to [persons in custody] at the outset of custody. This form should be available in different languages. Further, the detainee should be asked to sign a statement attesting that he has been informed of these rights'.[38]

36. *Fox, Campbell and Hartley*, ECtHR, (1990), para 40.

37. CPT/Inf/E (2002) 1, 'Extract from the 12th General Report', 12, para 40; and 13, para 42.

37. *Ibid*, 13, para 44.

Case study: Prisoner complaints form

The public prosecutor in Goiana has pioneered a simple, but extremely effective complaints mechanism. It distributes the following form to all prisoners in the state every 15 days. It is handed out on a Friday and returned the following Monday. Similar forms have since been produced by the National Justice Council (CNJ) and National Prosecutors Council (CNMP) for nationwide distribution.

Name: _____

How many inmates are in the same cell (counting [on] you): _____

The food provided is: ( ) Great ( ) Good ( ) Fair ( ) Poor ( ) Enough ( ) Insufficient

How many meals a day are offered? ( ) One ( )Two ( ) Three ( ) Four ( ) Five ( ) Six

Do you have your own private lawyer (or was one appointed for you)? ( ) Yes ( ) No

If you do not have a lawyer, do you have the financial means to hire one? ( ) Yes ( ) No

If you do not have the means to hire a lawyer, do you want one to be appointed for you? ( ) Yes ( ) No

Have you been receiving religious assistance? ( ) Yes ( ) No

If not, would you like to? ( ) Yes ( ) No. Which religion? _____

Are you married or with a regular partner? ( ) Yes ( ) No

Are conjugal visits allowed once a month? ( ) Yes ( ) No

Is your privacy during intimate visits being respected? ( ) Yes ( ) No

Are visits from your family and friends allowed? ( ) Yes ( ) No

Visits from family and friends occur: ( ) in your own cell ( ) in the prison courtyard

Do the guards call you by your own name or by a nickname? ( ) Name ( ) Nickname

If you are called by a nickname do you agree with it? ( ) Yes ( ) No

Have you received medical care? ( ) Yes ( ) No

Do you need to consult with a doctor? ( ) Yes ( ) No

Why? _____

Have you received dental care? ( ) Yes ( ) No

Do you need to consult with a dentist? ( ) Yes ( ) No

Why? _____

Have you had any contact with the Head of the Police Station? ( ) Yes ( ) No

Have you had any contact with the outside world through correspondence, radio and television?

( ) Yes ( ) No

Do you like to read? ( ) Yes ( ) No

Have you had access to books? ( ) Yes ( ) No

Are you interested in working? ( ) Yes ( ) No

What work would you like to do?

Other complaints and/or suggestions: _____

Date: _____

Signature: _____

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that 'any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights'.[39]

39. Principle 13.

Use of officially recognised places of detention and the maintenance of effective custody records

The Human Rights Committee has stated that 'to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognised as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends'.[40] The European Court of Human Rights has stated that the unacknowledged detention of an individual is a 'complete negation' of the guarantees contained in the European Convention against arbitrary deprivations of the right to liberty and security of the person.[41]

40. Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 30 (1994), para 11.

41. *Çakici v Turkey*, ECtHR, (1999), para 104.

The CPT recommends that there should be a complete custody record for each detainee, which should record 'all aspects of custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injuries, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc). Further, the detainee's lawyers should have access to such a custody record'.[42]

42. CPT/Inf/E (2002) 1, 7, para 40.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that the authorities must keep and maintain up-to-date official registers of all detainees, both at each place of detention and centrally.[43] The information in such registers must be made available to courts and other competent authorities, the detainee, or his or her family.[44] Further to this, these principles state that 'in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment... subject to reasonable conditions to ensure security and good order in such places'.[45]

43. *Ibid*, 302, Principle 12.

44. *Ibid*.

45. Principle 29.

The UN Special Rapporteur on torture has recommended that:

> Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court. No statement or confession made by a person deprived of liberty, other than one made in the presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means.'[46]

46. Report of the Special Rapporteur on Torture, UN Doc A/56/156, July 2001, para 39(d).

Avoiding incommunicado detention

International standards do not expressly prohibit incommunicado detention – where a detainee is denied all contact with the outside world – in all circumstances. However, international standards provide and expert bodies have maintained that restrictions and delays in granting detainees access to a doctor and lawyer and to having someone notified about their detention are permitted only in very exceptional circumstances for very short periods of time.

The Human Rights Committee has found that the practice of incommunicado detention is conducive to torture[47] and may itself violate Article 7 or Article 10 of the ICCPR. It has stated that provision should also be made against incommunicado detention as a safeguard against torture and ill-treatment.[48] The Inter-American Commission on Human Rights (IACHR) has stated that the practice of incommunicado detention is not in keeping with respect for human rights as it 'creates a situation conducive to other practices including torture', and punishes the family of the detainee impermissibly.[49] The IACHR also considers that the right to receive visits from relatives is 'a fundamental requirement' for ensuring respect for the rights of detainees.[50] It has stated that the right to visits applies to all detainees, independently of the nature of the offence of which they are accused or convicted, and that regulations allowing only short, infrequent visits and the transfer of detainees to distant facilities are arbitrary sanctions.[51]

47. Preliminary Observations of the Human Rights Committee: Peru, UN Doc CCPR/C/79/Add.67, paras 18 and 24, 25 July 1996.

48. Human Rights Committee, General Comment 20, para 11.

49. Inter-American Commission, Ten Years of Activities 1971-1981, at 318; see Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc.6, rev.2, 1 July 1981, at 41–42; and Annual Report of the Inter-American Commission, 1982-1983, OEA/Ser.L/V/II/61, doc.22, rev.1; Annual Report of the Inter-American Commission, 1983 - 1984, OEA/Ser.L/V/II/63, doc.22.

50. *Ms X v Argentina*, Inter-Am.C.H.R. case 10.506, (1997), para 98.

51. Annual Report of the Inter-American Commission, 1983-1984, OEA/Ser.L/V/II/63, doc.10, Uruguay; Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, doc.29, rev.1.

The UN Commission on Human Rights has stated that 'prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment'.[52] The UN Special Rapporteur on torture has stated that 'torture is most frequently practised during incommunicado detention. Incommunicado

52. Resolution 1997/38, para 20.

detention should be made illegal, and persons held incommunicado should be released without delay'.[53]

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that everyone who is arrested, detained or imprisoned has the right to inform, or have the authorities notify, their family or friends.[54] The information must include the fact of the arrest or detention and the place where he or she is being kept in custody. If the person is transferred to another place of custody, his or her family or friends must again be informed. This notification is to take place immediately, or at least without delay.[55]

Foreign nationals are entitled to have their consulates or other diplomatic representative notified.[56] If they are refugees, or are under the protection of an intergovernmental organisation, they have the right to communicate with, or receive visits from, representatives of the competent international organisation.[57]

Use of force, restraint or punishment

The Human Rights Committee has instructed states to ensure that all places of detention are free from any equipment liable to be used for inflicting torture or ill-treatment.[58] The Committee against Torture has recommended that states abolish the use of electro-shock stun belts and restraint chairs as a method of restraining those in custody as their use 'almost invariably' results in practices that amount to cruel, inhuman or degrading treatment or punishment.[59]

The UN Standard Minimum Rules for the Treatment of Prisoners (SMR) state that restraints, such as handcuffs, chains, irons and straitjackets, should only be used on detained or imprisoned people for genuine security reasons, and not as a punishment.[60] When used, restraints must not be applied for longer than is strictly necessary and the central prison administration is to decide on the pattern and manner of use of instruments of restraint.[61] Force may only be used on people in custody when it is strictly necessary for the maintenance of security and order within the institution, in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened. In any event, force may be used only if non-violent means have proved ineffective.[62]

The CPT has stressed that:

> 'a prisoner against whom means of force have been used should have the right to be immediately examined and, if necessary, treated by a doctor. In those rare cases where resort to instruments of physical

53. Report of the Special Rapporteur on Torture, UN Doc A/56/156, July 2001, para 39(f).

54. *Ibid*, 302, Principle 16.

55. *Ibid*, 302, Principle 15.

56. Principle 16 (2) UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment. See also, LaGrand, (*Germany v United States*) International Court of Justice (2000), www.icj-cij.org accessed, May 2013.

57. Principle 16 (2) UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.

58. *Ibid*, para 11.

59. Conclusions and Recommendations of the Committee against Torture: United States of America, 15 May 2000, UN Doc A/55/44, para 180 (c).

60. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 30 August 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 33.

61. *Ibid*, Rule 34.

62. *Ibid,* Rule 54.

> restraint is required, the prisoner should be kept under constant and adequate supervision. Instruments of restraint should be removed at the earliest opportunity and they should never be applied or their application prolonged as a punishment. A record should be kept of every instance of the use of force against prisoners'.[63]

63. CPT/Inf/E (2002) 1, 19, para 53(2).

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state that force may be used only if other means remain ineffective,[64] care must be taken to minimise damage and injury and assistance and medical aid must be provided at the earliest possible moment.[65] Firearms may only be used by law enforcement officers in defence against an imminent threat of death or serious injury, to prevent a crime involving grave threat to life, to arrest a person presenting such a danger or to prevent their escape, and only when less extreme means are insufficient. Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[66]

64. Resolução 43/173 da Assembleia Geral, de 9 de Dezembro de 1988 anexo, Principle 4.

65. *Ibid*, Principle 5.

66. *Ibid*, Principle 9.

The Human Rights Committee has found that the practice of incommunicado detention is conducive to torture and may itself violate Article 7 or Article 10 of the ICCPR.[67] The Basic Principles for the Treatment of Prisoners provide that states should undertake efforts to abolish solitary confinement as a punishment, or to restrict its use.[68] The SMR specify that 'corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences'.[69] The CPT has stressed that solitary confinement can have 'very harmful consequences for the person concerned' and that, in certain circumstances, solitary confinement can 'amount to inhuman and degrading treatment' and should, in all circumstances be applied for as short a period as possible.[70]

67. Human Rights Committee, General Comment 20, para 6.6.

68. *Ibid*, 327, Principle 7.

69. Rule 31.

70. CPT/Inf/E (2002) 1, 20 para 56(2).

Brazil has a separate disciplinary regime for prisoners, which permits detention in solitary confinement for up to 22 hours a day.[71] In addition to this, some federal maximum security prisons also permit solitary confinement. The constitutionality of this scheme is being discussed in the Supreme Court.[72] In June 2013, the UN Special Rapporteur submitted an Expert Opinion to the Brazilian Supreme Court stating that the Differentiated Disciplinary Regime may constitute a violation of Brazil's international obligation pursuant to the absolute prohibition of torture and cruel, inhuman and degrading treatment. The text of this Opinion is included as Appendix Seven of this manual.

71. RDD. Lei No 10.792/2003.

72. ADI 4162.

Case study: Visit of the Special Rapporteur II

The Special Rapporteur visited several police stations [in São Paulo]. In all of them, overcrowding was the main problem. For example, cells of the 50th district police station were holding five times more people than their official capacity. In all police stations visited, detainees were held in subhuman conditions in very dirty and smelly cells without proper light and ventilation. It was unbearably humid in most cells. Detainees had to share thin mattresses or sleep on the bare concrete floor, and often had to sleep in shifts because of the lack of space. Recent and long-term detainees were mixed together, some having just been arrested while others were in pre-trial detention; a large number had already been sentenced, but could not be transferred to prisons because of lack of space.

In all police station lock-ups, the Special Rapporteur heard from detainees the same testimonies of beatings with iron and wooden sticks or bars or being subjected to telefone, in particular during interrogation sessions to extract confessions, after attempted escapes or revolts, and to maintain calm and order. Plastic bags sprayed with pepper were said to be put over the detainees' heads in order to suffocate them and a large number of allegations referred to electroshocks.

On 26 August, the Special Rapporteur visited the 50th district police station where 166 persons were detained in six cells built to hold up to 30; ten days before the visit of the Special Rapporteur, there were said to have been more than 200 persons. Some had spent more than a year in these cells. Five police officers per shift were said to guard all the detainees, which posed serious problems with respect to security and order. According to the authorities, during the week before the visit of the Special Rapporteur, there had been four attempted escapes.

In one cell measuring approximately 15 square metres, 32 persons were detained. They indicated that they were sleeping in shifts on the six very thin mattresses they possessed. A hole was used as a toilet and shower. From Monday to Friday, they were reportedly let out of their cells and could use the little patio. According to the information received, relatives and friends of detainees were humiliated and harassed by police officers during visits. Detainees were allegedly also insulted by the guards during the visits. Only close relatives were said to be authorised to visit and only basic food, such as crackers and noodles, were allowed.

The Special Rapporteur visited the cell where the so-called seguros were detained, ie, those allegedly in need of protection from other detainees and therefore held separately. The cell measured approximately nine square metres and contained five beds. Sixteen persons were held there. Some confirmed that they had fought with other inmates while others did not know why they were detained in the seguros cell. One detainee believed he had a contagious disease. It is also believed that some were held in the seguros cell because they could not afford to buy space in a normal cell. They were allegedly never taken out of their cell, even during visits by their relatives.

Limits on interrogation

The term 'interrogation' does not only refer to the time in which a person is being formally questioned. It may include periods before, during and after the questioning when physical and psychological pressures are applied to individuals to disorient them and coerce them into compliance during formal questioning. All such practices must be absolutely prohibited.

Article 11 of the Convention against Torture requires states to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons under arrest, detention or imprisonment. The Human Rights Committee has stated that 'keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment'.[73] The Committee has also stated that 'the wording of Article 14(3)(g) – i.e. that no one shall be compelled to testify against himself or to confess guilt – must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession.'[74]

73. Human Rights Committee, General Comment 20, para 11.

74. *Kelly v Jamaica*, (1991); *Conteris v Uruguay,* (1985), 2 Sel Dec 168; *Estrella v Uruguay*, (1983), 2 Sel Dec 93.

The CPT considers that clear rules or guidelines should exist on the manner in which interrogations are to be conducted. A detainee should be informed of the identity of all those present at the interview. There should also be clear rules covering the permissible length of the interview, rest periods and breaks, places in which interviews may take place, whether the detainee will be required to remain standing when questioned, and the questioning of persons under the influence of drugs and alcohol. It should also be required that a record be kept of the time at which interviews start and end, of requests made by detainees during interviews and of persons present during interviews.[75]

75. CPT/Inf/E (2002) 1, 7, para 39.

The UN Guidelines on the Role of Prosecutors state that:

> 'When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.'[76]

76. Guideline 16.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that no-one should be compelled 'to confess, to incriminate himself otherwise or to testify against any other person... No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement'.[77] The UN Special Rapporteur on torture has

77. *Ibid*, 327, Principle 21.

stated that: 'All interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings.'[78]

78. Report of the Special Rapporteur on Torture, UN Doc A/56/156, July 2001, para 39(f).

79. CPT/Inf/E (2002) 1, 10-16, paras 33–50; Report of the Special Rapporteur on Torture, 2001, UN Doc A/56/156, July 2001, para 39.

The following checklist of good practice concerning interrogations is based on recommendations by the CPT and the UN Special Rapporteur on torture:[79]

- Interrogation should take place only at official centres and any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court against the detainee.
- The detainee should have the right to have a lawyer present during any interrogation.
- At the outset of each interrogation, the detainee should be informed of the identity (name and/or serial number) of all persons present.
- The identity of all persons present should be noted in a permanent record which details the time at which interrogations start and end and any request made by the detainee during the interrogation.
- The detainee should be informed of the permissible length of an interrogation; the procedure for rest periods between interviews and breaks during an interrogation, places in which interrogations may take place; and whether the detainee may be required to stand while being questioned. All such procedures should be laid down by law or regulation and be strictly adhered to.
- Blindfolding or hooding should be forbidden as they can render the subject vulnerable, involve sensory deprivation and may themselves amount to torture or ill-treatment. They may also make prosecutions virtually impossible as it will be more difficult to identify the perpetrators.
- All interrogation sessions should be recorded or transcribed and the detainee or, when provided by law, his or her counsel should have access to these records.
- The authorities should have and should regularly review procedures governing the questioning of persons who are under the influence of drugs, alcohol or medicine or who are in a state of shock.
- The situation of particularly vulnerable persons (for example, women, juveniles and people with mental health problems) should be the subject of specific safeguards.

The electronic recording of interviews significantly helps reduce the risk of torture and ill-treatment and can be used by the authorities as a defence against false allegations. As a precaution against tampering with the recordings, one tape should be sealed in the presence of the detainee and another used as a working copy. Adherence to such procedures also helps to ensure that a country's constitutional and legislative prohibition of torture and ill-treatment is respected and verifiable.

CHAPTER 7

Prosecuting Suspected Torturers and Providing Redress to the Victims of Torture

Introduction

This chapter relates to the prosecution of those involved in torture and other forms of ill-treatment. In particular it focuses on the role of the public prosecutors in Brazil, who are constitutionally charged with promoting justice. Torture is a serious crime in Brazil and there is considerable evidence that it takes place on a widespread and systematic basis. Yet there have been few prosecutions under Brazil's torture laws, and the majority of cases that have been brought have been against private individuals rather than state officials. This chapter outlines who may be held liable for such crimes and describes some of the legal and procedural steps involved in prosecuting those responsible, which potentially includes both public officials and private individuals. It also discusses the issues of amnesties and universal jurisdiction and highlights the importance of providing redress to the victims of torture and other forms of ill-treatment.

The responsibility of public prosecutors to combat torture in Brazil

Public prosecutors have a three-fold role in combating torture in the Brazilian legal system. First of all, they are legally required to ensure that all evidence gathered in the course of a criminal investigation has been properly obtained; they have to monitor for irregularities and malpractice; and they have to ensure that the rights of the criminal suspect have not been violated during the process. If a public prosecutor comes into possession of evidence against a suspect that he or she knows, or believes on reasonable grounds, was obtained through recourse to unlawful methods, he or she is legally obliged to reject it, inform the court and take all necessary steps to ensure that those responsible for obtaining it are brought to justice.[1] Any evidence obtained through the use of torture or similar ill-treatment can only be used against the perpetrators of these abuses.[2]

Secondly, it is the duty of public prosecutors to initiate investigations and prosecute torturers. The UN Convention against Torture provides that:

> 'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'[3]

There are no exceptional circumstances that may be invoked to justify the use of torture, nor may an order from a superior officer or a public authority be invoked as a justification.[4] The Human Rights Committee has stated that:

1. UN Guidelines on the Role of Prosecutors, Guideline 16.

2. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15.

3. Article 4, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

4. Article 2, *ibid*. This principle was also enshrined in the Charter of the Nuremberg and Tokyo Tribunals 1946, and subsequently reaffirmed by the UN General Assembly. It can also be found in the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia and, with minor modification, in the Statute of the International Criminal Court.

> 'States Parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.'[5]

5. Human Rights Committee, General Comment 20, para 13.

The Inter-American Convention to Prevent and Punish Torture states that: 'The States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.'[6] It also states that: 'A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so, will be held guilty of the crime of torture. A person who, at the instigation of a public servant or employee, orders, instigates, or induces the use of torture, directly commits it or is an accomplice to such acts will also be held guilty of the crime.'[7]

6. Article 6, Inter-American Convention to Prevent and Punish Torture, 1985.

7. Article 3, *ibid.*

Thirdly, as discussed in Chapter Nine of this Manual, public prosecutors – along with other external monitoring bodies – have the power to inspect prisons, public jails, police stations and other places of detention. If evidence of malpractice emerges during their inspections or the inspections by other bodies, they may have the responsibility to pursue criminal charges against identified individuals. This may prove difficult in cases of torture, or other forms of ill-treatment, because of the specific nature of the crime, where it is committed and who it is committed by. It is, therefore, important for public prosecutors to ensure that these inspections are carried out in a manner to ensure that any evidence gathered of torture, or other prohibited forms of ill-treatment, will be of sufficient standard to be accepted in any subsequent judicial proceedings.

Public prosecutors

The powers and institutional functions of Ministério Público (the Public Prosecutor's Office) are set out in the Constitution and this also protects its independence in line with the safeguards and privileges provided to the judiciary.[8] The Public Prosecutor's Office is responsible for both enforcing the law and protecting the rights of the people under it. This includes overseeing prosecutions of all defendants.

8. Constituição Federal de 1988, Articles 127–129.

The structure of the Ministério Público also follows that of the judiciary. There are prosecutors' offices in each of the 26 states and in the federal district employing around 12,000 attorneys both at federal and state levels (which means that there are around 4.22 public prosecutors to deal with every 100,000 Brazilians).[9] Promotores de justiça act as prosecutors at courts of first instance while procuradores de justiça attend appeals. The Procurador Geral da República (Prosecutor General) heads the federal body and tries cases before the STF. There is also a Superior College of Prosecutors, a Higher Council of Prosecutors and a control agency (Corregedoria-Geral do Ministério Público). Military prosecutors officiate at military tribunals (including cases involving the military police).

9. Defensoria Pública, Diagnostic II, Ministry of Justice, 2006, 106.

The origins of Ministério Público date back to colonial times, when public prosecutors had responsibility to apply and monitor the enforcement of the law in the name of the Portuguese Crown. The first Código de Processo Penal of 1832 began to systematise the work of Ministério Público while a Decree of 1890 contained a chapter on its structure and attributions within the federal justice system.[10] Public prosecutors were given the dual mandate of both enforcing the law and protecting the rights of the 'weak and defenceless' in Brazilian society. This role gradually expanded as they were granted powers to protect the rights of freed slaves, indigenous Brazilians, orphans, the 'mentally incapacitated' and other vulnerable groups. Ministério Público was also charged with monitoring prisons and mental health institutions, and protection of the interests of minors during the Imperial period. It was given a more general public interest monitoring function by several laws enacted during the first republic. In 1939, the Civil Procedure Code specified its role as monitoring the implementation of the law, in the interests of the public.[11] This gave Ministério Público a responsibility to intervene in every case in which there was a public interest aspect and it took on many of the functions of an ombudsman in Brazilian society including protection of the environment, cultural and historic heritage and the public patrimony.[12]

10. Decreto No 848, of 11 November 1890.

11. Decreto-Lei No 1.608, de 18 de setembro de 1939.

12. Oscar Vilhena, 'Public Interest law, a Brazilian perspective', (2008) 228 UCLA Journal of International Law and Foreign Affairs, 238.

The 1988 Constitution considerably enhanced and expanded the role and status of Ministério Público as a guarantor of citizens' rights. The Constitution recognises Ministério Público as 'a permanent institution, essential to the jurisdiction of the state, being responsible for the protection of the legal order, the democratic regime, and social and non-disposable individual interests.'[13] All its members are public servants for life, selected through a public contest, with the same guarantees of independence as the members of the judiciary. The President of the Republic appoints the Procurador Geral da República from within the ministry, subject to the ratification of the Senate, for a mandate of two years and state governors adopt a similar procedure. Ministério Público sets its own budget, which is sent directly to Congress for consideration

13. Constituição Federal de 1988, Article 127.

in much the same manner as the executive and judiciary do so. Ministério Público also has a high public profile as the body charged with tackling corruption and organised crime.

Although public prosecutors have become increasingly involved in public interest litigation, the overwhelming majority of their work, at the state level, remains that of ordinary criminal prosecution or civil litigation. Prosecutors have overall responsibility for supervising the conduct of criminal investigations by the police and for prosecuting a case when it comes to court. It is their responsibility to decide whether or not to bring charges against someone and they are duty-bound to request the acquittal of a defendant if they become convinced of his or her innocence. The police and public prosecutors usually work together in bringing forward criminal prosecutions, although there have been some legal challenges regarding their division of responsibility and there is not, as yet, a consolidated jurisprudence on this matter.

The Brazilian Constitution provides that Ministério Público is exclusively in charge of instituting public criminal action: 'II to ensure effective respect by the government branches and by services of public relevance for the rights ensured under this Constitution, taking the action required to guarantee such rights ... VII. to exercise external control over police activities [and] VIII. to request investigation procedures and the institution of police investigations, indicating the legal grounds of its procedural acts.'[14] This has been interpreted as meaning that the Ministério Público has the power to proceed with independent criminal investigations even in cases where no police inquiry has been opened or where a police inquiry is still pending or has been filed, and that it can indict law enforcement officials involved in criminal activities, such as torture. However, as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has noted in 2008:

14. Constituição Federal de 1988, Article 129.

> 'In practice, the prosecutors' investigative role has often been discouraged by Civil Police and impeded by legal controversy over prosecutorial powers. First, Civil Police show little awareness of the value of consulting with prosecutors to make sure that the evidence they are gathering will suffice to sustain criminal charges. For this reason, they seldom inform prosecutors until they reach a stage at which the law requires them to do so. This will typically not be until 30 days after the crime took place, by when the crime scene will almost certainly be destroyed, bodies are likely to have been buried, and witnesses may have fled. Second, some have challenged the legal power of prosecutors to gather evidence, arguing that only the Civil Police have the right to conduct investigations. While this argument appears to be motivated more by institutional jealousies than constitutional analysis, the courts have not provided a

definitive answer, meaning that prosecutors who gather evidence cannot be certain that it will prove admissible at trial.'[15]

He recommended that 'that the Civil Police consult with prosecutors from the start of a homicide investigation, that prosecutors conduct independent inquiries where police were implicated in a killing, and that the right of prosecutors to conduct their own investigations should be clarified and affirmed'.[16]

15. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, Mission to Brazil*, A/HRC/11/2/Add.2 future, 28 August 2008, para 59.

16. *Ibid*, para 60.

Prosecutions for torture in Brazil

As discussed in Chapter Two of this Manual, Brazil introduced a Law on the Crime of Torture in 1997.[17] This defines torture as:

17. Law No 9.455 of 7 April 1997.

> 'I - constraining a person by using violence or serious threat which results in physical or mental suffering; with the purpose of obtaining information, a declaration or confession from the victim or third person; to provoke criminal action or omission; due to racial or religious discrimination;
>
> II - submitting a person under one's responsibility, power or authority to intensive physical or mental suffering, by his/her use of violence or serious threat, as a way of enforcing personal punishment or as a preventive measure.[18]
>
> § 1 - submitting a person arrested or subject to a security measure to physical or mental suffering, through the performance of an act not provided for by law or not resulting from legal action.'

18. *Ibid*, Article 1.

The crime is defined both as an act and an omission and people can be punished both for committing torture or failing to prevent or report it, if they had a duty to do so.[19] Punishment is determined by the circumstances. The law provides for prison sentences of one to four years for an individual who absented him or herself before the practice of torture, when he or she was able to prevent it or report it. Those directly responsible for acts of torture, which did not cause serious injury or have other aggravating circumstances, shall receive prison sentences of two to eight years.[20] Where the acts of torture resulted in serious physical injury, this shall result in sentences of four to ten years,[21] and where it resulted in death, by eight to 16 years.[22] If the torture is committed by a public official, it shall be considered an aggravating factor and the sentences will be increased.[23] If the torture is perpetrated against a child, adolescent, pregnant woman or impaired person, this shall also be considered an aggravating factor and the sentence shall be increased. In addition, torture constitutes an aggravating factor in respect of other crimes such as kidnapping or homicide.[24] For example, a

19. *Ibid*, See also HC 94789/RJ Rio de Janeiro, Habeas Corpus, Relator: Min. Eros Grau, Julgamento 27 April 2010.

20. *Ibid*, Article 1, II.

21. *Ibid*, Article 1, II (Section 3°).

22. *Ibid*, Article 1, II (Section 3°).

23. Law 9455, Article 1, Section 4°, I.

24. Criminal Code, Article 61 II (d).

homicide, subject to a punishment of six to 20 years, is increased to 12 to 30 years if committed with torture.[25]

25. See Criminal Code, Article 121 (2) (III).

The definition of 'torture' used in the law differs from the one contained in the UN Convention against Torture in two significant respects. First of all, the UN Convention defines it as '*any act* by which severe pain or suffering, whether physical or mental is intentionally inflicted'. The Brazilian law by contrast defines it more narrowly as '*violence or serious threat* which results in physical or mental suffering' [emphasis added]. As discussed in Chapter Four of this Manual, physical and mental torture and other forms of ill-treatment may be carried out within a particular social, cultural or political specificity where an action that might seem trivial or harmless in one context could be deeply demeaning or traumatic in another. The narrower definition, therefore, offers less protection to torture victims and may make it harder to prosecute perpetrators.

Secondly, the Brazilian law differs from the UN Convention definition by not requiring the acts to have been carried out 'by or with the consent or acquiescence of the state authorities'. This means that private individuals can be prosecuted for acts of torture and, indeed, the majority of prosecutions that have taken place have been brought against these individuals rather than public officials such as police officers and prison guards. This aspect of the law has been criticised by some commentators who argue that, by including private individuals, it 'fails to take sufficient account of state responsibility and consequently may weaken the overall impact of the definition'.[26] However, as was discussed in Chapter Three of this Manual, Article 1(2) of UNACT makes clear there is nothing to prevent a state from including a broader definition of 'torture' under its national laws than that provided for in the Convention itself; and international criminal law does not require any particular status of the perpetrator. Nevertheless, states are still required to report to the Committee against Torture on the frequency of and action in response to acts of torture as defined in the Convention, because the involvement of public officials make the crime an abuse of authority as well as an act of violence.

26. Redress, *Reparation for Torture: Brazil*, 19 May 2010, 7.

Although comprehensive figures of the total number of prosecutions that have taken place since the Law on the Crime of Torture was enacted in 1997 are not available, it is widely agreed that the numbers have been very small. A report published by a group of Brazilian human rights NGOs in 2005, for example, found that in the state of São Paulo, which has the highest prison population in the country, there had only been 12 convictions under the torture law between 1997 and 2004, and that most of these convictions were of private individuals.[27] According to the 2012 Report of the Penitentiary Department of the Ministry of Justice (Departamento Penitenciário or DEPEN) there were 218 prisoners convicted of crimes of torture in the previous year.[28] Between 1997 and 2000, Ministério Público initiated 258 criminal

27. *Análise do Cumprimento pelo Brasil das Recomendações do Comitê da ONU contra a Tortura, Programa* DH INTERNACIONAL, Movimento Nacional de Direitos Humanos, Regional Nordeste – MNDH/NE e Gabinete de Assessoria Jurídica às Organizações Populares – GAJOP, Julho de 2005.

28. Ministry of Justice, Execução Penal, Sistema Prisional, Informações InfoPen, InfoPen – Estatística Formulário Categoria e Indicadores Preenchidos, Referência:12/2012, line 319.

investigations into crimes of torture, which led to 56 criminal proceedings, resulting in 11 convictions, three of which were immediately appealed.[29] However, national statistics of prosecutions under the law have not been maintained since then. Because the torture law also applies to private persons, it is also difficult to identify how many prosecutions have been brought against state employees acting in their official capacity. Reports from both UN and NGO human rights monitoring bodies consistently claim that most prosecutions brought under the Torture Law are against private individuals, while prosecutions against public officials – such as police officers and prison guards – tend to be brought using other, less serious, criminal offences. However, a survey of 57 criminal cases, involving a total of 203 defendants accused of torture, conducted between 2000–2004 in one criminal court in São Paulo, showed that 51 of these had been tried in first instance courts by 2008 while six were still in progress. Of the 203 defendants, 181 of them were state agents (military police, civil, correctional officers, or monitors in psychiatric hospitals) while 12 were private actors and ten were prisoners accused of torturing other prisoners.[30]

29. Redress, *Reparation for Torture: Brazil*, 19 May 2010, 6.

30. Maria Gorete Marques de Jesus, *O crime de tortura e a justiça criminal: um estudo dos processos de tortura na cidade de São Paulo*, São Paulo: USP (dissertação de mestrado), 2009.

Even before the Law on the Crime of Torture was enacted in 1997, perpetrators of torture could be prosecuted under the Criminal Code for illegal punishment (constrangimento ilegal),[31] bodily harm[32] or ill-treatment.[33] The offence of 'bodily harm' carries a punishment of three months to one year imprisonment. Ill-treatment is defined as 'the act of exposing to danger the life and health of a person under his authority, protection or surveillance for purposes of education, teaching, treatment or custody, whether by depriving him/her of food or indispensable care, or by submitting him/her to excessive or improper work, or abusing of means [of] correction or discipline'.[34] It carries a sentence of two months to one year, or a fine where the act did not cause serious injury or have other aggravating circumstances. If the act results in corporal injuries of a grave nature, the sentence is imprisonment of one to four years and, if it results in death, four to 12 years' imprisonment. The sentence shall be increased by a third if the crime is committed against a person younger than 14 years old.[35]

31. Criminal Code, Article 146.

32. *Ibid*, Article 129.

33. *Ibid*, Article 136.

34. *Ibid*.

35. *Ibid*.

Criminal investigations into acts of torture in Brazil

Investigations into acts of torture should follow the same principles as investigations into any other serious crime. The main difference is that the suspected crime may have been committed by law enforcement officials, or other state officials, which makes it more difficult to deal with than other forms of criminality. Crimes of torture are often also committed in places closed to the outside world, with no independent witnesses. Those responsible may have concealed their identity from the victim and be able to rely on either a protective 'wall of silence' from their colleagues – or

even their active collusion in concocting a false story. Even if the victim has identified them, perpetrators may argue that it is 'one person's word against another' and that this is insufficient to prove guilt, particularly if the victim is a suspected or convicted criminal. Victims and witnesses may also be intimidated into remaining silent – particularly if they are still in the detention facility where the torture is alleged to have occurred. Additionally, forensic and medical evidence may not have been collected, or may have been concealed or tampered with. Finally, the people responsible for investigating the crime may have – actively or passively – colluded with its occurrence.

Nevertheless, such crimes can and should be investigated. Any investigation is mainly a matter of obtaining, recording, refining and interpreting evidence gathered. The gathering, preservation and production of this material is the job of the investigator. It is for a court to weigh the evidential value of this material. In all investigations it is vitally important to:

- identify the 'scene of the crime';
- protect the 'scene of the crime'; and
- secure the 'scene of the crime'.

Most torture occurs in places where people are held in some form of custody, so preserving physical evidence or having unrestricted access to the scene may be difficult. Investigators should be given authority to obtain such access to any place or premises, and be able to secure the setting where torture allegedly took place. Otherwise the investigation risks being compromised through the movement of exhibits, the obliteration of evidence, the loss of evidence or additional evidence being added.

Investigators should document the chain of custody involved in recovering and preserving physical evidence in order to use such evidence in future legal proceedings, including potential criminal prosecution. The investigator should look for the presence or absence of elements that support or disprove the allegation, and any evidence of a pattern of such practices.

Investigators must obey domestic laws and rules, including the presumption of innocence, and they should give warnings, where appropriate, to those who are being investigated. Investigators should also keep an open mind, be patient, listen to what they are told and show tact and sensitivity, particularly when dealing with torture victims.

The following is a basic checklist for a 'scene of the crime' torture investigation:

- Any building or area under investigation should be closed off so as not to lose any possible evidence. Only investigators and their staff should be allowed entry into the area once it has been designated as under investigation.
- Material evidence must be properly collected, handled, packaged, labelled and placed in safekeeping to prevent contamination, tampering with or loss of evidence. If the alleged torture has taken place recently enough for such evidence to be relevant, any samples found of body fluids (such as blood or semen), hair, fibres and threads, should be collected, labelled and properly preserved.
- Any implements that could potentially be used to inflict torture should be taken and preserved.
- If recent enough to be relevant, any fingerprints located should be lifted and preserved.
- A labelled sketch of the premises or place where torture has allegedly taken place, should be made to scale, showing all relevant details, such as the location of different floors in a building, different rooms, entrances, windows, furniture, surrounding terrain, etc.
- Photographs should be taken at the scene of the crime either with a Polaroid camera, where this is available, or with a digital camera and printer so that relevant details can be marked or highlighted at the time of the inspection. The image should be saved and multiple copies made so that these can be subsequently used in evidence;
- Photographs should be taken of any injuries received, in colour, and using a ruler and colour chart against the skin to show the size and severity of these injuries.
- A record of the identity of all persons at the alleged torture scene should be made, including complete names, addresses and telephone numbers or other contact information.
- All clothing of the person alleging torture should be taken and tested at a laboratory, if available, for bodily fluids and other physical evidence.
- All clothing of the persons allegedly responsible for carrying out the torture should also be taken for forensic examination.
- Any relevant papers, records or documents should be saved for evidentiary use and handwriting analysis.

Identifying and prosecuting those responsible

Where an individual officer has been identified by name, by physical description, or through a serial or personal identification number, it should be possible to trace the officer through the official records. If the victim has been held at an officially recognised place of detention then the custody records should identify those responsible for the detention and anyone else who came into contact with the victim during this period. Other records held at police stations and detention facilities may also contain

relevant information. This could include: duty records and parade books (indicating which officers are on duty in a particular station); message pads and radio logs (recording all telephone and radio communications in a particular station); and crime reports and notebooks (recording specific action taken by individual officers in the course of their duties). If properly kept and preserved, this information can help to piece together evidence that could lead to the successful identification of someone accused of torture. It may also help to corroborate or disprove a particular allegation.

Where there are no independent witnesses, prosecutors may believe that the chances of a conviction are not high enough to justify taking a case. Some believe that if the evidence is simply one person's word against another, then the required 'beyond reasonable doubt' standard of proof for criminal conviction can never be satisfied. The assumption that a law enforcement officer accused of committing a crime in the course of his or her duties may stand a better chance of subsequently being acquitted than the average criminal defendant may also make some prosecutors reluctant to pursue a case. However, these factors need to be balanced against the public interest served in ensuring that those in positions of authority do not abuse it and this may justify bringing a prosecution even in cases where there is a greater likelihood of acquittal than would usually be the case. Where there is strong evidence that someone has suffered prohibited forms of ill-treatment in custody, and strong evidence that an identified officer, or group of officers, was present at the time of this ill-treatment, they could either be charged jointly with carrying out or aiding and abetting the ill-treatment or individually with failing to protect someone in their care.

Where there is no dispute that an identified officer has used force that resulted in a detainee suffering injury, the issue is likely to hinge on whether – if the alleged victim was not under the officer's control – the force was necessary, reasonable or proportionate. However, the prohibition of torture is absolute. Neither the dangerous character of a detainee, nor the lack of security in a detention facility can be used to justify torture.[36] In any event, force may be used only if non-violent means have proved ineffective.[37]

The Brazilian Code of Criminal Procedure prohibits the use of force against an arrested person, except in cases of 'acts of resistance' or attempt to escape.[38] In December 2012, the Human Rights Secretariat of the Presidency formally called for the removal of generic terms such as 'acts of resistance' and 'resistance followed by death' from police bulletins and crime reports.[39]

Criminal charges should also be brought against those in positions of responsibility who either knew or consciously disregarded information which indicated that their subordinates were committing crimes of torture or ill-treatment and failed to take reasonable measures to prevent

36. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2. See also, The Reports of the Committee Against Torture, *Mutambo v Switzerland* (13/1993) GAOR, 49th Session, Supplement No 44 (1994); *Khan v Canada* (15/1994), GAOR, 50th Session, Supplement No 44 (1995); and *Ireland v UK*, ECtHR, (1978); *Chahal v UK*, ECtHR, (1996); T*omasi v France*, ECtHR, (1992); *Selmouni v France*, ECtHR (1999).

37. Rule 54, Standard Minimum Rules for the Treatment of Prisoners; Principles 4 and 5, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

38. Article 284, Decree-Law No 3.689 of 3 October 1941 and Principle 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

39. Conselho de Defesa dos Direitos da Pessoa Humana, Resolution No 8, 21 December 2012.

it or report this. Where patterns of torture or ill-treatment emerge or there has been systematic failure to prevent them or hold the perpetrators to account, this could be taken as evidence that those in authority are effectively condoning such practices.

Culpability for crimes of torture or other forms of ill-treatment

As is discussed in Chapter Eight of this Manual, when the state deprives a person of liberty, it assumes a duty of care to maintain the person's safety and safeguard the person's welfare. This places an obligation on all those responsible for the deprivation of liberty and the care of the detainee.[40] Where an act of torture or other form of ill-treatment has taken place, the prosecutor should consider bringing charges against all those who failed to fulfil this obligation.

40. Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 33 (1994), para 3.

Culpability will extend to anyone in a responsible position within the institution in which the detainee was being held who knew or ought to have known that torture or ill-treatment was being perpetrated and failed to act to prevent it or report it. This could include police station commanders and their deputies, custody officers and doctors or medical personnel, as well as other officers and staff in the place of detention. It might also include prosecutors and judges, or others responsible for inspecting places of detention, if they knowingly ignored or disregarded evidence that torture or other forms of ill-treatment were being perpetrated in the places that they visited – or on people who had been brought before them.

To prove responsibility, a prosecutor will generally need to show that the defendant: committed, or attempted to commit the crime, whether as an individual, jointly with another or through another person; ordered, solicited or induced the commission of the crime or attempted crime; aided, abetted or otherwise assisted in its commission or its attempted commission; or in any other way contributed to the commission of the crime or attempted crime. This could involve an individual participating directly in the torture or ill-treatment, assisting it in some way – which had a substantial effect on the perpetration of the crime, or ordering it to be carried out. It could also involve failing to prevent it from being carried out by people over whom the person had command or management responsibility, where that person either knew, or owing to the circumstances at the time should have known, that the torture or ill-treatment was taking place and failed to take all necessary and reasonable measures to prevent it or to submit the matter to the competent authorities for investigation and prosecution. Failure to report criminal activity, even where the individual is not directly or indirectly responsible for the crimes being committed is also a criminal offence – albeit of a less serious nature.

The Brazilian law on torture allows prosecutions to be brought against private individuals, which significantly increases its scope. It would, for example, allow the authorities to bring charges of torture in cases of prisoner-on-prisoner violence, which is widespread in Brazilian prisons. Since the crime is defined both as an act and an omission, the authorities should consider charging not just individual prisoners in such cases, but all those in positions of authority within a prison administration who failed to prevent or report such acts if they had a duty to do so. This could lead to criminal charges being brought right up to the level of prison governors and their political and administrative superiors.

Medical evidence

Chapter Eight of this Manual contains a fuller discussion of the importance of access to doctors for all people deprived of their liberty.[41] Medical evidence is also vital for most torture investigations. Torture often does not leave physical traces or long-term physical marks. Conversely, not all marks or injuries suffered by a detainee are the result of torture as they may be the product of other causes. However, medical evidence can demonstrate that injuries or behaviour patterns recorded in the alleged victim are consistent with the torture he or she has described or alleged. Sophisticated medical techniques can often detect soft tissue or nerve trauma that might not be visible to the naked eye. A competent forensic medical examiner can also detect even minor signs of injury if he or she has early access to the person who has been tortured or ill-treated.

41. See also Tania Kolker, *Saúde e Direitos Humanos nas Prisões*, Governo do Estado do Rio de Janeiro, Secretaria de Estado de Direitos Humanos e Sistema Penitenciário, Subsecretaria de Direitos Humanos, Superintendência de Saúde, Conselho da Comunidade da Comarca do Rio de Janeiro, 2001.

Torture usually leaves psychological trauma and the evidence of this can also be collected. The psychological symptoms of torture are often subjective and relate to changed patterns of behaviour or evidence of stress that could have a variety of causes. Nevertheless, a psychological assessment should be sought where this is practical. Where there is a combination of physical and psychological evidence consistent with an allegation, this will strengthen the overall value of the medical evidence.
Where medical examinations are carried out upon arrival at a place of detention, it is particularly useful to ask to see the medical report of the first examination and all subsequent medical reports. Doctors and other medical personnel should also be interviewed about the circumstances in which they conducted their examinations. For example:

- Were they able to carry out an independent examination?
- Was anyone present during the examination?
- Did they issue a medical report?
- What did it say?
- Did the victim have any obvious signs of injury at the time?

- Was any attempt made to interfere with the medical report or was the doctor put under pressure to alter their findings in any way?

The objective of forensic – as opposed to therapeutic – medicine is to establish the causes and origins of injuries, rather than simply to treat them. A proper forensic medical examination should always be carried out during an investigation into alleged acts of torture. The report of that investigation should document:

- a full account of statements made by the person concerned which are relevant to the medical examination (including a description of the person's state of health and any allegations of ill-treatment);
- a full account of the medical findings based on a thorough examination of the person concerned; and
- conclusions that indicate the degree of consistency between the allegations made and the objective medical findings.

When obtaining medical evidence relating to torture, it is also important for the investigator to show full respect for medical ethics and patient confidentiality. This issue, and others relating to the investigation and documentation of torture allegations, is discussed in more detail in the Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[42]

42. The Istanbul Protocol, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Office for the High Commissioner for Human Rights, New York and Geneva, 2001.

Identifying and interviewing witnesses and suspects

Chapter Nine of this Manual contains a fuller discussion about the importance of interviewing prisoners during inspections. Most of the general points about conducting interviews also apply to interviewing witnesses to, or those suspected of, involvement in acts of torture or ill-treatment. Given that some of those involved are likely to be state officials – and often with considerable experience of the criminal justice system themselves – particular care needs to be taken with planning and structuring the interview and points to be put to the suspect or suspects.

A proper investigation should include interviews not only with those suspected of directly inflicting the ill-treatment, but also, potentially, with anyone in a responsible position within the institution in which the detainee was being held who knew that it was being perpetrated and failed to act to prevent it or report it. Civilian staff, or other police officers or prison staff at the police station or detention facility may have seen or heard the detainee at various stages during the detention. They may have seen or heard the torture or ill-treatment being carried out, heard it being discussed by other staff or detainees. They may also have been asked to

clean up the place where it took place or to collude in covering up evidence about it. Other witnesses who saw the detainee either before or when he or she was arrested may be able to say what physical state he or she was in prior to arrest, the circumstances leading up to the arrest, the manner in which the arrest was carried out and the identity of the arresting officers.

Co-detainees who did not directly witness the alleged torture may be able to provide information such as when the detainee was taken away for interrogation and describe his or her condition both prior and subsequent to being taken away, or that he or she never returned. They may be able to give evidence of sounds that they heard, such as screams or shouting, or of bloodstains or torture implements they might have seen. They may be aware of new injuries that became visible after the person arrived in custody or of existing injuries that worsened during the detention. They may be able to provide information about particular patterns of alleged torture – such as names, places, times or dates. They may also be able to give accounts of their own torture or that of other individuals they might have witnessed, which would help to establish that torture occurs in the establishment in question, or that a particular police officer or prison warden has previously engaged in torture or ill-treatment.

Where the victim is not the person making the allegation because he or she is dead, 'disappeared' or still in detention, the next-of-kin, neighbours or members of the local community may be able to suggest possible witnesses, or may themselves be able to provide useful information.

Interviews should be conducted in a clearly independent, impartial and professional manner. Allowance should also be made for the fact that the issues raised may be particularly emotive and that officers being investigated may generate considerable sympathy from their colleagues. Appropriate procedures should be developed to deal with representation, welfare, conflicts of interest, conflicts of loyalty and other factors that may impact upon the investigation. Suspects should always be interviewed separately and should not be allowed to confer with one another between interviews. If necessary they should be suspended from duty to prevent collusion between officers. Care should also be taken to respect the rights of potential suspects and not to render statements taken from them inadmissible as evidence.

Witness protection issues

Prosecution witnesses, particularly those who are likely to be called to give evidence at court proceedings, may find the prospect of testifying stressful and daunting. Witnesses also often suffer intimidation, verbal threats and/or physical violence from others attempting to dissuade them from testifying in court. Various forms of witness protection have been developed in response to these threats. At the simplest level, a prosecution witness may be accompanied to court by someone prepared to sit with them while they wait to give evidence, as this is often the most stressful period for a witness. Other common forms of witness protection include:

- advice on personal security;
- physical security measures at the individual's home such as the fitting of alarms, locks, or bars;
- moving home or to another place of work;
- complete change of identity and relocation;
- ensuring that the individual is not put in a situation where false 'counter allegations' could be made; and
- physical protection through the deployment of personal security guards.

Bearing these points in mind, prosecutors should consult witnesses about the different forms of witness protection. Care must, however, be taken to ensure that this cannot be misinterpreted as amounting to an inducement to a witness to testify. Scrupulous financial records should be kept, all policy decisions should be logged and signed agreements may also need to be made with the witness to guard against this.

Protecting witnesses is of crucial importance before and during a trial of people suspected of carrying out acts of torture or other prohibited forms of ill-treatment. The nature of these crimes means that the evidence of victims and witnesses is likely to be crucial to a successful prosecution. However, victims and witnesses are likely to face particular pressure not to testify, partly due to the effects that the crime in question has had on them and partly because they may be fearful of threats and intimidation. The fact that those accused of acts of torture are often likely to be state officials or law enforcement officers may make victims and witnesses feel particularly vulnerable should they testify.

In some cases, witnesses or victims may be held in custody, for other offences, in the period before or during the trial in which they will be called to give evidence. This will leave them particularly vulnerable to threats or ill-treatment designed to stop them testifying. In cases where current inmates are at risk, they ought to be transferred to another detention facility where special measures for their security can be taken. In other

cases, the victims or witnesses may have a criminal record and, therefore, be excluded from certain types of witness protection programmes. It is vital that such witnesses receive adequate protection and special arrangement should be considered, in these circumstances, to safeguard them.
Trials may commence some time after the original incident, or the conclusion of an investigation, and are sometimes subject to further delays. This can be particularly unnerving for prosecution witnesses. Witnesses should be kept informed of the progress of the case and should feel able to contact a member of the investigation team at any time. If a witness expresses concern for his or her personal safety or is subjected to any threats or intimidation, appropriate action should be taken to protect him or her and to hold the perpetrator to account.

Where the case involves a death as a result of torture or ill-treatment, and the next-of-kin or family are likely to be called as witnesses, special consideration should be given to the added grief and trauma that they are likely to experience through and beyond the trial. Special consideration should also be given to particularly vulnerable witnesses, such as juveniles, and the particular problems that they may experience attending court to give evidence. Providing video-link evidence, where the facilities exist for this, may help to prevent unnecessary distress to child witnesses and could provide the best environment for securing coherent and full evidence, without prejudice to the right of the accused to a fair trial. Some witnesses may also require special support in preparing them to attend court to give evidence because of their race, sex, sexual orientation, nationality, political or religious belief, or their social, cultural or ethnic background.

Even if a complaint of torture or ill-treatment is withdrawn during an investigation or prosecution, this should not automatically lead to the case being dropped. In some cases, victims or witnesses may have been put under pressure or intimidated into withdrawing their evidence. However, as with other crimes, there is nothing to prevent the case continuing on the basis of other evidence.

Immunities, amnesties and statutes of limitation

The judiciary has a duty to carry out, within their realm of jurisdiction, the international obligations to investigate, bring to justice and punish the perpetrators of crimes of torture. No one should be allowed to claim exemption from this because of their official capacity. Amnesties and other similar measures which prevent the perpetrators of gross human rights violations, such as torture, from being brought before the courts, tried and sentenced are incompatible with state obligations under international human rights law, including the obligations to investigate, bring to justice and punish those responsible for gross human rights violations.

The Statute of the International Criminal Court specifies that it:

> 'shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[43] Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.[44]

43. Statute of the International Criminal Court, Article 27(1).

44. *Ibid*, Article 27(2).

It further states that: 'The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.'[45] Although Protocol II to the four Geneva Conventions proposes that states should grant 'the broadest possible amnesty' to persons who have participated in an armed conflict following the end of hostilities, this is not believed to have been intended to provide immunity for acts amounting to war crimes.[46]

45. *Ibid*, Article 29.

46. Additional Protocol II 1977 to the Geneva Conventions of 1949, Article 6.5.

The Human Rights Committee has also stated:

> 'The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[47]
>
> It has stressed that these types of amnesty help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law.[48] The Vienna Declaration of the World Conference on Human Rights called on states to 'abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law'.[49]

47. Human Rights Committee, General Comment 20, para 15.

48. Concluding Observations of the Human Rights Committee: Argentina, 5 April 1995, UN Doc CCPR/C/79/Add.46; A/50/40, para 146.

49. Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc A/CONF.157/23 12 July 1993, para 60.

The Inter-American Court of Human Rights has stated that:

> 'all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation

> and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights.'[50]

50. *Barrios Altos (Chumbipuma Aguirre and others v Peru)*, (2001), para 41.

It re-stated this position in 2007, in the case of *the Rochela Massacre v Colombia*: and stated that: 'In the light of the foregoing considerations, the State must... effectively conduct both current and future criminal proceedings and adopt all such measures necessary to clarify the events in this case in order to identify those responsible for the violations.'[51]

51. *Rochela Massacre v Colombia* (2007), paras 294–5. See also *La Cantuta v Peru* (2006), para 152 (see also 162–89); *Almonacid Arellano et al v Chile* (2006), para 112; and *Ituango Massacres v Colombia* (2006), para 402.

Where it is within their discretion to do so, courts should, therefore, refrain from enforcing laws that are contrary to a state's international obligations and in breach of internationally-protected human rights, and declare them to be null and void.

Truth commissions often play an important role in establishing an authoritative record of the past and in providing victims with a platform to tell their stories and obtain redress. But truth commissions are not a substitute for justice in the form of full and fair prosecutions. Where truth commissions are established, they should respect due process, establish the truth, facilitate reparations to victims and make recommendations designed to prevent a repetition of the crimes. They should also operate alongside the courts in bringing perpetrators to justice and not be used as an alternative.

Universal jurisdiction and the obligation to prosecute

Article 5 of the Convention against Torture obliges states that have ratified it to:

> 'take such measure as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:
>
> - When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State
> - When the alleged offender is a national of that State
> - When the victim is a national of that State if that State considers it appropriate'.

It further obliges states to 'take such measure as may be necessary to establish jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction', if it does not extradite the person to another state. This obligation is regardless of where

the crime was committed, the nationality of the victim and the nationality of the alleged perpetrator. Article 7 of the Convention requires states 'under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution'. The 'try or extradite' obligation under the Convention against Torture applies to territories subject to the jurisdiction of the State Party, which includes any territory over which it has effective control. The Inter-American Convention to Prevent and Punish Torture also obliges every state party to try or extradite people found 'within the area under its jurisdiction,' regardless of where the crime was committed or the nationality of victim and alleged perpetrator.[52]

52. Inter-American Convention to Prevent and Punish Torture, Article 12.

The four Geneva Conventions also require states to exercise universal jurisdiction in respect of 'grave breaches' of the Convention and bring cases before their own national courts. The Conventions require States Parties to search for people alleged to have committed or ordered grave breaches of the Conventions, such as torture and inhuman treatment, or who have failed in their duties as commanding officers to prevent such grave breaches occurring. The 'search and try' obligation is without frontiers under the Geneva Conventions.

States that are not bound by any of these Conventions are still permitted to exercise universal jurisdiction if an alleged foreign perpetrator of torture is found on their territory as general or customary international law permits the exercise of universal jurisdiction over torture. Judges and prosecutors have a particularly important role to play in ensuring that these obligations are fulfilled with respect to the prosecution of people suspected of committing acts of torture or ancillary crimes.

The International Court of Justice has held that incumbent heads of state, foreign ministers and perhaps other high officials would appear, however, to enjoy immunity under international law from prosecution by foreign national courts for international crimes no matter how serious (apparently including torture); however, this is subject to waiver by the state itself. It remains unclear whether in the absence of waiver, after an official leaves the office that qualified them for the immunity, the official retains or loses immunity for acts committed during the time they held the office. In the case of the former head of state of Chile, Senator Pinochet, extradited from the United Kingdom to stand trial in Spain for crimes committed (primarily in Chile) during the period when he was head of state, the British House of Lords ultimately reached its decision based on domestic UK law.[53] However, in the course of the Law Lords' reasoning, several also addressed the situation under general international law. Lord Browne-Wilkinson, who gave the main judgment on the question of double criminality, stated

53. See *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (no 3) [2000] 1 AC 147 (HL).

that: 'the jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution"'.[54]

54. *Pinochet (no 3), ibid* 198. Here the Law Lord is quoting from a US case, *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; 776 F 2d 571.

Fair trials

Judges and prosecutors must ensure that the trials of people accused of torture and ancillary crimes are conducted fairly under national and international law and fully respect the rights of suspects and the interests of victims and their families. Suspects must have the right to legal advice and assistance of their own choice, at all stages of the criminal proceedings. National courts should also protect victims, witnesses and their families – including the provision of effective security. Such protection measures should not prejudice the right of suspects to a fair trial, including the right to cross-examine witnesses. This right should not, however, be permitted to be exercised in such a way as to intimidate or re-traumatise alleged victims or witnesses.

Where trials are conducted under universal jurisdiction, particular arrangements may need to be made to bring witnesses from overseas or to arrange video-link facilities, where these are available, to enable them to give evidence. Full interpretation facilities must also be provided where necessary.

Punishment

Punishment for crimes of torture will be determined by domestic law. However, the Convention against Torture states that States Parties 'shall make these offences punishable by appropriate penalties which take into account their grave nature'.[55] As well as involving acts of physical or mental violence, these crimes are often an abuse of authority and a betrayal of public trust. Where it is in their discretion to do so, judges and prosecutors should, therefore, ensure that acts of torture are treated as such. If the law has no crime by that name, or the facts cannot fit within a national definition that is narrower than the international definition, then the next most serious category of crime covering the facts should be invoked. This is so as to ensure that the court hands down a sentence commensurate with the gravity of the facts and to ensure that the premature application of periods of prescription (statutes of limitation) is avoided.

55. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 4 (2).

Redress

The Human Rights Committee and Committee against Torture have both

56. Human Rights Committee, General Comment no 20 (n 15), para 15; *R S v Trinidad and Tobago* (2002), para 9; Concluding Observations on Libya, UN Doc CCPR/C/LBY/CO/4 (15 November 2007), para 15; Committee against Torture, Concluding Observations on Turkey, UN Doc CAT/C/CR/30/5 (27 May 2003), para 7(h); *Saadia Ali v Tunisia,* (2008), UN Doc CAT/C/41/D/291/2006, para 15.8.

recognised rehabilitation, including medical and psychological care, to be a key form of reparation for survivors of torture.[56] Article 14 of the UN Convention specifically provides that a victim of torture must have an enforceable right to compensation that includes 'the means for as full rehabilitation as possible'. According to the Committee against Torture, this implies not only that some programme for rehabilitation must exist, but also that the state provides it with adequate resources to ensure its effective functioning. The Inter-American Court has ordered that victims of torture or other ill-treatment be provided by the state 'through its national health services, free of charge and for such period as may be necessary, such medical and psychological care and medication as may be recommended by appropriately qualified specialists'.[57] The UN General Assembly has stressed that 'national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment... receive appropriate social and medical rehabilitation' and has encouraged 'the development of rehabilitation centres'.[58]

57. *Caesar v Trinidad and Tobago* (2005), para 131.

58. UNGA Res 62/148 (18 December 2007), para 13.

59. Rodley, 2011, 160–1.

60. *Loayza-Tamayo v Peru*, (1998) [Reparations and Costs].

61. *Villagrán-Morales et al v Guatemala*, IACtHR, (2001); *Molina-Theissen v Guatemala*, IACtHR, (2004), ; *Gómez-Paquiyauri Brothers v Peru*, IACtHR, (2004).

62. *Molina-Theissen, ibid; Gómez-Paquiyauri Brothers, ibid; Tibi v Ecuador*, IACtHR, (2004).

63. *Gomez-Paquiyauri Brothers, ibid; Tibi, ibid.*

64. *Tibi, ibid.*

65. *Juan Humberto Sanchez v Honduras*, IACtHR, (2003).

The Inter-American Court of Human Rights has offered a number of extremely innovative remedies of satisfaction uniquely tailored to the cases before them.[59] It has, for instance, ordered: reinstatement of a victim of ill-treatment to the public employment she had lost;[60] dedication of a school with a name and plaque commemorating the victims;[61] public acknowledgment by high state officials of the state's international responsibility regarding the facts of the case and apologising to the victim;[62] publication of portions of the judgment in the official gazette and in national daily newspapers;[63] creation of training programmes for law enforcement personnel;[64] and creation of a registry of detainees (including identification of the detainees, the reason for their detention, the competent authority, the day and time of admission and of release, and information on the arrest warrant).[65] In many cases, the Court has also ordered that domestic law be changed to bring it in line with international human rights obligations.

66. E/CN.4/2000/62, 18 January 2000.

The Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights, Cherif Bassiouni, attached draft basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (the Van Boven-Bassiouni Principles) in his final report to the UN Commission on Human Rights in 2000.[66] The Van Boven-Bassiouni Principles include:

- Restitution: steps should be taken to restore the victim to the situation he or she was in before the violation occurred, including restoration of his or her legal rights, social status, family life, place of residence, property and employment;

- Compensation: steps should be taken to compensate for any economically assessable damage resulting from violations including physical or mental harm, emotional distress, lost educational opportunities, loss of earnings, legal and/or medical costs;
- Rehabilitation: steps should be taken to ensure medical and psychological care if necessary as well as legal and social services;
- Satisfaction and guarantees of non-repetition: steps should be taken to ensure cessation of continuing violations, public disclosure of truth behind violations, official declaration of responsibility and/or apologies, public acknowledgement of violations, as well as judicial or administrative sanctions, and preventive measures including human rights training.

Sometimes victims need expensive long-term medical care or therapy. Sometimes they are unable to work as a result of their experiences or they find their lives fundamentally altered in other ways. If torture has been inflicted by state agents, or with their acquiescence, the state must, as far as possible, repair the harm that it has done. Where it is within their discretion, judges should ensure that victims of torture receive redress that fully reflects the grave and serious nature of the crime to which they have been subjected. If the victim dies as a result of torture, the person's dependents are entitled to redress.

The Special Rapporteur on the Question of Impunity, Louis Joinet, elaborated a set of principles for the protection and promotion of human rights through action to combat impunity in his 1997 report to the UN Commission on Human Rights (the Joinet Principles).[67] These principles include:

67. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

- Principle 33. Rights and duties arising out of the obligation to make reparation. Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and the possibility for the victim to seek redress from the perpetrator;
- Principle 34. Reparation procedures. All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings... In exercising this right they shall be afforded protection against intimidation and reprisals. Exercise of the right to reparation includes access to the applicable international procedures;
- Principle 35. Publicising reparation procedures. Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services,

particularly in countries to which large numbers of victims have been forced into exile;

- Principle 36. Scope of the right to reparation. The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, and general measures of satisfaction... In the case of forced disappearances, when the fate of the disappeared person has become known, that person's family has the imprescriptible right to be informed thereof and, in the event of decease, the person's body must be returned to the family as soon as it has been identified, whether the perpetrators have been identified, prosecuted or tried or not.

CHAPTER 8

The Duty of Care towards those Deprived of their Liberty

Introduction

This chapter outlines the Brazilian government's obligations towards those deprived of their liberty. International human rights law creates a number of distinct but interrelated obligations on states, which are often referred to as the obligations to *respect, protect and fulfil*. This means that states are responsible for safeguarding the rights of everyone within their jurisdiction and may be held accountable for acts carried out by both state officials and private individuals if it supports or tolerates them, or fails in other ways to provide effective protection in law against them.

The 'positive obligations' that the state owes towards people in detention are often referred to as a 'duty of care'. This duty is set out in Brazil's Constitution and laws – as well as international law – and it is the responsibility of all Brazilian legal professionals to ensure that it is fulfilled in practice. Many of the obligations can be found in treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). These specify that everyone has the right to health, education, welfare and an adequate standard of living. There is a corresponding obligation on the state to provide, *respect, protect and fulfil* these rights to prisoners, who retain all of their human rights except those that are specifically forfeited as a consequence of the deprivation of their liberty.

A specific obligation towards prisoners can also be found in Article 10 (1) and (3) of the International Covenant on Civil and Political Rights (ICCPR), which states that: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. These articles also state that: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' As is discussed below, a number of other human rights treaties contain similar wording.

In practical terms, this means that the state is under an obligation to ensure that all prisoners are held in humane conditions. They should receive adequate food, clothing and bedding, and healthcare. Their accommodation should be of a reasonable condition and they should be provided with the necessary articles for their personal hygiene. Prisoners should have the right to request improvements in their treatment or to make complaints and the authorities must reply promptly and reasonably to such requests. The 'essential aim' of the treatment that they receive shall be their reformation and social rehabilitation and this should be the overall guide to penal policy. All detained people have the right to equal treatment without discrimination, but particular allowances should be

made for special categories of detainees whose vulnerabilities mean they may need particular care and support. This chapter provides specific guidance for those responsible for defending the rights of prisoners to ensure that these obligations are respected in practice.

Deprivation of liberty and the duty of care

Everyone has the right to liberty and security of person – including the right to be free from arbitrary arrest or detention.[1] The law does permit people to be detained in certain specified circumstances, including: people who have been convicted of a criminal offence and sentenced to a period of imprisonment; some people who are awaiting trial and who may either abscond, interfere with witnesses or otherwise prejudice the outcome of their trial; and foreign nationals detained under immigration powers. People who are held in lawful detention forfeit, for a time, their right to liberty, but they retain all their other rights with the exception of those that have been lost as a specific consequence of that deprivation.

1. International Covenant on Civil and Political Rights article 9 (1); European Convention on Human Rights Article 5; African Charter on Human and Peoples' Rights Article 6; American Convention on Human Rights Article 7.

People who have not been convicted of a crime are being deprived of their liberty as a precautionary measure and not as a punishment. For people who have been sentenced to terms of imprisonment, the punishment is the actual deprivation of liberty. In neither case are the detaining authorities permitted to inflict additional punishments to those decreed by the courts or sentencing authority. On the contrary they assume a 'duty of care' to those for whom they are responsible.

These positive obligations towards prisoners can be found in a number of international human rights instruments, to which Brazil is a party.[2] They are also contained in laws such as the Penal Code,[3] the Code of Criminal Procedure (Código de Processo Penal – CPP)[4] and the Law on the Execution of Sentences (Lei de Execução Penal, LEP).[5] These specify that all those deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, and that detainees are not to be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.

2. For example, Articles 7 and 10(1) of the International Covenant on Civil and Political Rights (ICCPR); Article 5 American Convention on Human Rights; Article 37 Convention on the Rights of the Child; Article 1 Convention on the Elimination of All Forms of Discrimination Against Women; Articles 2 and 4 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. See also Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 33 (1994), para 3.

3. Decree Law No 2,848 of 7 December 1940.

4. Decree Law No 3,689 of 3 October 1941.

5. Law No 7,210 of 11 July 1984.

Access to a doctor and medical treatment

Brazilian law does not specify that all people who are arrested shall be examined by a doctor when they are first taken into custody and this is instead left to the discretion of individual commanders of police stations. This is a violation of internationally accepted standards for the protection of prisoners' right to be protected against torture. The Human Rights Committee, for example, has stated that the protection of detainees requires that each person detained be afforded prompt and regular access to doctors.[6]

6. Human Rights Committee, General Comment 20, para 11.

The failure to provide this also removes an obvious protection for custody officers against false accusations of torture. It is, for example, permissible to use 'reasonable force' to arrest a criminal suspect or prevent an escape. Without an independent medical examination on entry into custody it is much more difficult to determine whether any injuries that a detainee has suffered occurred before, after or during the course of their arrest and detention. This makes it far more difficult to investigate claims of torture and to protect custody officers against ill-founded claims.

In the report of its visit to Brazil in 2011, the UN Subcommittee for the Prevention of Torture (SPT) recommended 'that forensic institutes be made fully independent from public security secretariats. The SPT also recommends that the State party establish a system of independent examinations in accordance with the Istanbul Protocol, 15 under which qualified forensic doctors and psychologists shall carry out exhaustive investigations when the doctor who has checked the detainee has grounds for supposing that the person has been subject to torture and/or ill-treatment'.[7]

7. CAT/OP/BRA/1, 5 July 2012, para 35.

According to Brazilian law, all prisoners have the right to medical, pharmaceutical and dental treatment once they are in detention.[8] In cases where the penitentiary does not have the proper facilities to provide the necessary medical assistance, it will be carried out in another place upon the authorisation of the director.[9] The law also states that detainees have the right to contract the services of a medical doctor personally known to the internee or outpatient, by his or her relatives or dependents, in order to provide guidance and monitor treatment.[10] The SPT considered:

> 'the situation of healthcare in most facilities it visited was extremely worrying. Overall concerns included the lack of financial, material and human resources and the subordination of health services to the security services. In police stations there was no access to doctors. A physical examination ("corpo de delito") was performed on detainees shortly upon their arrest and normally before their admission to the police station. All detainees interviewed by the SPT stated that this examination was superficial and conducted in a perfunctory manner'.[11]

8. For details see, Ministerio da Saúde, Legislação Saúde no Sistema Penitenciário, 2010. The right to healthcare is guaranteed by Lei de Execução Penal de Julho de 1984 (LEP) Article 14 as well as by Lei 8080/90, which created the Sistema Único de Saúde, that is supposed to guarantee medical assistance to all Brazilians, including those deprived of their liberty.

9. LEP, Article 14(2).

10. LEP, Article 43.

11. CAT/OP/BRA/1, 5 July 2012, paras 36 and 37.

Such concerns have been repeatedly expressed by monitoring bodies. The UN Special Rapporteur on torture noted in 2001 that 'the great majority of provisional detention facilities and prisons' he visited in Brazil 'were characterized by a lack of medical resources, both in terms of qualified staff and medication'. [12] For example, he observed that in one police lock-up:

12. E/CN.4/2001/66/Add.2, para 125.

> 'Many detainees had serious health problems, allegedly resulting from the treatment they had been subjected to during interrogation. One detainee had attempted, with co-detainees, to treat an injury resulting from a gunshot which, because of lack of medical treatment, had become seriously infected. Another had a dislocated right shoulder. A third was said to be suffering from tuberculosis and was in an obviously very weak state. The Special Rapporteur noted that prisoners complained that their requests for medical assistance "were not responded to by the police authorities and often lead to further beatings". He said that "a large number of detainees also complained about skin diseases brought about by the conditions of detention". The Special Rapporteur also noted that, "numerous detainees refused to speak to him out of fear of reprisals". When asked by the Special Rapporteur if their names could be referred to the *delegado* in order to ensure that appropriate medical treatment was provided, some detainees refused, also for fear of reprisals.'[13]

13. *Ibid*, para 24.

In the *casa de detenção* of Carandiru (São Paulo), the Special Rapporteur:

> 'noted with concern a sign on the fifth floor stating that the prison infirmary had "no medication", that the doctor would come once a week and that only the names of ten prisoners would be handed to the doctor for treatment. Medical treatment outside the prisons was reportedly arranged unwillingly and rarely. The alleged unavailability of vehicles or military police personnel to accompany the transport to hospital, lack of planning or appointments and, in some cases, the unwillingness of doctors to treat prisoners often lead to the denial of prompt and appropriate medical treatment. With regard to the situation in many of the police stations visited, which most of the time were holding a significant number of convicted prisoners, the Special Rapporteur received allegations that prisoners requiring urgent medical treatment were not or only belatedly transferred to hospitals despite the fact that none of these police stations had any medical facilities. Furthermore, prisoners were allegedly threatened with beatings if they asked for medical attention. As a result, common illnesses affecting a great number of prisoners, such as skin rashes, colds, tonsillitis and influenza, were allegedly seldom treated, if at all. The Special Rapporteur accordingly referred a number of detainees obviously in urgent need of appropriate medical treatment to the good offices of the officers-in-charge concerned'.[14]

14. *Ibid*, para 125.

As well as being in violation of Brazilian law, such treatment also clearly violates international human rights standards. For example, the Body of Principles for the Protection of All Persons under Any Form of Detention

or Imprisonment state that: 'a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.'[15] It also specifies that detainees have the right to request a second medical opinion by a doctor of their choice, and to have access to their medical records.[16] The UN Basic Principles for the Treatment of Prisoners also states that: 'Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.'[17] The 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 contain a similar provision.[18]

15. Principle 24.

16. Principles 25 and 26.

17. *Basic Principles for the Treatment of Prisoners*, Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990, Principle 9.

18. 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, Rule 1.

The European Committee for the Prevention of Torture (CPT) has stressed that even if state-appointed doctors are available to treat detainees, in the interests of the prevention of ill-treatment, it is desirable that they should, in addition, have access to a doctor of their choice.[19] The UN Special Rapporteur on torture has recommended that: 'At the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention.'[20] He has further stated that: 'Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in torture. Such prohibition should extend to such practices as examining a detainee to determine his "fitness for interrogation", procedures involving ill-treatment or torture, as well as providing medical treatment to ill-treated detainees so as to enable them to withstand further abuse.'[21]

19. CPT/Inf/E (2002) 1, 6, para 36 and footnote 1.

20. Report of the Special Rapporteur on Torture, UN Doc A/56/156, July 2001, para 39(f).

21. *Ibid*, para 39(l).

The UN Standard Minimum Rules (SMR) have elaborated in greater detail on the standards of healthcare to which prisoners have a right. These specify that: every prison must retain the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organised in close relationship to the general health administration of the community or nation and should include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.[22] Sick prisoners who require specialist treatment must be transferred to specialised institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. Every prisoner should also have a right of access to a dentist.[23]

22. UN Standard Minimum Rules, Article 22.

23. *Ibid*.

Sick prisoners should receive daily medical visits and the medical officer must report to the director whenever he or she considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.[24] The medical officer should also carry out regular inspections of the prison and advise its director on the:

24. *Ibid*, Article 25.

- quantity, quality, preparation and service of food;
- hygiene and cleanliness of the institution and the prisoners;
- sanitation, heating, lighting and ventilation of the institution;
- suitability and cleanliness of the prisoners' clothing and bedding; and
- observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

The director of the detention facility must take these reports into consideration, making appropriate recommendations for improvements where necessary and advising superior authorities where the matters fall outside his or her competence. [25]

25. *Ibid*, Article 26.

The CPT has also provided detailed guidance on the risks from transmissible diseases, such as tuberculosis, hepatitis and HIV/AIDS. It has stated that:

> 'The spread of transmissible diseases and, in particular, of tuberculosis, hepatitis and HIV/AIDS has become a major public health concern … Further, material conditions under which prisoners are held have often been found to be such that they can only favour the spread of these diseases. The CPT is aware that in periods of economic difficulties – such as those encountered today in many countries visited by the CPT – sacrifices have to be made, including in penitentiary establishments. However, regardless of the difficulties faced at any given time, the act of depriving a person of his liberty always entails a duty of care which calls for effective methods of prevention, screening, and treatment. Compliance with this duty by public authorities is all the more important when it is a question of care required to treat life-threatening diseases.[26]

26. Extract from the 11th General Report CPT/Inf (2001) 16, para 31.

> The use of up-to date methods for screening, the regular supply of medication and related materials, the availability of staff ensuring that prisoners take the prescribed medicines in the right doses and at the right intervals, and the provision when appropriate of special diets, constitute essential elements of an effective strategy to combat the above-mentioned diseases and to provide appropriate care to the prisoners concerned. Similarly, material conditions in accommodation for prisoners with transmissible diseases must be conducive to the improvement of their health; in addition to natural

light and good ventilation, there must be satisfactory hygiene as well as an absence of overcrowding. Further, the prisoners concerned should not be segregated from the rest of the prison population unless this is strictly necessary on medical or other grounds. In this connection, the CPT wishes to stress in particular that there is no medical justification for the segregation of prisoners solely on the grounds that they are HIV-positive.[27]

27. *Ibid*.

A prison health care service should ensure that information about transmittable diseases (in particular hepatitis, AIDS, tuberculosis, dermatological infections) is regularly circulated, both to prisoners and to prison staff. Where appropriate, medical control of those with whom a particular prisoner has regular contact (fellow prisoners, prison staff, frequent visitors) should be carried out. As regards more particularly AIDS, appropriate counselling should be provided both before and, if necessary, after any screening test. Prison staff should be provided with ongoing training in the preventive measures to be taken and the attitudes to be adopted regarding HIV-positivity and given appropriate instructions concerning non-discrimination and confidentiality.'[28]

28. *Ibid*, paras 54–56.

Humane conditions of detention

As is discussed throughout this Manual, conditions in Brazilian prisons and detention facilities fall far short of what can be considered humane. The Brazilian authorities are trying to tackle the problem of prison overcrowding through a prison-building and modernisation programme and also provide guidance to states on the construction and physical reform of penal establishments.[29] However, it should be stressed that a lack of resources as justification for poor conditions has been explicitly rejected by international human rights monitoring organisations. For example, the Human Rights Committee has stated that the duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment.[30] States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs.[31] Failure to provide adequate food and recreational facilities constitutes a violation of Article 10 of the ICCPR, unless there are exceptional circumstances.[32]

29. Diretrizes Básicas para arquitetura penal, Ministry of Justice, 2011.

30. Human Rights Committee, General Comment No 21.

31. *Kelly v Jamaica*, (1991); *Párkányi v Hungary*, (1992).

32. *Kelly v Jamaica*, (1991), para 5.

In one case, the Human Rights Committee found violations of both Article 7 and 10, based on conditions during pre-trial detention, where a detainee, despite suffering from asthma, was made to sleep in some instances on a cold concrete floor without a mattress; at other times in an extremely hot cell where his asthma worsened.[33] In *Lantsova v Russian Federation*,

33. *Brown v Jamaica*, (1999), UN Doc CCPR/C/65/D/775/1997, paras 6.5 and 6.13.

concerning a death in custody, the Committee noted that the population of a detention centre was five times the allowed capacity, with poor ventilation and inadequate food and hygiene and concluded that holding people in such conditions n of Article 10(1) and that the death due to inadequate medical attention constituted a violation of Article 6 (right to life).[34] In *Kennedy v Trinidad and Tobago*, the Committee considered that conditions of detention in which the applicant had been kept on remand for a total of 42 months with at least five and up to ten other detainees in a cell measuring 6 by 9 feet, and for a period of almost eight years on death row he was subjected to solitary confinement in a small cell with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once a week, and with wholly inadequate food that did not take into account his particular dietary requirements amounted to a violation of Article 10.[35] In *Mulezi v Democratic Republic of Congo*, the Committee found a violation of Article 10 as well as of Article 7 where the applicant, as well as being subject to acts of torture, had been held, while badly injured, confined in crowded cells (including at one point for some 16 months with 20 others in a cockroach-infested 3 by 5 metre cell), with little or no access to medical care, and inadequate food and sanitation.[36] The Committee has made numerous similar rulings.[37]

34. *Lantsova v Russian Federation*, (2002), paras 8.2–9.3.

35. *Kennedy v Trinidad and Tobago,* (2002).

36. *Mulezi v Democratic Republic of Congo*, (2004).

37. See for example, *Elahie v Trinidad and Tobago*, (1997), para 8.3; *Lewis v Jamaica*, (1997), para 8.5; *Blaine v Jamaica*, (1997), para 8.4; *Hill v Spain,* (1997), para 13; *Cabal and Pasini Bertran v Australia*, (2003); *Vargas Mas v Peru,* (2005), paras 3.3, 6.3; *Gorji-Dinka v Cameroon*, (2005), para 5.2; *Sextus v Trinidad and Tobago*, (2001), paras 2.1, 2.4, 3.6; *Xavier Evans v Trinidad and Tobago*, (2003), para 6.4; *Arutyunyan v Uzbekistan*, (2004), para 6.2; *Lobban v Jamaica*, (2004), para 8.2; *Francesco Madaff eri v Australia*, (2004), para 9.3; *Abdelhamid Benhadj v Algeria*, (2007), para 8.5.

38. See Rodley, 2011, 387–92.

In such cases, the Committee has often found violations of Article 10 rather than Article 7 because while the conditions complained about are unacceptable, they do not appear objectively to differ substantially from those of other prisoners in the general population. If there is some indication that the individual, or group of individual, complainants have been subjectively 'targeted' for particularly poor conditions of detention the Committee will primarily view the situation through the lens of Article 7.[38]

Both the European and Inter-American Courts and the African Commission of Human Rights have also addressed conditions of detention in considerable detail. For reasons of space, the following paragraph summarises the findings of the Inter-American Court in relation to Article 5 of the American Convention, which both prohibits torture and other ill-treatment and requires that persons deprived of liberty be treated with respect for the inherent dignity of the human person.

In *Suarez-Rosero v Ecuador*, the Court held that the 36 days of incommunicado detention to which the victim had been subjected in itself qualified as cruel, inhuman or degrading treatment, but it referred too to his having been held in a damp underground cell measuring approximately 15 square metres with 16 other prisoners, without the necessary hygiene facilities, and the fact that he was obliged to sleep on newspaper, as being among the factors contributing to its finding of a violation of Article 5.[39] In *Tibi v Ecuador*, the Court summarised findings from several prior cases as follows:

39. *Suarez-Rosero v Ecuador*, (1997), para 91.

> 'Pursuant to [article 5(2)], a person deprived of his or her liberty has the right to live in a detention situation that is compatible with his or her personal dignity. In other cases, the Court has pointed out that keeping a detainee in overcrowded conditions, lacking natural light and ventilation, without a bed to rest on or adequate hygiene conditions, in isolation and incommunicado or with undue restrictions to the system of visits, constitutes a violation of that person's right to humane treatment. Since the State is responsible for the detention centers, it must guarantee the inmates conditions that safeguard their rights.' [40]

In subsequent cases, insufficient space and overcrowding, inadequate ventilation, natural light and heating, food and sanitary facilities, and unsatisfactory medical care, have repeatedly been found to constitute violations of Article 5.[41] In *Raxcaco-Reyes v Guatemala*, the Court made specific note of 'Numerous decisions of international organizations invoke the United Nations Standard Minimum Rules for the Treatment of Prisoners, in order to interpret the content of the right of prisoners to decent and humane treatment. These rules prescribe the basic rules for a prisoner's accommodation, hygiene, medical care and exercise.'[42] The Inter-American Commission on Human Rights has often addressed prison conditions in both regular and special reports,[43] and has adopted a set of 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas', based on a broad variety of 'soft-law' instruments.

The UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment state that everyone detained or imprisoned has the right to request improvements in their treatment or to complain about their treatment. The authorities must reply promptly, and if the request or complaint is refused, it may be brought to a judicial or other authority.[44] While conditions of detention will vary, the CPT has provided a general checklist[45] of factors that need to be considered when assessing the suitability of a place used for *short-term* detention:

- Cells should be clean, of a reasonable size for the number of persons they are used to accommodate, and have adequate lighting (sufficient to read by, sleeping periods excluded) and ventilation; preferably, cells should have natural light.
- Cells should be equipped with a means of rest (a fixed chair or bench), and persons obliged to stay overnight in custody should be provided with a clean mattress and blankets.
- Persons in custody should be allowed to comply with the needs of nature in clean and decent conditions, and be offered adequate washing facilities.

40. *Tibi v Ecuador*, (2004), para 150. See also: *Bulacio v Argentina*, (2003), para 126; *Cantoral-Benavides v Peru,* (2000), paras 85–9; and *Loayza-Tamayo v Peru,* (1997), para 58.

41. *Lori Berenson-Mejia v Peru*, (2004), paras 106–109; *Montero-Aranguren and others (Detention Center of Catia) v Venezuela*, (2006), paras 85–104 [citing also ECPT standards on cell size]; *Yvon Neptune v Haiti*, (2008), paras 127–39.

42. *Raxcaco-Reyes v Guatemala*, (2005), paras 99–102. See also Neptune, *ibid* para 137.

43. For example, Special Report on the Human Rights situation at the Challapalca prison, Department of Tacna, Republic of Peru, OEA/Ser.L/V/II.118 Doc. 3 (9 October 2003). See also Presentation by the Executive Secretariat of the Commission, on the situation of persons under any form of detention or imprisonment in the hemisphere, OEA/Ser.G, CP/CAJP-2096/03 corr.1 (21 November 2003).

44. Principle 33.

45. CPT/Inf/E (2002) 1, 8, para 42.

- Persons in custody should have ready access to drinking water and be given food at appropriate times, including at least one full meal every day.
- Those detained for extended periods, 24 hours or more, should be allowed to take outdoor exercise.

These are to be regarded as minimum standards. Any further period in detention should normally be in a facility designed for longer-term detentions, where the standards to be expected are more exacting. Deprivation of liberty in conditions that do not meet these standards can amount to inhuman or degrading treatment in contravention of international human rights law.[46]

46. *Peers v Greece*, ECtHR, (2001); *Kalashnikov v Russia*, ECtHR, (2002).

The SMR contain some more detailed guidance on this subject:

- **Accommodation.** Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room. Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.[47] All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.[48] The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation; artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.[49] The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.[50] Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.[51] All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.[52]
- **Personal hygiene.** Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.[53] In order that prisoners may maintain a good appearance compatible with

47. UN Standard Minimum Rules, Article 9.

48. *Ibid*, Article 10.

49. *Ibid*, Article 11.

50. *Ibid*, Article 12.

51. *Ibid*, Article 13.

52. *Ibid*, Article 14.

53. *Ibid*, Article 15.

their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.[54]

- **Clothing and bedding.** Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating. All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene. In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorised purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.[55] If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the institution to ensure that it shall be clean and fit for use.[56] Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.[57]
- **Food.** Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. Drinking water shall be available to every prisoner whenever he needs it.[58] Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.[59]

Brazilian law specifies that closed regime sentences must be served in individual cells measuring at least 6 square metres.[60] The LEP prohibits the use of 'dark cells and collective sanctions' and states that 'sanctions may not jeopardize the physical and moral integrity of the convicted'.[61] It also states that the authorities must respect the physical and moral integrity of the convicted prisoners and of the provisional prisoners, such as the right to food, clothes, work, medical care, legal and social assistance, among others.[62] In practice, the conditions in most prisons and detention facilities violate Brazilian and international law.

In the report of its visit to Brazil in 2011, the UN Subcommittee for the Prevention of Torture (SPT) stated that:

> 'all persons deprived of their liberty be informed about their right to submit direct and confidential complaints to the authority responsible for the administration of the place of detention, to higher authorities and to authorities with remedial powers. Information about this right should be provided in a language they can understand and in writing

54. *Ibid*, Article 16.
55. *Ibid*, Article 17.
56. *Ibid*, Article 18.
57. *Ibid*, Article 19, *ibid*.
58. *Ibid*, Article 20.
59. *Ibid*, Article 21.
60. LEP, Article 88 caput and (b).
61. LEP, Chapter IV, Section II.
62. LEP, Article 41.

at the time of arrival at the place of detention, and should be made generally known throughout all the places of detention, through signs or posters posted visibly in places of detention. The right to submit complaints should be guaranteed in practice and complaints should be received uncensored as to substance and be considered and replied to without undue delay. No reprisals or other forms of prejudice should be suffered by those making a complaint. Relevant authorities should keep a record of all complaints received, including their nature, the institution where it originated, date of receipt, date of decisions, the nature of decision and any action taken as a result. Such registers shall be made available to external monitoring bodies'.[63]

63. Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil, CAT/OP/BRA/1, 5 July 2012.

Rehabilitation and resettlement

Article 10(3) of the ICCPR states that the 'essential aim' of the treatment that people receive in prison 'shall be their reformation and social rehabilitation'. This has been elaborated in a number of soft-law instruments, such as the SMR which set out a comprehensive set of guidelines for the treatment of sentenced prisoners that are 'intended to show the spirit in which penal institutions should be administered and the purposes at which they should aim'.[64] The rules emphasise that the very fact of depriving someone of his or her liberty is afflictive so the prison system should not seek to aggravate the suffering that is inherent within this status as a prisoner.[65] Because the purpose of imprisonment is ultimately to protect society against crime, the period in which people are imprisoned should be used, so far as possible, to prepare them to lead a law-abiding and self-supporting life upon their release.[66] Prisons should, therefore, provide all appropriate assistance to help individual prisoners with this aim in mind.[67]

64. Standard Minimum Rules, Article 56.

65. *Ibid*, Article 57.

66. *Ibid*, Article 58.

67. *Ibid*, Article 59.

The SMR specify that prisoners should be treated in ways that encourage their self-respect and develop their sense of responsibility.[68] To these ends, 'all appropriate means shall be used' including 'education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his [or her] social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release'.[69] Released prisoners should also receive efficient after care and measures should be taken to reduce public prejudice against former prisoners.[70]

68. *Ibid*, Article 65.

69. *Ibid*, Article 66.

70. *Ibid*, Article 64.

The SMR stress that prisons should seek to minimise any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. They should also take steps to prepare prisoners for a gradual return to

life in society before the completion of their sentences. Penal institutions should link up with community agencies and social workers to organise supervised release on trial or pre-release regimes:[71] 'The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it.' Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. Every institution should contain social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his or her family. In addition: 'Steps should be taken to safeguard the rights relating to civil interests, social security rights and other social benefits of prisoners.'[72] Prison medical services should also help to detect and treat any physical or mental problems that may hamper a prisoner's rehabilitation.[73]

71. *Ibid*, Article 60.

72. *Ibid*, Article 61.

73. Ibid, Article 62.

Prisons should be safe and secure places: for prisoners, prison staff and visitors alike. A secure and well-run prison will be easier to achieve if everyone feels that they are being treated with fairness and justice. The majority of prison riots and disorders throughout the world are provoked by protests against conditions and, as discussed in Chapter Four of this Manual, there is a clear link between prison conditions and the wider violence in Brazilian society. The concept of 'dynamic security' has been developed to describe a proactive approach by prison staff to interacting with prisoners in a positive way and thereby developing a greater awareness of what is going on in the prison.[74] Alert, professional and well-trained staff can use 'dynamic security' to spot and respond to situations that are different from the norm. In order to be effective, this concept rests on knowing what rights prisoners have, and can reasonably claim, from the authorities. Clearly current conditions in Brazilian prisons are not in conformity with these norms. Monitoring the implementation of Brazilian penal policy and conditions in individual prisons and other detention facilities is discussed further in Chapter Nine of this Manual.

74. See, *Making Law and policy that work: a handbook for Law and policy-makers on reforming criminal justice and penal legislation, policy and practice* (Penal Reform International 2010).

Safeguards for special categories of detainees

Case study: The Segregated Assistance Programme

The Segregated Assistance Programme was established by Defensoria Pública in Mato Grosso in 2008 to provide a more systematic analysis and monitoring of the procedural status of the cases of prisoners who are receiving educational measures as part of their sentence for rehabilitation. Previous efforts to provide them with this were mainly ad hoc and lacked continuity between different visiting bodies.

The Segregated Assistance Programme provides for the online registration and monitoring of each case so that prisoners receive updated information about the progress of their sentence, when they are entitled to reductions of security and progress towards parole and when they can expect to move from a closed regime to an open or semi-open one. It also registers complaints that they may make about their conditions, together with requests sent to the prison administration. Requests for certificates of employment and referrals to healthcare facilities can also be registered.

All detained people have the right to equal treatment without discrimination on the grounds of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular allowances should, however, be made for the rights and needs of special categories of detainees including women, juveniles, elderly people, foreigners, ethnic minorities, people with different sexual orientation, people who are sick, people with mental health problems or learning disabilities, and other groups or individuals who may be particularly vulnerable during detention.

Some groups may be targeted for discriminatory abuse by the staff of the institution where they are detained. They may also be vulnerable to abuse from other detainees. Since Brazil's Torture Law criminalises torture committed by private individuals as well as public officials, the authorities are under a particular obligation to protect all people in detention from such acts.

Women in detention

Brazil's Constitution and laws provide theoretical protection to women detainees. Women should serve their sentences in institutions designed for women, which should have sections for pregnant women and women in labour, as well as daycare sections for young children.[75] These should have a nursery, where women will be able to breastfeed, stay with and nurse their children. Women prisoners must also be supervised by women guards.

75. Constituição Federal de 1988, Article 5 (L); LEP, Articles 83 (2) and 89.

Women prisoners make up about seven per cent of the total Brazilian prison population. However, their numbers are growing more rapidly than the male prison population and existing facilities are unable to cope. In October 2007, it was estimated that there were 48 per cent more women prisoners than there were places available in the country's prisons, while the deficit for the male prison population was 37 per cent. In practice, this means that some prisons have become 'mixed' and, although these have designated areas for women, they rarely have facilities to meet the needs of women.[76]

76. *Ibid*.

A report by the Catholic Church's Pastoral Carcerária in 2005 revealed that mothers were frequently being separated from their newborn babies.[77] Another report published in 2006 stated that sexual harassment of women prisoners was routine and that the separation of women from their families increased their sense of isolation due to the long distances they had to travel for visits.[78] The Parliamentary Commission of Inquiry into Brazil's prison system in 2008 reported that in one prison it visited, a

77. Pastoral Carcerária, *A situação dos direitos humanos no sistema prisional dos estados do Brasil – contribuição e observações da Pastoral Carcerária,* 2005.

78. Caroline Howard, *Mulheres Encarceradas e Direitos Humanos* (Instituto Terra, Trabalho e Cidadania e Pastoral Carcerária 2006).

six-day-old baby was seen sleeping on the floor, in a mouldy, overcrowded cell, on top of some sheets spread on the floor.[79]

A report by a coalition of Brazilian human rights NGOs in 2009 noted that women prisoners have very limited access to hygiene and healthcare products such as toilet paper, sanitary towels, condoms and medication. And while family visits for prisoners are foreseen under Brazilian law, only 38 per cent of female prisoners receive such visits, compared to 86 per cent of men. 'This both contributes to the isolation of women inmates and reflects the impact that imprisonment has on women's affective relations and family structure. Moreover, very few women's prisons offer adequate facilities for intimate visits, another factor contributing to their social and psychological isolation and the breakdown of family units.'[80]

One of the most notorious violations of the rights of women prisoners occurred in the state of Pará, in 2007, when a 15-year-old girl, Lidiany, was held for more than 30 days in the Public Jail of Abaetetuba together with some 20 male detainees. She was repeatedly tortured and raped in front of the authorities that administrated the unit. The girl, who had been jailed for attempted theft, was forced to have sex for food and suffered burns and other abuse. Two social workers tried to visit her, after receiving an anonymous phone call, but police barred them from doing so. The girl was finally rescued by the guardianship council for children and adolescents (*conselho tutelar*). Afterwards, she spoke out about what was happening to her, in front of several policemen.[81]

Such practices clearly violate international human rights standards. For example, the Human Rights Committee has expressed concern at the practice of allowing male prison officers access to women's detention centres, which has led to serious allegations of sexual abuse of women and the invasion of their privacy.[82] It has also stated that female staff should be present during the interrogation of female detainees and prisoners and should be solely responsible for conducting body searches.[83] The SMR state that women in custody should be supervised by female members of staff.[84] They should also either be held in separate institutions, or segregated within an institution, under the authority of female staff. No male staff should enter the part of the institution set apart for women unaccompanied by a female member of staff.[85] In institutions where women are held in custody, facilities for pre-natal and post-natal care and treatment must be provided.[86] Whenever possible, arrangements should be made for children to be born in a hospital outside the institution.[87] The UN Special Rapporteur on torture has recommended that states should provide gender-sensitive training for judicial and law enforcement officers and other public officials.[88]

In the report of its 2011 visit to Brazil, the SPT reported that it had received

79. Relatório final da CPI do sistema carcerário, Câmera dos Deputados, Julho 2008.

80. *The Criminalization of Poverty, A Report on the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Brazil, An Alternative Report submitted to the 42nd Session of the United Nations Committee on Economic, Social and Cultural Rights, May 2009*, Justiça Global, the National Movement of Street Boys and Girls (MNMMR), World Organisation Against Torture (OMCT), no date, 52.

81. CNN World, 'Brazil investigates 15-year-old girl's jail horror story', 23 November 2007.

82. Observations of the Human Rights Committee: USA, UN Doc CCPR/C/79/Add.50, 7 April 1995, para 20.

83. Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 21 (1994), para 8.

84. Standard Minimum Rules, Article 53.

85. *Ibid*, Article 8(a).

86. *Ibid*, Article 23.

87. *Ibid.*

88. Report of the UN Special Rapporteur on Torture, UN Doc E/CN.4/1995/34, 8.

'allegations... that mothers with children in prison were deprived of their right to keep custody of their child after the age of two, who in some cases had been put up for adoption'. It recommended that decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children, and be based on careful individual assessment. It also recommended that the use of strip searches and intimate searches should comply with criteria of necessity, reasonableness and proportionality and should only be carried out under adequate sanitary conditions, by qualified personnel of the same sex, and be compatible with human dignity and respect for fundamental rights. Intrusive vaginal or anal searches should be forbidden by law.[89]

89. CAT/OP/BRA/1, 5 July 2012, paras 119–21.

Juvenile detainees

Some specific obligations with respect to the use of pre-trial detention in cases involving children are found in the Convention on the Rights of the Child. The Convention applies to children up to the age of 18, who would normally be regarded as juveniles within most criminal justice systems. Article 37 emphasises that the detention of children – pre-trial or any other form – should be a measure of last resort and used for the shortest appropriate period of time. It requires due account to be taken of the needs of children who are deprived of their liberty and that they should be kept separately from adults unless it is considered in their best interest not to do so. Article 39 obliges states, inter alia, to promote physical and psychological recovery and social reintegration of a child victim of torture or any other form of cruel, inhuman or degrading treatment or punishment as well as any form of neglect, exploitation or abuse.

The CPT has laid down some specific safeguards for protecting children against ill-treatment. It stresses that:

> 'it is essential that all persons deprived of their liberty (including juveniles) enjoy, as from the moment when they are first obliged to remain with the police, the rights to notify a relative or another third party of the fact of their detention, the right of access to a lawyer and the right of access to a doctor. Over and above these safeguards, certain jurisdictions recognise that the inherent vulnerability of juveniles requires that additional precautions be taken. These include placing police officers under a formal obligation themselves to ensure that an appropriate person is notified of the fact that a juvenile has been detained (regardless of whether the juvenile requests that this be done). It may also be the case that police officers are not entitled to interview a juvenile unless such an appropriate person and/or a lawyer is present.[90]
>
> The Statute of the Rights of the Child and Adolescent (Estatuto da

90. CPT/Inf/E (2002) 1, 73, para 23.

Criança e do Adolescente, ECA)[91] provides for a range of sanctions for juvenile offenders with the deprivation of liberty being regarded as an absolute last resort. Juvenile offenders should be accommodated in an establishment "exclusively reserved" for them and subjected to "rigorous separation" on grounds of age, physical build, temperament and the gravity of the infraction.[92] They should be interned in a locality close to their parents' home, receive visits at least weekly, live in hygienic conditions, carry out leisure activities and retain personal possessions.[93] The ECA also specifies the obligations on the detaining authorities to provide adequate conditions of habitability, personal hygiene and health and safety, ensure sufficient nutrition and clothing, offer medical, psychological and dental care, provide education and vocational training, cultural, sports and leisure activities, as well as religious assistance, when desired.[94] Incommunicado detention of juveniles is also absolutely prohibited. The ECA states that 'no child or adolescent shall be the object of any form of neglect, discrimination, exploitation, violence, cruelty, or oppression, and any attempt, act or omission to their fundamental rights will be punished in accordance with the law'.[95]

91. Law No 8069 of 13 July 1990.

92. ECA, Article 123.

93. ECA, Article 124.

94. ECA, Article 94.

95. Law 8.069 of 13 July 1990, Article 5.

The ECA has been described as among the most progressive of its kind in Latin America. However, a Human Rights Watch (HRW) report published in 2004 noted 'gross deficiencies' in its application. It visited youth detention facilities in Rio de Janeiro that were 'overcrowded, filthy, and violent, failing in virtually every respect to safeguard youths' basic human rights'. Although officially termed 'socio-educational' centres, they had 'almost no capacity for or commitment to providing education, vocational training, or rehabilitative services'. Beatings at the hands of guards were said to be common and HRW's researchers interviewed detainees who showed them physical injuries that were consistent with their descriptions of beatings. It reported that the institutions were 'understaffed' and that many of the guards had no prior experience with youths apart from the one-week training course they received before they began work.[96]

96. Human Rights Watch, *Real Dungeons: Juvenile Detention in the State of Rio de Janeiro* (HRW 2004).

A study carried out in 2002 by the Instituto de Pesquisa Econômica Aplicada (IPEA) of 190 juvenile detention centres in Brazil found that 71 per cent of such centres failed to provide the minimum standards established by the United Nations regarding physical infrastructure and medical, legal and educational facilities. Of the 10,000 adolescents included in this survey, only 7.6 per cent had started *ensino médio* (high school, normally from 14 years onwards) and over 89 cent had not completed primary school *(ensino fundamental*, normally between the ages of five and 14).[97]

97. Ministério da Justiça, Secretaria de Estado de Direitos Humanos, Departamento da Criança e do Adolescente, and Instituto de Pesquisa Econômica Aplicada, *Mapeamento da situação das unidades de execução de medida sócio-educativa de privação de liberdade ao adolescente em conflito com a lei* (Brasília: Ministério da Justiça, December 2002).

According to a report published in 2011 by the Human Rights Secretariat,

there were 58,764 adolescents who had been sentenced to 'socio-economic measures' in Brazil the previous year, of whom 18,107 had been deprived of their liberty, while 40,657 were serving these sentences in 'semi-open regimes'.[98] This represents a more than tripling of the numbers deprived of their liberty since 1996. The biggest numbers of sentenced adolescents were concentrated in the south-east region, followed by the south, north-east, centre-west and north.[99] A frequent criticism of the treatment of adolescents in conflict with the law in Brazil has been the lack of national coordination and oversight mechanisms to assist individual states. In 2012, the government created the National System of Socio-educative Treatment (Sistema Nacional de Atendimento Socioeducativo (SINASE)) in response.[100]

98. *Levantamento Nacional, Atendimento Socioeducativo ao Adolescente em Conflito com a Lei* 2010, Brasília, Secretaria de Direitos Humanos, junho de 2011.

99. *Ibid.*

100. Created by Law 12.594/12.

The SPT noted in its 2011 visit to Brazil that: 'the institutions in which children and adolescents were held were frequently no different than ordinary prisons for adults with a very rigid disciplinary system'.[101] In one detention facility that it visited, the SPT observed that inmates kept their heads facing the floor and their hands behind their back, and were not allowed to talk. The SPT noticed bruises (black eyes) on the face of some of the inmates.[102] The SPT also received credible and reiterated allegations of torture and ill-treatment. These included beatings by staff on the back of the head and other parts of the body with open hands, wood or metal batons, stripping of children and adolescents, forcing them to stand in uncomfortable positions, insults and threats. The SPT also noted that humiliating practices were resorted to as a tool to maintain discipline. In the Internment Unit of Jatobá in São Paulo, the SPT collected evidence of dismissal and cover-up of injuries by medical staff. In the facility for children and adolescents in Espírito Santo, which was run as a maximum security prison, there had been five suicide attempts and one suicide in the previous seven months.[103]

101. CAT/OP/BRA/1, 5 July 2012, paras 119–21.

102. *Ibid*, para 143.

103. *Ibid*, para 145.

The delegation found overcrowding in the cells, inadequate bedding, inadequate access to hygiene materials and poor clothing. Its members were shown samples of food distributed to the children, some appearing to be rotten.[104] The delegation also stated that it was concerned at the lack of emphasis on the socio-educational dimension of the juvenile system and was left with the impression that specialised training for technical staff was lacking. In order to ensure the full implementation of the ECA in accordance with international standards, and bearing in mind the best interests of the child, the SPT recommended that:[105]

104. *Ibid*, para 137.

105. *Ibid*, para 132.

- Children and adolescents only be deprived of their liberty as a measure of last resort, for the shortest possible period of time, subject to regular review.
- A change in approach be made from punitive to preventive, in order

to avoid further stigmatisation and criminalisation of children. The existing infrastructure and human resources should be improved and training of staff be enhanced.
- The State Party expands the available vocational training provided to children and adolescents held in centres so as to enable their reintegration into their community and society as a whole.
- The State Party maintains and further encourages the participation of parents during the entire period of implementation of socio-educational measures to enable the child or adolescent's constant contact with his or her family.

The SPT also stated that children and adolescents were not given the special protection they needed from the moment of arrest. Those interviewed reported consistent practices of physical abuse, some amounting to torture, as well as a lack of legal safeguards. While welcoming the overall involvement of the public defender in centres for children and adolescents, the SPT expressed its concern at the lack of transparent information provided to children who were not properly informed about the judicial process and the system in place for evaluating their progress and ability to reintegrate into society. The SPT was also concerned at the absence of visits carried out by public prosecutors and judges in centres for children and adolescents. It recommended that:[106]

106. *Ibid*, para 135.

- All legal safeguards provided by the ECA be applied to the child or adolescent from the moment of arrest.
- Priority be given to reducing the number of children detained prior to a determination by a judge, and to reducing the duration of deprivation of liberty when there are compelling reasons for the child to be deprived of liberty.
- Children receive proper legal defence at all stages of legal proceedings, including during police interviews and regular inspections of those centres be carried out by judges and public prosecutors.

People with mental health problems

Case study: Testimony without Harm

Testimony without Harm was created in 2003 in Rio Grande do Sul and now serves as a model for many other states throughout Brazil. In March 2009, the Senate passed a Bill that incorporates the methodology in the Comissão de Constituição e Justiça.

The aim of the project is to reduce the re-traumatisation of suffering that children who have experienced sexual abuse often undergo when testifying to the authorities about their experiences. Previously, children needed to repeat accounts of their suffering several times, first to a Guardian Counsel (Conselho Tutelar), then in a specialised police station, at the Institute of Forensic Medicine, at a health centre, to the public prosecutor and, lastly, at the specialist court or, where none exists, in criminal court which they often have to attend more than once.

Testimony without Harm simplifies this system. The child only has to testify once to a psychologist or other designated professional and his or her speech is recorded. In the new system, the child is physically located in a room adjacent to the courtroom during the actual trial, linked to the court by a television. His or her evidence is transmitted by television and the judge, the defence counsel, public prosecutor and the accused are able to see and hear everything that is said. The child gives his or her evidence accompanied by a psychologist to whom all questions during both the examination and cross-examination are put, via an ear-set. The psychologist then re-phrases these questions for the child using appropriate language and may also use toys and dolls to help the child understand what is being asked and respond.

Although implementation of the procedure has caused some concern, particularly over the role of psychologists in conducting interviews that are being used in criminal investigations, it has generally been widely welcomed by judges and criminal justice specialists who say it is far less invasive and traumatic and makes children more willing to testify about the abuse that they have suffered. The court in Rio Grande do Sul received evidence from 2,000 children using this method in the project's first seven years.

The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care state that: 'All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.'[107] It also states that: 'All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.'[108] The SMR also state that people with mental health problems shall not be detained in prisons and 'shall be observed and treated in specialized institutions under medical management'.[109]

107. Principle 2.

108. Principle 3.

109. Standard Minimum Rules, Article 82.

The CPT has stated that: 'A mentally ill prisoner should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. That facility should be a civil mental hospital

or a specially equipped psychiatric facility within the prison system.'[110] A mentally disturbed violent prisoner should be treated through close supervision and nursing support. While sedatives may be used, if considered appropriate, instruments of physical restraint should only be used rarely and must either expressly be authorised by a medical doctor or be immediately brought to the attention of a doctor. These should be removed at the earliest opportunity and should never be used as a means of punishment. All uses of physical restraint should be recorded in writing.[111]

110. CPT/Inf/E (2002) 1, 33, para 43.

111. *Ibid*, 33, para 44.

The first international condemnation of Brazil for violation of rights protected under the American Convention concerned the death of Damião Ximenes Lopes, in Guararapes Psychiatric Asylum, in Sobral, in the State of Ceará.[112] The victim suffered torture and ill-treatments by the attendants. The failure to investigate and punish those responsible, and the lack of judicial guarantees, was considered by the Inter-American Court on Human Rights to violate the Convention in four main Articles: 4 (right to life); 5 (right to physical integrity); 8 (right to judicial guarantees); and 25 (right to judicial protection). In its decision of 4 July 2006 – which was the first judgment in the Inter-American system concerning human rights violations of persons with a disability – the Inter-American Court determined, among other things, the obligation of the Brazilian state to investigate those responsible for the death of the victim, to conduct training programmes for professionals in psychiatric care, and to pay compensation (within one year) to the victim's family.

112. *Ximenes-Lopes v Brazil*, IACHR, (2006).

The Court highlighted the 'special consideration' it would give to standards such as the UN Principles when assessing compliance with Article 5 of the Convention in such circumstances. It found that persons were at a particular risk of violence in the clinic, both from officials and other patients, due in part to the fact that employees were often not trained to work with mentally ill persons, and patients were called upon to physically restrain other patients when they became aggressive; material conditions in the clinic and medical care were also wholly inadequate. The need to obtain consent, from the patient himself unless it were proven he was unable to give consent, and otherwise from next of kin or legal representatives, could not simply be ignored with respect to persons with mental disabilities. To be compatible with Article 5, means of physical restraint could be used only as a last resort and then only with the purpose of protecting the patient, or else the medical staff or third persons, when the behaviour of the patient involved was such as to pose a threat to their safety; if restraint was to be applied, the least restrictive possible restraint techniques were to be selected and only for such period of time as was absolutely necessary and under conditions which respected the patient's dignity and minimised the risks of impairing his or her health.[113]

113. *Ibid.*

Case study: Mental health detainees

Although the first international condemnation of Brazil under the American Convention on Human Rights involved a person detained in a mental health hospital for psychiatric treatment, Brazil has had some successful experiences in its treatment of people with mental health problems. The programme of Integrated Attention to Judicially Detained Patients (Programa de Atenção Integral ao Paciente Judiciário Portador de Sofrimento Mental Infrator – PAI-PJ), which was created by the Court of Minas Gerais, provides a fully integrated system of monitoring detained patients through all stages of the criminal justice system by a multidisciplinary team. The programme involves an inter-sectoral partnership between the judiciary and the state authorities, with the active involvement of the local community. Judges receive advice from mental health professionals and are encouraged to consider alternatives to incarceration, such as care within the community. Although this development is still in its early stages, hundreds of people have benefited from its provisions, and it provides an example of good practice which could be scaled up nationally. The project was officially recognised as a 'judicial innovation' by the Innovare national prize in 2009.

CHAPTER 9

Penal Policy, Monitoring Places of Detention and Investigating Allegations of Torture

Introduction

This chapter discusses the treatment of prisoners in Brazil, including the need for an effective system of external monitoring of place of detention. While Brazil's prison laws and penal policies are extremely progressive on paper, these are often ignored or flouted by those responsible for implementing them. There are a large number of different bodies charged with monitoring places of detention, but none appears to perform its oversight role adequately. Brazil has ratified the Optional Protocol to the UN Convention on Torture (OPCAT), which requires it to create a National Preventive Mechanism (NPM) charged with carrying out visits to places of detention in order to prevent and investigate acts of torture and other ill-treatment. The first such body was physically established in Rio de Janeiro in 2011.[1]

This chapter outlines how monitoring bodies should conduct investigations and inquiries into acts of torture. It discusses how they should respond to allegations and gather evidence. It also provides advice on interviewing victims, witnesses and suspects and protecting witnesses during investigations and trials.

Prisons and penal policy

Brazil's prison population in 2013 was around 550,000 people,[2] making it the fourth highest in the world.[3] The number of prisoners in Brazil is increasing rapidly and, the proportion of pre-trial detainees is also growing.[4] Between 2003 and 2007, the number of prisoners in pre-trial detention grew dramatically, from 67,549 to 127,562: an increase of 89 per cent (compared to an increase of 37 per cent in the general prison population).[5] Between June 2009 and June 2012, the population of people deprived of their liberty in penal institutions grew by nearly 24 per cent, while the number of pre-trial detainees increased by more than 27 per cent. The prison population increased by 17 per cent, the population under custody in the prison system has increased 24 per cent and, specifically, the population of pre-trial detainees under the custody system prison followed this trend, increasing 28 per cent. In the same period, the overall capacity of prisons increased by only three per cent.[6] This has overwhelmed the capacity of the already overcrowded Brazilian penal system. According to the Ministry of Justice's National Penitentiary Department (DEPEN), in June 2008 the number of people being incarcerated exceeded the design capacity of Brazil's prisons by 40 per cent, and the number of prisoners was increasing by approximately 3,000 per month.[7]

The prison population is distributed among several categories of facilities, including penitentiaries and prisons (*penitenciárias* and *presídios*), jails

1. Law No 5778/2010 of the State of Rio Janeiro.

2. Ministry of Justice, Execução Penal, Sistema Prisional, Informações InfoPen, – Estatística Formulário Categoria e Indicadores Preenchidos, Referência:12/2012, lists the total number as 548,003. The same report in June 2012 listed the total as 549,577. The problem of capturing entirely accurate statistics in Brazil has been referred to in other parts of this Manual, but the overall trend is very clear.

3. UN Office for the High Commissioner of Human Rights, News release, 'Brazil: UN expert group concerned about excessive use of deprivation of liberty and lack of legal assistance', 28 March 2013.

4. According to a Brazilian government report submitted to a UN Human Rights Review body in March 2008, the prison population was 420,000, of whom around 122,000 were being held in pre-trial detention. See *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1, Brazil, Working Group on the Universal Periodic Review, First session, Geneva*, 7-18 April 2008, A/HRC/WG.6/1/BRA/1, 7 March 2008, para 61. According to a Ministry of Justice report the same year, the total number was 440,000. See Ministry of Justice/DEPEN, INFOPEN at http://portal.mj.gov.br/data/Pages/MJD574E9CEITEMIDC37B2AE94C6840068B1624D28407509CPTBRNN.htm, accessed May 2013. Since the total number is estimated to be rising at a rate of about 3,000 a month, these figures are all broadly consistent, MJD574E9CEITEMIDC37B2AE94C6840068B1624D28407509CPTBRNN.htm, accessed May 2013. Since the total number is estimated to be rising at a rate of about 3,000 a month, these figures are all broadly consistent.

5. Ministry of Justice, DEPEN, InfoPen, Consolidated Data 2008.

6. See note 2 above. The number of people sentenced to open or semi-open prison regimes increased by 17 per cent in the same period.

7. See *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, Mission to Brazil*, A/HRC/11/2/Add.2 future, 28 August 2008, para 42.

(*cadeias públicas* and *cadeiões*), houses of detention (*casas de detenção*), police precinct lock-ups (*distritos policiais* or *delegacias*) and psychiatric hospitals. Criminal suspects upon arrest should be brought to a police lock-up, for booking and initial detention, where they should be held for a maximum of a few days before being charged or released. If the suspect is not released, he or she should be transferred to a jail or house of detention to await trial and sentencing. If convicted, the prisoner should be transferred to a separate facility.

Pre-trial detainees fall into one of four categories: (i) detainees who have been formally charged and are awaiting the commencement of their trial; (ii) detainees whose trial has begun but has yet to come to a conclusion whereby the court makes a finding of guilt or innocence; (iii) detainees who have been convicted but not sentenced; and (iv) detainees who have been sentenced by a court of first instance but who have appealed against their sentence or are within the statutory time limit for doing so.

Convicted prisoners should be held in one of three basic categories of institution: closed facilities, semi-open facilities and open facilities. The usual closed facility is a prison. Semi-open facilities include low security units, where the prisoner is expected to work and receive training. Open facilities are places where a prisoner will sleep at night, but be allowed to come and go from during the day. The sentencing judge will specify which facility the prisoner should be placed in initially – in accordance with the type of crime, length of sentence, previous convictions, perceived dangerousness, and other characteristics – but, by law, a prisoner should expect to move from a high security to lower security facility during the course of his or her sentence. The stated aim of Brazilian penal policy is the rehabilitation and reintegration of the prisoner back into society and so the move to an increasingly less restrictive type of facility is to prepare the prisoner for eventual release.[8]

8. LEP, Article 1 and Article 112; CP, Article 33 Section 2; and Sum 716 STF.

The law specifies a prisoner's route through the penal system in considerable detail. After sentencing, a prisoner should spend his or her first weeks or months in an observation centre, where a corps of trained personnel can conduct interviews and carry out personality and criminological exams to assess his or her behaviour and attitudes in order to select the most appropriate penal facility to reform that particular individual. In practice, however, Brazil's prisons lack both the staff and infrastructure to comply with the law. Many states do not have open facilities or anything like the number of low security units to cope with the number of sentenced prisoners – who overwhelmingly serve out their entire sentences in high security facilities instead. In fact, Brazil does not even have enough spaces in prison to accommodate all of its prisoners, despite the massive overcrowding that exists, and so many convicted

prisoners remain for years in police lock-ups instead. According to DEPEN, in the second semester of 2012, the total prison population in Brazil was 548,003, of which 513,713 were held in the country's prison system and 34,290 were held in police cells.[9]

9. See note 2 above.

Brazilian law is in line with international standards. For example, the UN Standard Minimum Rules for the Treatment of Prisoners (SMR) recommend that individual personality profiles be built up on sentenced prisoners soon after their admission to prison, which, as long as the prisoner consents to and is involved in the process, could be a useful technique for helping to develop treatment suitable to his or her individual needs, capacities and dispositions.[10] Such reports should always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner. The reports and other relevant documents should be placed in an individual file, which should be kept up to date and classified in such a way that it can be consulted by the responsible personnel whenever the need arises.[11] The SMR also stress that 'institutions need not provide the same degree of security for every group' of prisoners and that '[i]t is desirable to provide varying degrees of security according to the needs of different groups. Open institutions, by the very fact that they provide no physical security against escape but rely on the self-discipline of the inmates, provide the conditions most favourable to rehabilitation for carefully selected prisoners.'[12]

10. Standard Minimum Rules, Article 69.

11. *Ibid*, Article 66.

12. *Ibid*, Article 63.

Most prisoners come from deprived backgrounds. Many will have previously been unemployed and are likely to have low education or training skills. The problems that they faced before entering prison will probably be compounded by the stigma and discrimination that many former prisoners encounter after their release. It is obviously in the interests of both society as a whole and the individual prisoner that his or her time in prison should be spent constructively. This should include providing prisoners with opportunities to change and develop and equipping them with the skills for life after their release. It should also aim to counter some of the personal and social damage caused by the act of imprisonment itself. The challenges here are considerable. As well as providing prisoners with a range of constructive activities while they are in prison, the authorities should also help them to maintain their links with the outside community and seek to ensure that the routines of prison life are as close to possible as the normal conditions that they could enjoy if they had not been deprived of their liberty. Reducing the differences between life inside and outside prison encourages independence and responsibility, gives practice in basic skills and reduces reliance on services produced by the prison administration.

However, most sentenced prisoners in Brazil never see an open or semi-open facility; instead they serve their entire sentence in a high security facility or even a police lock-up. Few judges ever carry out their responsibility to make prison inspections and the inspections that do occur are often cursory. As is discussed below, other monitoring bodies are often not viewed as impartial or independent by the prisoners who are therefore afraid to report complaints to them. Clearly, Brazil is not only violating its obligations under international human rights law, but also its own laws and Constitution.

In an effort to deal with this backlog, the National Council of Justice (Conselho Nacional de Justiça – CNJ) created a *mutirão* (literally, 'the help that members of a family give to one another'), as an ad hoc initiative to try and tackle the caseload. Coordinated by a small team based in Brasília, the *Mutirão Carcerário* was composed of groups of judges, drawn from different areas, who are assembled in a single state to re-examine its caseload, aiming to work their way through all of Brazil's 26 states and the federal district, prioritising the most serious problems.

In August 2011, the CNJ announced that after examining 283,695 cases, the *Mutirões Carcerários* had freed 30,766 people who had been imprisoned irregularly.[13] A further 56,939 were found to be being held at inappropriate security levels. The Mutirões Carcerários found hundreds of people who had spent far longer in pre-trial detention than they could have expected to serve as sentenced prisoners. One person had spent 11 years on remand and the *Mutirões Carcerários* found many people who had spent five or six years in pre-trial detention. Others had served out their full sentences, but had not been released due to bureaucratic incompetence. In one state, Bahia, the mutirão discovered that while the prison authorities had recorded a prison population of 10,000–11,000 in January 2009, there were actually around 15,000 people in detention facilities.[14] This suggests that a significant proportion of the people in prison in Brazil at the moment should not be there at all.

13. *Dados atualizados mutirão carcerário*, CNJ, 19 August 2011.

14. Interviews conducted with CNJ officials in November and December 2009.

In 2009, CNJ launched a new initiative, Projeto Começar de Novo (Project Start Over Again) with the objective of promoting the social reintegration of former prisoners and supporting the creation of alternatives to penal sentencing.[15] The project is located in the judiciary, but aims to link up with private companies – to find work for former prisoners – as well as with schools, universities and training colleges – to promote their education. The project should be implemented by the judiciary in collaboration with the *Conselhos da Comunidade* whose role is discussed below.

15. Resolução Conselho Nacional da Justiça No 96, de 27 de outubro de 2009.

Case study: Youth Justice Programme

The Youth Justice Programme was launched by the National Justice Council in June 2010. It consists of an interdisciplinary team including judges with experience in implementing socio-educational measures, as well as social workers, psychologists and teachers. Ministerio Público, Defensoria Pública and the Ordem dos Advogados do Brasil (Brazilian Bar Association) also participate in the programme. The Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas – DMF (Department to Monitor and Inspect the Penal System and the System of Executing Socio-educational Measures) of the CNJ is responsible for coordinating the project.

The project reviews the detention status of young people in conflict with the law, checking their cases individually to ensure that where they are being detained it is in full conformity with the law and that the conditions of their detention are in accordance with the provisions of the Statute on the Rights of the Child and Adolescents as well as the National System of Socio-Educational Measures (SINAS). At the time of publication of this Manual, the Youth Justice Programme had worked through 20 of Brazil's states using a similar methodology to the *mutirão carcerário*, which is described in Chapter Eight of this Manual.

External monitoring of places of detention

Although Brazilian penal policy is governed by a federal law, LEP, the administration of prisons is primarily carried out at state level. The state governor usually manages the prison system, via his or her Secretariat of Justice and/or Secretariat for Penitentiary Administration, while the governor's Secretariat of Public Security is generally in control of policing, which includes responsibility for police stations and lock-ups. However, this is subject to some variations. The structure of state penal systems does not follow a single model and there are considerable variations on issues such as levels of prison overcrowding, monthly costs per inmate and guards' salaries.

The two federal agencies in Brazil concerned with prison policy are located within the Ministry of Justice: the Departamento Penitenciário (Penitenciary Department or DEPEN) and the Conselho Nacional de Política Criminal e Penitenciária (National Council on Criminal and Penitentiary Policy – CNPCP); the former is primarily charged with practical matters such as the funding of new prison construction, while the latter focuses on guiding policy. In July 2012, CNPCP passed a resolution to give guidance and orientation to states on standardising the monthly costs of their penal institutions in order to address the problem of budget under-spends discussed in Chapter Four of this Manual.[16]

16. Resolução CNPCP No 06, de 2 de julho de 2012.

The CNPCP is responsible for the publication of the national prison census, which contains useful information and statistics on prisoners, prison staff,

incarceration costs and the state of the prison infrastructure in Brazil. This should guide prison policy at the state and federal level, although the separation of the different bodies sometimes leads to fragmentation. It is also supposed to visit sites of detention, although the frequency of such visits is not specified by law.[17] DEPEN also carries out prison inspections, although these are more related to administrative matters concerning the running and maintenance of prisons.[18] States may also create local DEPENs as well as Secretaries of Justice, Penal Administration and Public Security.

17. LEP Article 64.

18. Ministry of Justice, Execução Penal, CNPCP, Relatórios de inspeção.

Prison councils and community councils

The LEP specifies that every state should establish a prison council (*Conselho Penitenciário*) and a community council (*Conselho da Comunidade*). The *Conselho Penitenciário* is an expert advisory body of professionals and academics appointed by the state governor. It is responsible for providing recommendations to the judges about whether individual prisoners should be parolled, pardoned or have their sentences commuted and whether and when they should be moved to lower levels of security. Although every state should have a *Conselho Penitenciário*, research carried out in 2004 indicated that eight states had still not established one.[19]

19. Fernando Salla, Paula Ballesteros, Olga Espinoza, Fernando Martinez, Paula Litvachky and Anabella Museri, *Democracy, human rights and prison conditions in South America*, Centre for the Study of Violence, University of São Paulo, June 2009, 76.

Every judicial jurisdiction should also have a *Conselho da Comunidade*, which is composed of at least one representative of a commercial or industrial association, one lawyer elected by the Ordem dos Advogados do Brasil (Brazilian Bar Association) and one social worker chosen by the Sectional Delegation of the National Council of Social Workers. The *Conselhos da Comunidades* have the duty to: 'visit, at least once a month, penal establishments in the area, interview prisoners, present monthly reports to the penal execution judge and to the prison council, and work towards the acquisition of material and human resources for better assistance for prisoners and detained persons, in cooperation with the director of the establishment'.[20] They should also present monthly reports to both the *Conselho Penitenciário* and the Juiz da Vara de Execução Penal (Judge of Penal Execution), who then processes prisoners' requests for parole and other benefits.[21] The lay element of *Conselhos da Comunidade* is also intended to strengthen ties with local communities and so help the reintegration of prisoners after their release from prison.

20. LEP Article 81.

21. *Ibid*.

In practice, many states have not established *Conselhos da Comunidades* and even where these do exist they are sometimes of limited effectiveness. They are often chronically under-resourced – since the law does not specify the allocation of a minimum level of support – and their lay members often do not have sufficient time to work for them.[22] There have also been instances where the prison authorities have denied access to community councils attempting to make visits.[23]

22. See note 19 above, 74.

23. AI Index: AMR 19/023/2007.

The results of inspections are rarely made public and, although some individuals show considerable commitment to monitoring prisons, lack of coordination between the different inspecting bodies mean that they often duplicate each other's efforts. They are often also constrained by a lack of staff and resources. Indeed, little appears to have changed since the UN Special Rapporteur on torture noted in 2001 that:

> 'there is a wide range of positive initiatives and institutions designed to ensure law-abiding law enforcement and protect those in the hands of the authorities. These include access by the Catholic Prison Ministry, community councils, state human rights councils, police and prison ombudsmen and internal affairs departments. Again, the problem is reliance on primarily volunteer work in respect of the first three (in many places community councils and state human rights councils either do not exist or do not function), or they are starved of the resources (as with some *ouvidorias*) [ombudsmen] and sometimes of the genuine independence necessary to do effective work (as with some *corregedorias*) [inspectors]'.[24]

24. E/CN.4/2001/66/Add.2, 30 March 2001, para 163.

One of the repeated concerns of human rights monitoring bodies is that people who make complaints about torture or ill-treatment suffer reprisals from the authorities as a result. In the report of its visit to Brazil in 2011, for example, the UN Subcommittee for the Prevention of Torture (SPT) noted its 'grave concerns' regarding reprisals against persons interviewed, as well as the lack of appropriate control and safeguards against reprisals. It emphasised that those providing information to international or national monitoring bodies or institutions should not suffer any punishment or otherwise negative consequences for having provided such information. The SPT welcomed the commitment of the Ouvidor Nacional dos Direitos Humanos (National Human Rights Ombudsman) to monitor the places of detention visited by the SPT, to investigate whether there were reprisals, but noted that 'reprisals did take place in at least one of the places of detention visited, namely the Nelson Hungria female prison. This violates Brazil's specific obligations under OPCAT'. The SPT expressed its strong condemnation of these and any other acts of reprisals and requests the State Party to launch an immediate investigation into the matter and hold accountable those found responsible. [25]

25. CAT/OP/BRA/1, 5 July 2012, paras 59–62.

In October 2009, the CNJ passed a resolution mandating all penal execution judges to create Conselhos da Comunidades within their localities and to support the prisoner rehabilitation scheme Projeto Começar de Novo.[26] The resolution noted the gap between the formal aims of Brazilian penal policy, set out in the LEP and elsewhere, and the realities revealed by the *Mutirões Carcerários*. It called on all of Brazil's courts to establish a group, presided over by a judge, to monitor and

26. See note 15 above.

inspect the prison system within their jurisdiction. These groups should ensure that *Conselhos da Comunidade* are in fact established as laid out by law and that they work effectively to improve the system including the promotion of alternative sentencing measures and the social reintegration of prisoners.

Both the law creating the Sistema Nacional de Atendimento Socioeducativo (National System of Social-educational Treatment (SINASE)) in response[27] and the Estatuto da Criança e do Adolescente (Statute on Children and Adolescents (ECA)) contain monitoring mechanisms for adolescents.[28] The latter provides for the creation of municipal, state and national councils of child and adolescent rights, charged with controlling their implementation at all levels, with the involvement of NGOs, as well as the participation of judges, the Office of the Public Prosecutor, the Public Defender's Office, Secretaries of Public Security and Secretaries of Social Assistance. The Act provides for the creation of a Council of Guardianship, a permanent, autonomous, non-jurisdictional entity, composed of members of the municipality.[29] These are charged with observing the implementation of the rights contained in the statute. It is their duty to inform the Public Prosecutor's Office of violations of the rights of the child. The public prosecutor is specifically charged 'to watch over the effective respect for the legal rights and guarantees ensured to children and adolescents, sponsoring appropriate judicial and extrajudicial measures'.

27. Created by Law 12.594/12.

28. ECA Article 86–88.

29. ECA Article 131.

Case study: Monitoring FEBEM

Since 2003, the civil society organisations Conectas Human Rights and Associação de Mães e Amigos de Crianças e Adolescentes em Risco (Association of Mothers and Friends of Children at Risk – AMAR) have been monitoring conditions in the juvenile detention centre in São Paulo – FEBEM (now Fundação CASA).

They have filed 65 compensation lawsuits and administrative proceedings in cases involving torture or deaths in custody. Cases have been taken both to the national courts and to international monitoring bodies, particularly through the Inter-American system. These cases have managed to raise compensation levels for the deaths of juvenile prisoners from R$10,000 to R$500,000. They have also won cases related to visiting rights and the need for proper investigations into violations, which has resulted in the administration being forced into taking disciplinary action against staff for neglect of their duties. Some of the worst units in the institution have been closed down and smaller, more modern ones have been opened.

The authorities responded by attempting to limit access to the centre by civil society organisations, passing an administrative norm in 2005 that restricted access to organisations specifically contracted by FEBEM to carry out socio-educational service activities. Since these organisations would be contractually dependent on FEBEM, they could not have an independent monitoring function.

A group of civil society organisations including: Conectas, AMAR, Centro de Direitos Humanos – CDH, Centro de Defesa dos Direitos da Criança e do Adolescente 'Mônica Paião Trevisan' – CEDECA Sapopemba, Centro de Defesa dos Direitos da Criança e do Adolescente – CEDECA Sano Amaro, Centro de Defesa dos Direitos da Criança e do Adolescente de Interlagos – CEDECA Interlagos, Centro de Defesa dos Direitos da Criança e do Adolescente 'Pe Ezequiel Ramim', CEDECA Belém, Conselho Estadual de Defesa dos Direitos da Pessoa Humana – CONDEPE, Fundação Projeto Travessia e Instituto Pro Bono, took a civil action against FEBEM demanding continued access and transparent management of the institution. The case was lost in the lower courts, but the Appeal Court ruled that Brazil's Constitution and federal laws specify that it is the duty of everyone, not just the state, to protect the rights of children and adolescents and so independent civil society organisations should have a right of access to ensure that the socio-educational services that FEBEM is legally required to provide are in fact being provided.

Other prison monitoring bodies

An Amnesty International report in 2007 noted both some good and bad practices in relation to prison monitoring. The establishment of prison and prison ombudsman's offices in some states had brought some improvements, but these bodies often lacked sufficient resources and powers to be effective. Judges were often also completely over-burdened investigating allegations of police malpractice and so unable to fulfil their prison monitoring role. Inspections were generally regarded as secondary to other official duties, which received priority, and which sometimes created conflicts of interest:[30]

30. AI Index: AMR 19/023/2007.

> 'In São Paulo state, the Judge Inspector and 12 Assistant Judges are responsible for monitoring prisons in the Greater São Paulo area and investigating complaints of ill-treatment and maladministration, as well as for overseeing the sentences of some 50,000 prisoners, and processing requests for parole, remission, pardons and so forth. This combined responsibility leaves little time available for inspecting the prisons in the Greater São Paulo region. In some states, however, the offices of the Judge Inspector of prisons and the Judge who oversees the serving of sentences are separate. Not only does this decrease the workload, allowing the Judges to carry out their duties with greater efficiency, but it also eliminates the potential for conflicts of interest. At present a number of bodies with powers to inspect prisons, such as the Councils on Penal Affairs, the Judges responsible for overseeing the serving of sentences, and *Ministerio Público* also decide on aspects of the prisoners' sentence. As a result, prisoners may not have confidence in the independence of these bodies. Where states have only the office of the sentencing court Judge, these may restrict themselves to processing the prisoners' cases, rather than taking an active interest in prisoners' well-being.'[31]

31. *Ibid.*

The Judge Inspector in São Paulo quoted above also had responsibility for checking the progress of some 55,000 police investigations a year, leaving little time available for inspecting police stations or investigating complaints by prisoners. He told Amnesty International's researchers that at the rate of one visit a month, each police station under his charge would be visited less than once every three years. In reality, his team of eight staff only visited police precincts about which they had suspicions or had received complaints. Investigations mainly consisted of interviewing prisoners and their relatives as well as prison staff. The judges had no medical training and no medical expertise on which to draw, nor was there any requirement on prison staff to keep photographs or other records of injuries, which could be inspected at a later date.[32]

32. *Ibid.*

The report argued that penal reform is achievable without great extra cost and that there are numerous examples of good practice that could be built upon at the national level. It called for a greater use of alternative sentencing, 'dynamic security' within prisons and more involvement by prisoners' families and community groups in the monitoring of places of detention. It concluded that the key challenge facing both the state and federal governments was in identifying, analysing and learning from these positive experiences in order to reproduce them within government policy.[33]

33. *Ibid.*

The Amnesty International report also noted that:

> 'There is no routine and comprehensive data collection on deaths in

custody, and most go un-investigated. Almost complete impunity enables police and prison officers to continue inflicting torture and ill-treatment on those in their custody. Prisoners are left with nowhere to turn to report such gross human rights violations, because prisons and penal establishments are very rarely inspected, and a number of prisons and police stations have limited or denied access both to relatives and to human rights organizations. Many prisoners fear reporting torture or ill-treatment or asking for medical treatment because the Forensic Medical Institute is structurally linked to the public security apparatus. In some cases, prisoners have suffered reprisals and further violence as a result of making a complaint. It is, therefore, very rare for human rights violations committed in a prison or police station to result in a properly concluded investigation, a criminal prosecution or the conviction and punishment of those responsible.'[34]

34. *Ibid.*

Ministério Público and the judiciary also have a monitoring role over prison conditions and both bodies are supposed to carry out monthly inspections. However, this obligation is generally not observed in practice. According to Amnesty International, there are cases in which prison guards have administered beatings to detainees while a judge looked on. The report claims that its researchers were also effectively denied access to a prison by the judge responsible for overseeing sentences, the State Council on Penal Affairs, and the local legal aid lawyers, all of whom seemed determined to prevent them from talking directly to the prisoners in a detention facility in which several prisoners had been killed and dozens more injured during violent episodes in the preceding nine months.[35]

35. *Ibid*.

Combating torture in Rio de Janeiro

In June 2010, the Legislative Assembly of Rio de Janeiro passed Law No 5778, which creates the Committee (CEPCT/RJ) and Mechanism (MEPCT/RJ) for the Prevention and Combat of Torture in Rio de Janeiro. Such Law states that both bodies are administratively bound to the Legislative Assembly and establishes their composition and competencies. The Law incorporates the definition of torture contained in the UN Convention against Torture.[36] According to Law No 5778/2010, the CEPCT/RJ is composed of representatives of the state and civil society. Its membership consists of the following: [37]

36. Law No 5778/2010, Article 1.

37. *Ibid*, Article 3.

- the Secretary of State for Social Assistance and Human Rights;
- the President of the Legislative Assembly Commission of Human Rights and Citizenship;
- one representative of the state Court of Justice;
- one representative of the Public Prosecutor's Office;

- one representative of the Human Rights Centre of the Public Defender's Office;
- one representative of the Council for the Defence of Human Rights;
- one representative of the Community Council of Rio de Janeiro;
- one representative of the Rio Council for the Defence of Children and Adolescents;
- one representative of the Rio Sectional Council of the Brazilian Bar Association (OAB/RJ);
- one representative of the Rio Regional Council of Psychology;
- one representative of the Rio Regional Council of Social Work; and
- five representatives of prominent civil society organisations.

The CEPCT/RJ's mandate includes: monitoring and providing technical and material support to the mechanism's activities; designing and implementing projects for technical cooperation between Rio and other national and international bodies dealing with torture; and fostering the establishment of similar committees at the municipal level.[38] It may carry out visits of places of detention and refer cases to the competent authorities to open criminal or administrative proceedings in cases where it finds evidence of torture or other cruel, inhuman or degrading treatment.[39]

38. *Ibid*, Article 4.

39. *Ibid*, Article 8.

The MEPCT/RJ is constituted of six members, chosen from 150 applicants, by the CEPCT/RJ.[40] Its members were appointed at the end of 2010 but only had their positions finalised in July 2011.[41] They do not represent any institution or organisation and are selected based on their personal and professional background. Law No 5788/2010 provides them with a set of safeguards in order to assure their independence and impartiality. For instance, they are: entitled to receive specific financial, material and human resources to develop their work; given free access to all data regarding people deprived of their liberty and to all places of detention; and they have freedom to choose the places to visit.[42]

40. *Ibid*, Article 5.

41. Resolution 74/2011, Legislative Assembly of Rio de Janeiro.

42. *Ibid*, Article 7.

The MEPCT/RJ has still not been allocated necessary infrastructure, such as office space, and so is based in the offices of the Rio Sectional Council of the Brazilian Bar Association (OAB/RJ).[43] It has conducted some prison visits as part of its training activities and a schedule of further visits is planned. Clearly, the MEPCT/RJ will need the cooperation of the relevant authorities, in terms of resources and access to places of detention, if it is to function properly. In the report of its visit to Brazil in 2011, the UN Subcommittee for the Prevention of Torture (SPT) recommended that relevant state authorities provide the Rio de Janeiro mechanism, as well as other mechanisms to be created, with functional independence and sufficient resources so as to allow these bodies to discharge their functions effectively in accordance with the provisions of OPCAT.[44]

43. Report, Rio Committee for the Prevention and Combat of Torture, May 2011.

44. *Report on the visit of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, CAT/OP/BRA/1, 5 July 2012, para 20.

In December 2012, the MEPCT/RJ presented its first annual report to the Legislative Assembly of Rio de Janeiro.[45] This contained a comprehensive account of its activities, placing these in their national, international and state context. It also discussed some emblematic cases which it had confronted, listed some of the problems of attempting to prevent torture and contained a series of recommendations for the state authorities. In its short period of existence, the mechanism has shown how the authorities and civil society can work together at the state and federal level to protect Brazilians against torture.

45. *Relatório Anual do Mecanismo Estadual de Prevenção e Combate à Tortura do Rio de Janeiro 2012*, Assembléia Legislativa do Estado do Rio de Janeiro, 2012.

Checklists for monitoring places of detention

It is widely recognised that external monitoring of places of detention, including regular inspections, constitutes one of the most effective preventive measures against torture.[46] Places of detention should be visited regularly – and without prior warning – and every effort must be made to communicate directly and confidentially with people being detained or imprisoned. Places to be visited include police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons. Inspection teams should be free to report publicly on their findings should they choose to do so.

46. See, for example, 2nd General Report on the CPT's Activities, 1991, para 54 and CPT/Inf/E (99) 1 (REV. 2), para 97 and Report of the Special Rapporteur on Torture, 2001, UN Doc A/56/156, para 39(c).

The Association for the Prevention of Torture (APT), which is a non-governmental organisation, has produced a report based on a number of CPT reports and recommendations, concerning national visiting mechanisms. This contains the following basic checklist for external inspections.[47]

47. *CPT Recommendations Concerning National Visiting Mechanisms*, The Association for the Prevention of Torture, June 2000.

- **Independent.** The visiting body should demonstrate its independence and impartiality, distinct from the staff and administration of the place of detention. It must make it clear that its only concern is to ensure that detention conditions are humane and that detainees are treated justly.
- **Expert.** Those involved in conducting inspections should have specific knowledge and expertise regarding the particular kind of place of detention that they are involved in inspecting.
- **Direct and personal contact with detainees.** The visiting body should strive to establish direct contact with detainees during visits. Detainees who have not requested an interview with the monitoring body should be chosen at random and interviewed as part of a regular visit. Detainees should also have a right to register complaints, both within and outside the detention facility.
- **Confidential.** The visiting body should be able to communicate with detainees out of sight and hearing of the staff of the place of detention.
- **Regular and resourced.** Weekly visits to prisons and other places of

detention are most effective. Monthly visits may be an acceptable alternative. Visiting bodies should be provided with adequate time and resources to make visits with sufficient regularity to ensure effectiveness. They should also have access to all necessary information, budgetary resources and technical facilities to investigate fully all aspects of complaints.

- **Unannounced.** Visiting bodies should have, and exercise, the power to visit any place of detention on any day and at any time that they choose. The investigative body should be entitled to issue summonses to witnesses, to demand the production of evidence and to seize all relevant operational orders and related briefing materials.
- **All parts of the facility.** The visiting body should have, and seek, access to all parts of the facility and have unrestricted access to places of custody, documents and persons.
- **Regular reports.** The visiting body should make regular reports of their visits available to relevant national institutions. The findings of all investigations should be made public, unless there are pressing reasons not to do so.

As well as talking to detainees and observing their physical condition, overall demeanour and their relationship with the staff in the detention facility, members of the visiting body should also be observant for any equipment or implements that could be used to inflict torture or ill-treatment. The staff of the detention facility should always be questioned about any such items and detainees should also be questioned, separately from the staff.

Conducting investigations and inquiries into acts of torture

The responsibility to carry out such investigations and inquiries is firmly established in international law. The Convention against Torture requires States Parties of their own initiative to carry out investigations of torture, even if there has not been a formal complaint, and to provide individuals with a right to complain, to have their complaints investigated and to be offered protection against any consequent threats or ill-treatment.[48] The same obligations apply in respect of other cruel, inhuman or degrading treatment or punishment.[49] The absence of an adequate investigation has itself been found to constitute a violation of the corresponding articles of the European and American Conventions by their respective courts.[50]

The Human Rights Committee has commented that the right to lodge complaints against torture or other forms of ill-treatment must be recognised in domestic law. Complaints must be investigated promptly and impartially by competent authorities. States must also hold those responsible to account for such acts whether the involvement has been

48. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Articles 12 and 13.

49. *Ibid*, Article 16.

50. *Aksoy v Turkey*, (1996), ECHR Reports 1996-VI; *Aydın v Turkey,* (1997), ECHR 1997-VI, para 103; *Assenov v Bulgaria*, (1998), ECHR 1998-VIII, para 102; *Labita v Italy*, (2000), ECHR 2000-IV, para 131; *Ilhan v Turkey,* (2000), ECHR 2000-VII, paras 89–93; *Bekos and Koutropoulos v Greece*, ECtHR, (2005), paras 45–55; *Corsacov v Moldova*, ECtHR, (2006), paras 66–82. See also, Inter-American Court of Human Rights, *Velásquez-Rodríguez v Honduras*, (1988), paras 159–88, 194; *Bueno-Alves v Argentina*, (2007), paras 88–90 and 108.

through 'encouraging, ordering, tolerating or perpetrating' them.[51] The persons responsible for carrying out the investigation must be independent from those implicated in the events and carry out their work impartially. This includes not only a lack of formal hierarchical or institutional relationships but also independence in practice.[52] Investigations must be prompt, thorough and effective.[53] A certain degree of transparency, to any complainants and/or the public, may also be required.[54]

The European Court of Human Rights has held that states are obliged to investigate all 'arguable claims' of torture and that this is implicit both in the notion of the right to an effective remedy and the right to be protected from acts of torture.[55] It has stated that 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation as to the cause of the injury'.[56] Where an individual raises an arguable claim that he has been seriously ill-treated by agents of the state, the authorities are obliged to carry out an effective and independent official investigation – including the taking of witness statements and the gathering of forensic evidence – capable of leading to the identification and punishment of those responsible.[57] Without such a duty to investigate, the Court noted that 'the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity'.[58] The Inter-American Court of Human Rights has similarly found the failure to mount an investigation to be a violation of the right to be protected against torture and inhuman treatment.[59]

The Special Rapporteur on torture has stated that 'when a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place... Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim'.[60]

Responding to allegations of torture

When a detainee or relative or lawyer lodges a torture complaint, an inquiry must always take place promptly. In all cases of death occurring in custody or shortly after release, an inquiry must be held by judicial or other impartial authorities.

The process of registering a complaint should be straightforward and, initially, confidential. The existence of complaint mechanisms should be widely publicised and people encouraged to report all acts of torture or

51.'General Comment no 7: Torture or cruel, inhuman or degrading treatment or punishment' (1982), para 1; 'General Comment no 20: Torture or cruel, inhuman or degrading treatment orpunishment' (1992), para 13 and 14. See also, *Rodriguez Veiga v Uruguay,* (1994).

52. General Comment No 31 (n 15), para 15. See also, Committee against Torture: *Nikoli and Nikoli v Serbia and Montenegro,* (2005); *Khaled M'Barek (re: Faisal Baraket) v Tunisia*, (1999); and *Boicenco v Moldova*, ECtHR, (2006), para 121.

53. General Comment No 31 (n 15), para 15. See also Human Rights Committee, *Rajapakse v Sri Lanka*, (2006), paras 9.4–9.5; *Blanco Abad v Spain*, (1998); *Yeil and Sevim c Turquie,* ECtHR, (2007); *Cafer Kurt c Turquie,* ECtHR, (2007); *Fazıl Ahmet Tamer and Others c Turquie,* ECtHR, (2007); *Cobzaru v Romania,* (2007); *Maslova and Nalbandov v Russia*, ECtHR, (2008); *Khashiyev and Akayeva v Russia*, (2005), paras 156–66, 178–80.

54. Inter-American Court of Human Rights, *Rochela Massacre v Colombia,* (2007), paras 195 and 295; *Kucheruk v Ukraine*, ECtHR, (2007), paras 155, 158.

55. *Assenov and others v Bulgaria,* ECtHR, (1998); *Aksoy v Turkey*, ECtHR, (1996).

56. *Ribitsch v Austria*, ECtHR, (1995); *Aksoy v Turkey*, ECtHR, (1996); *Assenov and others v Bulgaria*, ECtHR, (1998); *Kurt v Turkey*, ECtHR, (1998); *Çakici v Turkey*, ECtHR, (1999); *Akdeniz and others v Turkey*, ECtHR, (2001).

57. *Ibid*; See also, *Sevtap Veznedaroglu v Turkey,* ECtHR, (2000); *Kelly and Others v UK*, ECtHR, (2001).

58. *Ibid*; see also *Selmouni v France,* ECtHR, (1999).

59. *Velásquez Rodríguez v Honduras*, (1988).

60. General Recommendations of the Special Rapporteur on Torture, UN Doc E/CN.4/2003/68, para 26(k); [earlier version at UN Doc E/CN.4/1995/34, para 926(g)]. See also, Report of the Special Rapporteur on Torture, UN Doc A/56/156, July 2001, para 39(d).

other forms of ill-treatment. If it is necessary to fill in a form to make a complaint, these should be widely available and in all commonly spoken first languages. It should be possible to pass complaints to the body in a sealed envelope so that they cannot be read by custodial staff who come into contact with the complainant. The complaints body should acknowledge receipt of the complaint promptly. Where the case is current, and an individual is at risk, it should be acted upon immediately. In all cases there should be tight time-limits or targets for investigating and answering complaints. Victims and their legal representatives should have access to information relevant to the investigation.

Victims and witnesses should also be protected during and after investigations. Those implicated by the investigation should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation. Unless the allegation is manifestly ill-founded, public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings. In cases where current inmates are at risk, they should be transferred to another detention facility where special measures for their security can be taken. Where appropriate, victims of and witnesses to acts of torture should be placed in witness protection programmes. Witness protection programmes should be open to all victims of and witnesses to acts of torture, regardless of whether they have criminal convictions.

Case study: Visit of the Special Rapporteur III

In an office next door to the one where interrogation sessions were said to be held and as indicated by detainees, the Special Rapporteur found several iron bars similar to those described by the alleged victims of beatings. The officers in charge explained first that they were items of evidence in police criminal inquiries. The Special Rapporteur was not convinced by this explanation as the articles were not labelled. They then explained that they were used to check the cells' bars. Detainees indicated to the Special Rapporteur that as the guards were checking bars, they were beating detainees. In another room on the first floor, the Special Rapporteur found other iron bars. The same explanation was given to the Special Rapporteur by the *delegado* who had arrived in the meantime. He added that some of the bars had been confiscated from detainees who were planning to use them during revolts. The Special Rapporteur noted that some of these instruments were actually labelled, while others were not. Finally, the Special Rapporteur found some hoods identical to those described by detainees, for example, with respect to the incident of 9 June 2000, and a small package of electrodes. With regard to the latter, the *delegado* stated that they were used to weld iron bars damaged by detainees. The *delegado* explained that the hoods had been found in the cells, but could not explain what the detainees would use them for.

Principles governing investigations and inquiries

Inquiries and investigations may be carried out by a variety of institutions and may also take different forms. Often they will be internal investigations by the police or other law enforcement bodies with a view to possible disciplinary sanctions or referral to the prosecuting authorities. Sometimes they may be the result of judicial inquiries or coroners' inquests into deaths, judicial commissions of inquiry into a specific pattern of abuse or a major incident. Some will be carried out by specialised complaints investigation bodies responsible for directly investigating police abuses or supervising internal investigations. Where the findings reveal prima facie evidence of a crime, then a criminal investigation should always follow. Chapter Five of this Manual provides more detailed guidance on criminal investigations into crimes of torture, although many of the points also apply to investigations and inquiries.

Even when a complaint of torture or ill-treatment is not upheld by an investigation, it is important to ensure that the investigation has been properly conducted and can be shown to have been properly conducted. The complainant should be given a reasoned decision in writing that sets out the evidence as well as the finding once the investigation is completed. There should be a clearly auditable trail established, which demonstrates that a robust, impartial and expeditious investigation took place and why it reached its particular conclusions. The conduct of each investigation should also be regularly reviewed and the findings recorded so that best practices can be identified and the 'lessons learned' can help to improve the quality of future investigations.

Investigations should clarify the facts about allegations of torture, identify any patterns relating to these practices and recommend measures needed to prevent their recurrence. The investigation should aim to identify not just those responsible for the torture or ill-treatment, but also those responsible for the supervision of the detainee when it occurred, as well as those responsible for the supervision and management of these staff, and any patterns of alleged torture or ill-treatment that may be identified.

The purpose of such an investigation is to uncover the truth about an allegation. If there is substance to the allegation then the investigations must also gather evidence for three distinct purposes:

- disciplinary action against those responsible;
- criminal prosecution of those responsible; and
- compensation for the victim and full reparations and redress from the state.

The standard of proof may be different for each of the above and – even where it has been carried out expeditiously – considerable time may elapse between the different phases of the investigation. It is vital that the evidence collected is of a sufficient quality to be used for all of the above purposes and can be used to corroborate or disprove any allegations to the required standard.

One of the most important aspects of any investigation into possible cases of torture or other forms of ill-treatment is the systematic recording of why various lines of enquiry were pursued, or why they were not pursued. The detailed recording of such decisions and the reasons for making each decision should be a matter of course. All actions performed and information received must also be recorded accurately and a definitive record maintained for subsequent use at any court or tribunal.

Checklist for investigators:

- All incidents should be investigated as potential crimes of torture or ill-treatment until the contrary is proved.
- The investigation should be planned and structured to ensure that all information received is acted upon and that urgent inquiries are conducted so as to establish the facts quickly and accurately.
- The circumstances should be investigated thoroughly and impartially. All information should be recorded and documented to ensure that the highest levels of evidence can be presented before a court or tribunal.
- All parties should be provided with appropriate levels of information, while care is taken not to impede the progress of the investigation.
- Victims and witnesses must be properly protected during the investigation and every effort should be made to ensure that those implicated are not able to obstruct or subvert the inquiry.
- Victims of torture or ill-treatment must be handled sensitively at all times and provided with appropriate support. Care should be taken not to re-traumatise them during the investigation.
- Where the torture or ill-treatment has resulted in a death, similar consideration should be shown to relatives, partners and next of kin.
- The investigation should take full account of vulnerable persons involved.
- The investigation should also be sensitive to factors such as race, sex, sexual orientation and the nationality, political or religious beliefs, and social, cultural or ethnic background of the alleged victims or perpetrators.

Conducting interviews

The general rules for conducting interviews with victims, witnesses and suspects during any criminal or disciplinary investigation also apply to interviews during investigations into acts of torture. The role of the investigative interview is to obtain accurate and reliable information from suspects, witnesses or victims in order to discover the truth about matters under investigation. When conducting interviews it is important to develop a trusting and professional relationship between interviewer and interviewee, consider the location and setting in which the interview takes place, and be patient and methodical. This issue is also considered in detail in the Istanbul Protocol.[61]

61. *Ibid*.

Interviews can be valuable sources of information, but are only one part of the whole evidence gathering process and investigators should not over-rely on interviews. They should also be particularly aware of the dangers of over-reliance on confessions. Particular care should be taken to respect the rights of potential suspects. On no account should an interview be conducted with someone who might subsequently be charged with a criminal offence in relation to the investigation, in circumstances where that statement would then be ruled inadmissible.

Interviews should be approached with an 'open mind' and information obtained should always be tested against what the interviewer already knows or what can reasonably be established. When questioning anyone, the interviewer must act fairly in the circumstances of each individual case, but the interviewer is not constrained by the rules applied to lawyers in a court. Interviewers are not bound to accept the first answer given and questioning is not unfair merely because it is persistent. Even when a suspect exercises the right of silence, the interviewer will have the right to put questions and record any response, or lack of response.

The interviewer should also be familiar with the cultural and religious beliefs of the interviewee. This may prevent any inaccurate assumptions being made based on the individual's behaviour. The interviewer should also be careful not to make assumptions based on his or her own cultural background. Vulnerable people, whether victims, witnesses or suspects, must be treated with particular consideration at all times and rules governing their treatment must be strictly adhered to.

Checklist for conducting interviews

- Know as much as possible about the alleged crime and circumstances.
- Know what evidence is already available.
- Know what explanations he or she requires from the interviewee.

- Know the 'points to prove' for the offence under consideration.
- Know as much as possible about the person being interviewed.

The circumstances of the interview should always be recorded, and the substance of the interview – questions, answers and any occurrences – should be transcribed or recorded, verbatim, at the time (in writing if not by electronic means).

Interviewing alleged torture victims

The questioning of an alleged torture victim will usually be of critical importance to an investigation as the main evidence in many cases will be his or her testimony, together with any medical evidence.

Interviews must be conducted in a sensitive manner and allowance should be made for the interviewee's physical and emotional state. Particular care should be taken to avoid re-traumatising the interviewee or placing them in further danger. The interview may also need to be conducted in several stages and over a period of time as some details of what happened may not emerge until the interviewer has won the interviewee's trust. Indeed, it may be advisable for the interviewer to spend some time discussing matters other than the alleged ill-treatment in order to establish a 'climate of confidence', which will make it easier to discuss more sensitive subjects.

The basic aim of the interview is to obtain as detailed a factual record as possible of:

- What was done?
- When was it done?
- Where did it occur?
- Who did it?
- How often was it done?
- Why was it done?
- What have been the effects?

The more direct the source of the information, the greater the level of detail and the more consistent the account, the greater its credibility will be. However, allowance should be made for some inconsistencies. For example, a victim may be scared, confused or suffering from post-traumatic stress. The interviewee may have been intimidated into making an earlier false statement. He or she may also have delayed making a complaint until it was safe to do so. Inconsistencies do not necessarily mean that an allegation is false. The interviewee may also have found some questions difficult to understand. Inconsistencies can sometimes be resolved by asking the same question in a different way or coming back to it in subsequent interviews.

62. Camille Giffard, *The Torture Reporting Handbook* (Human Rights Centre, University of Essex in conjunction with the Foreign and Commonwealth Office of the United Kingdom 2000).

The following checklist for investigators when conducting interviews with alleged torture victims has been produced by the Human Rights Centre at the University of Essex:[62]

- The circumstances leading up to the torture, including arrest and detention. Had the interviewee received any threats prior to their arrest? In what manner was the person arrested and did he or she suffer any injuries during the course of this arrest? Did anyone witness the arrest? Did the interviewee suffer any ill-treatment before being taken into custody?
- The place where the interviewee was held, including the name and location of the institution.
- How long the interviewee was held.
- Was the interviewee transferred from one institution to another? If so, where to, by whom and on what approximate dates? How did he or she get there? Was any reason given for the transfer? If it was temporary, how long did it last?
- Approximate dates and times of the alleged torture, including when the last instance occurred.
- A detailed description of those involved in the arrest, detention and alleged torture.
- Contents of what the interviewee was told or asked.
- Description of the usual routine in the place of detention and the pattern of alleged torture.
- Description of the facts of the alleged torture, including methods of torture and a description of weapons or other physical objects used.
- Any distinctive things about the room in which the alleged torture occurred. If appropriate, the interviewee might be asked to draw a diagram of the location and lay-out of the room in which the alleged torture occurred.
- Whether the interviewee was sexually assaulted.
- Physical injuries sustained in the course of the alleged torture.
- The identity of any other witnesses to the events – such as co-detainees and any civilian staff of the institution.
- Were any medical personnel present just before, during or after the alleged torture – if so, did they identify themselves and what was their role?
- Did the interviewee receive any medical treatment, immediately or any time later, including on release? Was the doctor able to carry out an independent examination? Was anyone present during the examination? Did the doctor issue a medical report? What did it say?
- Did the interviewee complain to anyone about his or her treatment or tell anyone in authority? What was the response? Was any investigation carried out? What did it involve? Were any witnesses interviewed? Were the alleged perpetrators interviewed?
- Has the interviewee had any contact with the officials who took him

or her into custody (or other officials from the same service or agency) since the incident?

A statement taken for use in a judicial investigation should be made in the first person and can include considerable detail about how the detainee felt at particular stages. The interviewee should be asked, wherever possible, to relate what happened to more everyday experiences, including any familiar sensations that he or she encountered. For example: How did the interviewee know that a room was a particular size? What did a particular smell remind him or her of? Who did one of the officers look like (if, for example, they resembled a TV personality or another well-known personality)? This type of questioning will provide additional information for corroboration, and may help identify inconsistencies or prompt the interviewee to remember more about what happened to him or her. Attention should also be paid to the interviewee's senses other than sight – such as what he or she could hear, smell or touch. This will be particularly important if the interviewee was blindfolded for part of his or her time in detention or interrogation.

The sort of information that needs to be recorded includes:

- Location of the room within the institution: Did the interviewee have to go upstairs or down, if so, roughly how many steps or flights of stairs; what could he or she hear and smell; did the interviewee notice any landmarks on the way; if there was a window in the room could anything be seen outside?
- The room itself: What size was it; what were the walls, floor, ceiling, door made of; what shape was it and was there anything unusual or distinctive about it?
- Others held in the room: Were any other people held there; if so, how many; and are any of them possible witnesses; would they have noticed anything about the state of health of the alleged victim; what state of health were the other people in?
- Isolation: If the interviewee was held in isolation, for how long and in what manner?
- Content of the room: What was in the room – bedding, furniture, toilet, sink?
- Climate of the room: What was the temperature like; was there any ventilation; was there any dampness?
- Light: Was there any light; was it natural light from a window, or electric light; if it was electric light, how much of the time was it on; what did the light look or feel like, for example, colour, intensity?
- Hygiene: Were there any facilities for personal hygiene; where and how did the interviewee go to the toilet or bathe; what was the general hygiene of the place like; and was it infested in any way?

- Clothes: What clothes did the interviewee wear and could he or she wash or change these?
- Food and drinking water: How often and how much food and water was given; what was the quality like; who provided it; was it provided free of charge?
- Exercise: Was there any opportunity to leave the cell and, if so, for how long and how often?
- Regime: Were there any especially stringent or monotonous aspects to the regime?
- Medical facilities: Was a doctor or any other form of healthcare professional present or available; was the interviewee examined or treated in a separate medical facility such as by a family doctor or hospital; were medicines available; who were they provided by?
- Family visits: Did the interviewee have access to family visits; if so, where did these take place; could conversations be overheard; did the family know where the interviewee was?
- Legal representation: Did the interviewee have access to a legal representative; when was access first given, that is, how long after the interviewee was first taken into custody; how often was it given; where did visits take place; could the conversation be overheard?
- Appearance before a judicial officer: Did the interviewee appear before a magistrate or court; when did this happen, that is, how long after he or she was first taken into custody?
- Requests: Did the interviewee make any additional requests, if so to whom and what was the result?
- Bribes: Did the interviewee have to pay any bribes for any facilities and was a bribe requested at any time?

It should, however, be remembered that torture and ill-treatment can often take place outside a detention facility and the interviewer should ensure that the interview includes a full account of all the alleged ill-treatment that the victim claims to have suffered, irrespective of where this took place.

Interviewing alleged victims of sexual violence

Particular sensitivity is called for when questioning alleged victims of sexual violence. Discussion of such subjects is taboo, or extremely sensitive, in Brazilian society and interviewees may find describing these events a particular ordeal. Statements should preferably be taken by someone who is the same sex as the alleged victim – depending on this person's own wishes – and rules of confidentiality are even more important. However, the subject should not be avoided and every effort should be made to obtain a detailed and thorough account of what happened so that the perpetrators can be held to account.

Most people will tend to answer a question on 'sexual assault' as meaning actual rape or sodomy. Investigators should be sensitive to the fact that verbal assaults, disrobing, groping, biting, lewd or humiliating acts, or blows or electric shocks to the genitals are often not taken by the victim as constituting sexual assault. Nevertheless, these acts all violate the individual's intimacy, and should be considered as being part and parcel of sexual assault. Conversely, such acts often accompany physical rape or sodomy and may be regarded as 'clues' that these acts also took place. Very often, victims of sexual assault will not say anything, or even deny any sexual assault at first. It is often only on the second or third contact, if earlier contact has been empathic and sensitive to the person's culture and personality, that more of the story will come out. Investigators should, therefore, show particular tact and patience during such questioning.

In all cases of alleged sexual assault, intimate examinations should only be carried out with the full consent of the alleged victim and by suitably qualified medical personnel, preferably of the same sex as the interviewee.

Interviewing children and juveniles

Children may have been tortured themselves or forced to witness the torture of others, particularly parents or close family members. This can have a particularly traumatic effect on children and particular care must be taken not to re-traumatise the child during the interview. Interviewing children is very different from interviewing adults, and needs to be treated as such. Interviewers should have some experience of working with children – and some training in how to conduct interviews with children – or the effects of an interview may be more detrimental than the potential benefits. A child should always be interviewed in the presence of his or her parent, relative or guardian. Particular attention should be paid to non-verbal signals. Children's ability to express themselves verbally depends on their age and stage of development, and their behaviour may reveal more about what happened to them than their words. Children are particularly sensitive to tiredness and should not be pressed during an interview. The child should also be provided with support immediately after the interview has finished.

APPENDICES

1. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Adopted by the General Assembly of the United Nations on 10 December 1984 in resolution 39/46

Article 1

1. For the purposes of this Convention, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
    1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
    2. When the alleged offender is a national of that State;
    3. When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the

offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12
Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13
Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14
1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15
Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16
1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Adopted by the General Assembly of the United Nations on 19 December 1966

Article 7
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10(1)
All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Signed in Rome on 4 November 1950

Article 3
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

AMERICAN CONVENTION ON HUMAN RIGHTS

Signed in San José, Costa Rica, on 22 November 1969

Article 5
1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Approved by the Organization of African Unity, in Banjul, on 27 June 1981

Article 5
Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

COMMON ARTICLE 3 OF GENEVA CONVENTIONS, 1949

Adopted on 12 August 1949 by the Diplomatic Conference held at Geneva from 21 April to 12 August 1949, for the purpose of establishing a Convention for the Protection of Civilians in Time of War

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b) taking of hostages;
c) outrages upon personal dignity, in particular humiliating and degrading treatment;
d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Adopted in Rome, on 17 June 1998

Article 7 – Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a) Murder;

b) Extermination;

c) Enslavement;

d) Deportation or forcible transfer of population;

e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f) Torture;

g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i) Enforced disappearance of persons;

j) The crime of apartheid;

k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; "

d) Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any

way be interpreted as affecting national laws relating to pregnancy; "

g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8 – War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

i. Wilful killing;

ii. Torture or inhuman treatment, including biological experiments;

iii. Wilfully causing great suffering, or serious injury to body or health;

iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

vi. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

vii. Unlawful deportation or transfer or unlawful confinement;

viii. Taking of hostages.

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
xi. Killing or wounding treacherously individuals belonging to the hostile nation or army;
xii. Declaring that no quarter will be given;
xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
xvi. Pillaging a town or place, even when taken by assault;
xvii. Employing poison or poisoned weapons;
xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
xx. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this

Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

xxiii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

xxiv. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

iii. Taking of hostages;

iv. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

v. Pillaging a town or place, even when taken by assault;

vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

ix. Killing or wounding treacherously a combatant adversary;

x. Declaring that no quarter will be given;

xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151

1. This general comment replaces general comment 7 (the sixteenth session, 1982) reflecting and further developing it.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State Party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States Parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment.

Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States Parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States Parties should indicate in their reports what measures they have adopted to that end.

10. The Committee should be informed how States Parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States Parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State Party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States Parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

13. States Parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held

responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.
14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States Parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States Parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.
15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT 31

Nature of the General Legal Obligation on States Parties to the Covenant, Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)

1. This General Comment replaces General Comment No 3, reflecting and developing its principles. The general non-discrimination provisions of article 2, paragraph 1, have been addressed in General Comment 18 and General Comment 28, and this General Comment should be read together with them.
2. While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention

to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States Parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by in the Covenant has immediate effect for all States Parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.

6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed

as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.]

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention he rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

11. As implied in General Comment 2911 General Comment No.29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3., the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific

rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7). Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States Parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States Parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States Parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

Adopted by General Assembly Resolution 43/173, on 9 December 1988

Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.

Use of terms

For the purposes of the Body of Principles:

a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

d) "Detention" means the condition of detained persons as defined above;

e) "Imprisonment" means the condition of imprisoned persons as defined above;

f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles,

aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:
   a. The reasons for the arrest;
   b. The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
   c. The identity of the law enforcement officials concerned;
   d. Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

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

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

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

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

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

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph l of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph l of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining

authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

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

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall 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.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

b) 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;

c) Keep matters in the possession confidential, unless the performance of duty or the needs of justice require otherwise;

d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1985

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them 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.
3. The judiciary shall 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.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. 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.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

BASIC PRINCIPLES ON THE ROLE OF LAWYERS (EXTRACTS)

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1990

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons 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.

RECOMMENDATIONS OF THE SPECIAL RAPPORTEUR ON TORTURE

Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, E/CN.4/2003/68, 17 December 2002, Annex 1

The Special Rapporteur included in his report to the Commission on Human Rights (see E/CN.4/2001/66) a revised version of the recommendations that he had compiled in 1994 (see E/CN.4/1995/34). As stated earlier, these recommendations may all be resolved into one global recommendation – an end to de facto or de jure impunity. He would like to encourage States to reflect upon them as a useful tool in efforts to combat torture. A further revised version of the recommendations follows:

a) Countries that are not party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Covenant on Civil and Political Rights should sign and ratify or accede to these Conventions. Torture should be designated and defined as a specific crime of the utmost gravity in national legislation. In countries where the law does not give the authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator or victim (universal jurisdiction), the enactment of such legislation should be made a priority;

b) Countries should sign and ratify or accede to the Rome Statute of the International Criminal Court with a view to bringing to justice perpetrators of torture in the context of genocide, crimes against humanity and war crimes and at the same time ensure that their national courts also have jurisdiction over these crimes on the basis of universal jurisdiction;

c) The highest authorities should publicly condemn torture in all its forms whenever it occurs. The highest authorities, in particular those responsible for law enforcement activities, should make public the fact that those in charge of places of detention at the time abuses are perpetrated will be held personally responsible for the abuses. In order to give effect to these recommendations, the authorities should, in particular, make unannounced visits to police stations, pre-trial detention facilities and penitentiaries known for the prevalence of such treatment. Public campaigns aimed at informing the civilian population at large of their rights with respect to arrest and detention, in particular to lodge complaints regarding treatment received at the hands of law enforcement officials, should be undertaken;

d) Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court. No statement of confession made by a person deprived of liberty, other than one made in the presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means. Serious consideration should be given to introducing video- and audio-taping of proceedings in interrogation rooms;

e) Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. In addition, official bodies should be set up to carry out inspections, such teams being composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society. Ombudsmen and national or human rights institutions should be granted access to all places of detention with a view to monitoring the conditions of detention. When it so requests, the International Committee of the Red Cross should be granted access to places of detention;

f) Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be scrupulously recorded; similar information should also be recorded regarding the actual detention. Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. Security personnel who do not honour such provisions should be punished. In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an

independent lawyer, such as one recommended by a bar association. In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours. At the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention. Each interrogation should be initiated with the identification of all persons present. All interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings. The practice of blindfolding and hooding often makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers. Thus, blindfolding or hooding should be forbidden. Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted;

g) Administrative detention often puts detainees beyond judicial control. Persons under administrative detention should be entitled to the same degree of protection as persons under criminal detention. At the same time, countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention;

h) Provisions should give all detained persons the ability to challenge the lawfulness of the detention--e.g., through habeas corpus or amparo. Such procedures should function expeditiously;

i) Countries should take effective measures to prevent prisoner-on-prisoner violence by investigating reports of such violence, prosecuting and punishing those responsible, and offering protective custody to vulnerable individuals, without marginalizing them from the prison population more than necessitated by the needs of protection and without rendering them at further risk of ill-treatment. Training programmes should be considered to sensitize prison officials as to the importance of taking effective steps to prevent and remedy prisoner-on-prisoner abuse and to provide them with the means to do so. In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, prisoners should be segregated along the lines of gender, age and seriousness of the crime, as well as first-time/repeat offenders and pre-trial/convicted detainees;

j) When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings. Where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment. Serious consideration should also be given to the creation of witness protection programmes for witnesses to incidents of torture and similar ill-treatment which ought to extend fully to cover persons with a previous criminal record. In cases where current inmates are at risk, they ought to be transferred to another detention facility where special measures for their

security should be taken. A complaint that is determined to be well founded should result in compensation to the victim or relatives. In all cases of death occurring in custody or shortly after release, an inquiry should be held by judicial or other impartial authorities. A person in respect of whom there is credible evidence of responsibility for torture or severe maltreatment should be tried and, if found guilty, punished. Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated. If torture has occurred in an official place of detention, the official in charge of that place should be disciplined or punished. Military tribunals should not be used to try persons accused of torture. Independent national authorities, such as a national commission or ombudsman with investigatory and/or prosecutorial powers, should be established to receive and to investigate complaints. Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim. Furthermore, the forensic medical services should be under judicial or other independent authority, not under the same governmental authority as the police and the penitentiary system. Public forensic medical services should not have a monopoly of expert forensic evidence for judicial purposes. In that context, countries should be guided by the Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as a useful tool in the effort to combat torture;

k) Training courses and training manuals should be provided for police and security personnel and, when requested, assistance should be provided by the United Nations programme of advisory services and technical assistance. Security and law enforcement personnel should be instructed on the Standard Minimum Rules for the Treatment of Prisoners the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and these instruments should be translated into the relevant national languages. In the course of training, particular stress should be placed upon the principle that the prohibition of torture is absolute and non-derogable and that there exists a duty to disobey orders from a superior to commit torture. Governments should scrupulously translate into national guarantees the international standards they have approved and should familiarize law enforcement personnel with the rules they are expected to apply;

l) Health-sector personnel should be instructed on the Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Detainees and Prisoners against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in torture. Such prohibition should extend to such practices as examining detainees to determine their "fitness for interrogation" and procedures involving ill-treatment or torture, as well as providing medical treatment to ill-treated detainees so as to enable them to withstand further abuse. In other cases, the withholding of appropriate medical treatment by medical personnel should be subject to sanction.

Submitted in accordance with Commission resolution 1999/33, Commission on Human Rights, Fifty-sixth session, under item 11.d of the provisional agenda on 18 January 2000 (E/CN.4/2000/62)

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND ENFORCE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

1. Every State has the obligation to respect, ensure respect for and enforce international human rights and humanitarian law norms that are, inter alia:

(a)Contained in treaties to which it is a State Party;

(b) Found in customary international law; or

(c) Incorporated in its domestic law.

2. To that end, if they have not already done so, States shall ensure that domestic law is consistent with international legal obligations by:

(a) Incorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective and prompt reparation as defined below; and

(d) Ensuring, in the case that there is a difference between national and international norms, that the norm that provides the greatest degree of protection is applied.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, inter alia, a State's duty to:

(a) Take appropriate legal and administrative measures to prevent violations;

(b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;

(c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;

(d) Afford appropriate remedies to victims; and

(e) Provide for or facilitate reparation to victims.

III. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the

investigation and prosecution of these violations.
5. To that end, States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses.

IV. STATUTES OF LIMITATIONS

6. Statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law.
7. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.

V. VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

8. A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.
9. A person's status as "a victim" should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

VI. TREATMENT OF VICTIMS

10. Victims should be treated by the State and, where applicable, by intergovernmental and non-governmental organizations and private enterprises with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety and privacy as well as that of their families. The State should ensure that its domestic laws, as much as possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS' RIGHT TO A REMEDY

11. Remedies for violations of international human rights and humanitarian law include the victim's right to:

(a) Access justice;
(b) Reparation for harm suffered; and
(c) Access the factual information concerning the violations.

VIII. VICTIMS' RIGHT TO ACCESS JUSTICE

12. A victim's right of access to justice includes all available judicial, administrative, or other public processes under existing domestic laws as well as under international law. Obligations arising under international law to secure the individual or collective right to access justice and fair and impartial proceedings should be made available under domestic laws. To that end, States should:

(a) Make known, through public and private mechanisms, all available remedies for violations of international human rights and humanitarian law;

(b) Take measures to minimize the inconvenience to victims, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to a remedy and reparation for violations of international human rights or humanitarian law.

13. In addition to individual access to justice, adequate provisions should also be made to allow groups of victims to present collective claims for reparation and to receive reparation collectively.

14. The right to an adequate, effective and prompt remedy against a violation of international human rights or humanitarian law includes all available international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.

IX. VICTIMS' RIGHT TO REPARATION

15. Adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.

16. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms.

17. In cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim.

18. In the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide reparation to victims who have sustained bodily injury or impairment of physical or mental health as a result of these violations and to the families, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these.

19. A State shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations.
20. In cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims.

X. FORMS OF REPARATION

21. In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.
22. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.
23. Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities, including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity; and

(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

24. Rehabilitation should include medical and psychological care as well as legal and social services.
25. Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;

(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;

(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(f) Judicial or administrative sanctions against persons responsible for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;

(i) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting persons in the legal, media and other related professions and human rights defenders;

(v) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials;

(vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;

(vii) Creating mechanisms for monitoring conflict resolution and preventive intervention.

XI. PUBLIC ACCESS TO INFORMATION

26. States should develop means of informing the general public and in particular victims of violations of international human rights and humanitarian law of the rights and remedies contained within these principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.

XII. NON-DISCRIMINATION AMONG VICTIMS

27. The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and be without any adverse distinction founded on grounds such as race, colour, gender, sexual orientation, age, language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability.

UN Office for the High Commissioner for Human Rights, New York and Geneva, 2001

The Commission on Human Rights in its resolution 2000/43 and the UN General Assembly in its resolution 55/89 drew the attention of Governments to the Principles and strongly encouraged Governments to reflect upon the Principles as a useful tool in combating torture.
1. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment (hereafter torture or other ill-treatment) include the following:
(i) Clarification of the facts and establishment and acknowledgment of individual and State responsibility for victims and their families;
(ii) Identification of measures needed to prevent recurrence;
(iii) Facilitating prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible, and demonstrating the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.
2. States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated. Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission, investigations by impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards, and the findings shall be made public.
3. a. The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.
3. b. Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.
4. Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.
5. a. In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of

abuse, or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles. Under certain circumstances, professional ethics may require information to be kept confidential. These requirements should be respected.

5. b. A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report shall be made public. It shall also describe in detail specific events that were found to have occurred, the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

6. a. Medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and in particular shall obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.

6. b. The medical expert should promptly prepare an accurate written report. This report should include at least the following

i. Circumstances of the interview: name of the subject and names and affiliations of those present at the examination; the exact time and date; the location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house, etc.); the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor;

ii. History: a detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;

iii. Physical and psychological examination: a record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;

iv. Opinion: an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination should be given;

v. Authorship: the report should clearly identify those carrying out the examination and should be signed.

6. c. The report should be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. It should also be

provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report should not be made available to any other person, except with the consent of the subject or on the authorization of a court empowered to enforce such transfer.

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Adopted on 18 December 2002 at the fifty-seventh session of the general assembly of the United Nations by resolution a/res/57/199 entered into force on 22 June 2006

PREAMBLE

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional Protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention, have agreed as follows:

Part I – General principles

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee Against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.

2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.

3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.

4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

Part II – Subcommittee on Prevention

Article 5

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.

2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.

3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.

4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.

5. No two members of the Subcommittee on Prevention may be nationals of the same state.

6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

Article 6

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.

2.

(a) The nominees shall have the nationality of a State Party to the present Protocol;

(b) At least one of the two candidates shall have the nationality of the nominating State Party;

(c) No more than two nationals of a State Party shall be nominated;

(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:

(a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;

(b) The initial election shall be held no later than six months after the entry into force of the present Protocol;

(c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;

(d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:

(a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;

(b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

Article 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the chairman of the meeting referred to in article 7, paragraph 1 (d).

Article 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.

2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:

(a) Half the members plus one shall constitute a quorum;

(b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;

(c) The Subcommittee on Prevention shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the committee against torture shall hold their sessions simultaneously at least once a year.

Part III – Mandate of the Subcommittee on Prevention

Article 11

1. The Subcommittee on Prevention shall:

(a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(b) In regard to the national preventive mechanisms:

(i) Advise and assist States Parties, when necessary, in their establishment;

(ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;

(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(iv) Make recommendations and observations to the States Parties with a view

to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;

(c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

(a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;

(b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;

(d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

Article 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.

2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.

3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.

4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:

(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Article 16

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.

2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.

3. The Subcommittee on Prevention shall present a public annual report on its activities to the committee against torture.

4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

Part IV – National preventive mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.

3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.

4. When establishing national preventive mechanisms, States Parties shall give due consideration to the principles relating to the status of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose the places they want to visit and the persons they want to interview;

(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Article 22
The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.
Article 23
The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

Part V – Declaration
Article 24
1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part iii or part iv of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the subcommittee on pre vention, the committee against torture may extend that period for an additional two years.

Part VI – Financial provisions
Article 25
1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.
Article 26
1. A special fund shall be set up in accordance with the relevant procedures of the general assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The special fund may be financed through voluntary contributions made by governments, intergovernmental and non-governmental organizations and other private or public entities.

Part VII – Final provisions
Article 27
1. The present Protocol is open for signature by any state that has signed the convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all states that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each state ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article 29

The provisions of the present Protocol shall extend to all parts of federal states without any limitations or exceptions.

Article 30

No reservations shall be made to the present Protocol.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva conventions of 12 august 1949 and the additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the international committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the convention. Denunciation shall take effect one year after the date of receipt of the notification by the secretary-general.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.

3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that state.

Article 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The secretary-general shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months

from the date of such communication at least one third of the States Parties favour such a conference, the secretary-general shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two -thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the convention on the privileges and immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that convention.

Article 36

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) respect the laws and regulations of the visited state;

(b) refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all states.

'SUBSTANTIVE' SECTIONS OF THE CPT'S GENERAL REPORTS

[Extracts from the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the CPT Standards, Substantive Sections of the CPT's General Reports, Council of Europe, October 2001, CPT/Inf/E (2002)]

I. Police custody

Extract from the 12th General Report [CPT/Inf (2002) 15]

33. It is essential to the good functioning of society that the police have the powers to apprehend, temporarily detain and question criminal suspects and other categories of persons. However, these powers inherently bring with them a risk of intimidation and physical ill-treatment. The essence of the CPT's work is to seek ways of reducing that risk to the absolute minimum without unduly impeding the police in the proper exercise of their duties. Encouraging developments in the field of police custody have been noted in a number of countries; however, the CPT's findings also highlight all too often the need for continuing vigilance.

34. The questioning of criminal suspects is a specialist task which calls for specific training if it is to be performed in a satisfactory manner. First and foremost, the precise aim of such questioning must be made crystal clear: that aim should be to obtain accurate and reliable information in order to discover the truth about matters under investigation, not to obtain a confession from someone already presumed, in the eyes of the interviewing officers, to be guilty. In addition to the provision of appropriate training, ensuring adherence of law enforcement officials to the above-mentioned aim will be greatly facilitated by the drawing up of a code of conduct for the questioning of criminal suspects.

35. Over the years, CPT delegations have spoken to a considerable number of detained persons in various countries, who have made credible claims of having been physically illtreated, or otherwise intimidated or threatened, by police officers trying to obtain confessions in the course of interrogations. It is self-evident that a criminal justice system which places a premium on confession evidence creates incentives for officials involved in the investigation of crime--and often under pressure to obtain results--to use physical or psychological coercion. In the context of the prevention of torture and other forms of ill-treatment, it is of fundamental importance to develop methods of crime investigation capable of reducing reliance on confessions, and other evidence and information obtained via interrogations, for the purpose of securing convictions.

36. The electronic (i.e. audio and/or video) recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interviewprocess, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity

for defendants to later falsely deny that they have made certain admissions.

37. The CPT has on more than one occasion, in more than one country, discovered interrogation rooms of a highly intimidating nature: for example, rooms entirely decorated in black and equipped with spotlights directed at the seat used by the person undergoing interrogation. Facilities of this kind have no place in a police service.

In addition to being adequately lit, heated and ventilated, interview rooms should allow for all participants in the interview process to be seated on chairs of a similar style and standard of comfort. The interviewing officer should not be placed in a dominating (e.g. elevated) or remote position vis-à-vis the suspect. Further, colour schemes should be neutral.

38. In certain countries, the CPT has encountered the practice of blindfolding persons in police custody, in particular during periods of questioning. CPT delegations have received various--and often contradictory--explanations from police officers as regards the purpose of this practice. From the information gathered over the years, it is clear to the CPT that in many if not most cases, persons are blindfolded in order to prevent them from being able to identify law enforcement officials who inflict ill-treatment upon them. Even in cases when no physical ill-treatment occurs, to blindfold a person in custody--and in particular someone undergoing questioning--is a form of oppressive conduct, the effect of which on the person concerned will frequently amount to psychological ill-treatment. The CPT recommends that the blindfolding of persons who are in police custody be expressly prohibited.

39. It is not unusual for the CPT to find suspicious objects on police premises, such as wooden sticks, broom handles, baseball bats, metal rods, pieces of thick electric cable, imitation firearms or knives. The presence of such objects has on more than one occasion lent credence to allegations received by CPT delegations that the persons held in the establishments concerned have been threatened and/or struck with objects of this kind.

A common explanation received from police officers concerning such objects is that they have been confiscated from suspects and will be used as evidence. The fact that the objects concerned are invariably unlabelled, and frequently are found scattered around the premises (on occasion placed behind curtains or cupboards), can only invite scepticism as regards that explanation. In order to dispel speculation about improper conduct on the part of police officers and to remove potential sources of danger to staff and detained persons alike, items seized for the purpose of being used as evidence should always be properly labelled, recorded and kept in a dedicated property store. All other objects of the kind mentioned above should be removed from police premises.

40. As from the outset of its activities, the CPT has advocated a trinity of rights for persons detained by the police: the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice. In many States, steps have been taken to introduce or reinforce these rights, in the light of the CPT's recommendations. More specifically, the right of access to a lawyer during police custody is now widely recognised in countries visited by the CPT; in those few countries where the right does not yet exist, plans are afoot to introduce it.

41. However, in a number of countries, there is considerable reluctance to comply with the CPT's recommendation that the right of access to a lawyer be guaranteed from the very outset of custody. In some countries, persons detained by the police enjoy this right only after a specified period of time spent in custody; in others, the right only becomes effective when the person detained is formally declared a "suspect".

The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.

The right of access to a lawyer must include the right to talk to him in private. The person concerned should also, in principle, be entitled to have a lawyer present during any interrogation conducted by the police. Naturally, this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immediately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation.

The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend -- and stay at -- a police establishment, e.g. as a "witness".

Further, for the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer.

42. Persons in police custody should have a formally recognised right of access to a doctor. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests. Further, the right of access to a doctor should include the right of a person in custody to be examined, if the person concerned so wishes, by a doctor of his/her own choice (in addition to any medical examination carried out by a doctor called by the police).

All medical examinations of persons in police custody must be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise in a particular case, out of the sight of such officials.

It is also important that persons who are released from police custody without being brought before a judge have the right to directly request a medical examination/certificate from a recognised forensic doctor.

43. A detained person's right to have the fact of his/her detention notified to a third party should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefore, and to require the approval of a senior police officer unconnected with the case or a prosecutor).

44. Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are expressly informed of their rights without delay and in a language which

they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights.

45. The CPT has stressed on several occasions the role of judicial and prosecuting authorities as regards combating ill-treatment by the police.

For example, all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue; there are still certain countries visited by the CPT where this does not occur. Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour).

Naturally, the judge must take appropriate steps when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment.

The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to illtreat persons in their custody will quickly come to believe that they can do so with impunity.

46. Additional questioning by the police of persons remanded to prison may on occasion be necessary. The CPT is of the opinion that from the standpoint of the prevention of ill-treatment, it would be far preferable for such questioning to take place within the prison establishment concerned rather than on police premises. The return of remand prisoners to police custody for further questioning should only be sought and authorised when it is absolutely unavoidable. It is also axiomatic that in those exceptional circumstances where a remand prisoner is returned to the custody of the police, he/she should enjoy the three rights referred to in paragraphs 40 to 43.

47. Police custody is (or at least should be) of relatively short duration. Nevertheless, conditions of detention in police cells must meet certain basic requirements.

All police cells should be clean and of a reasonable size1 for the number of persons they are used to accommodate, and have adequate lighting (i.e. sufficient to read by, sleeping periods excluded); preferably cells should enjoy natural light.

Further, cells should be equipped with a means of rest (e.g. a fixed chair or bench), and persons obliged to stay overnight in custody should be provided with a clean mattress and clean blankets. Persons in police custody should have access to a proper toilet facility under decent conditions, and be offered adequate means to wash themselves. They should have

ready access to drinking water and be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich) every day. Persons held in police custody for 24 hours or more should, as far as possible, be offered outdoor exercise every day. Many police detention facilities visited by CPT delegations do not comply with these minimal standards. This is particularly detrimental for persons who subsequently appear before a judicial authority; all too frequently persons are brought before a judge after spending one or more days in substandard and filthy cells, without having been offered appropriate rest and food and an opportunity to wash.

48. The duty of care which is owed by the police to persons in their custody includes the responsibility to ensure their safety and physical integrity. It follows that the proper monitoring of custody areas is an integral component of the duty of care assumed by the police. Appropriate steps must be taken to ensure that persons in police custody are always in a position to readily enter into contact with custodial staff.

On a number of occasions CPT delegations have found that police cells were far removed from the offices or desks where police officers are normally present, and were also devoid of any means (e.g. a call system) enabling detained persons to attract the attention of a police officer. Under such conditions, there is considerable risk that incidents of various kinds (violence among detainees; suicide attempts; fires etc.) will not be responded to in good time.

49. The CPT has also expressed misgivings as regards the practice observed in certain countries of each operational department (narcotics, organised crime, anti-terrorism) in a police establishment having its own detention facility staffed by officers from that department. The Committee considers that such an approach should be discarded in favour of a central detention facility, staffed by a distinct corps of officers specifically trained for such a custodial function. This would almost certainly prove beneficial from the standpoint of the prevention of ill-treatment. Further, relieving individual operational departments of custodial duties might well prove advantageous from the management and logistical perspectives.

50. Finally, the inspection of police establishments by an independent authority can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully effective, visits by such an authority should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights (in particular the three rights referred to in paragraphs 40 to 43); compliance with rules governing the questioning of criminal suspects; and material conditions of detention.

The findings of the above-mentioned authority should be forwarded not only to the police but also to another authority which is independent of the police.

III. Training of law enforcement personnel

Extract from the 2nd General Report [CPT/Inf (92) 3]

59. Finally, the CPT wishes to emphasise the great importance it attaches to the training of law enforcement personnel1 (which should include education on human rights matters -- cf. also Article 10 of the United Nations Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment). There is arguably no better guarantee against the ill-treatment of a person deprived of his liberty than a properly trained police or prison officer. Skilled officers will be able to carry out successfully their duties without having recourse to ill-treatment and to cope with the presence of fundamental safeguards for detainees and prisoners.

60. In this connection, the CPT believes that aptitude for interpersonal communication should be a major factor in the process of recruiting law enforcement personnel and that, during training, considerable emphasis should be placed on developing interpersonal communication skills, based on respect for human dignity. The possession of such skills will often enable a police or prison officer to defuse a situation which could otherwise turn into violence, and more generally, will lead to a lowering of tension, and raising of the quality of life, in police and prison establishments, to the benefit of all concerned.

VII. Juveniles deprived of their liberty

Extract from the 9th General Report [CPT/Inf (99) 12]

Preliminary remarks

20. In certain of its previous general reports, the CPT has set out the criteria which guide its work in a variety of places of detention, including police stations, prisons, holding centres for immigration detainees and psychiatric establishments.

The Committee applies the above-mentioned criteria, to the extent to which they are appropriate, in respect of juveniles (i.e. persons under the age of 18) deprived of their liberty. However--regardless of the reason for which they may have been deprived of their liberty--juveniles are inherently more vulnerable than adults. In consequence, particular vigilance is required to ensure that their physical and mental well-being is adequately protected. In order to highlight the importance which it attaches to the prevention of ill-treatment of juveniles deprived of their liberty, the CPT has chosen to devote this chapter of its 9th General Report to describing some of the specific issues which it pursues in this area.

In the following paragraphs, the Committee identifies a number of the safeguards against ill-treatment which it considers should be offered to all juveniles deprived of their liberty, before focussing on the conditions which should obtain in detention centres specifically designed for juveniles. The Committee hopes in this way to give a clear indication to national authorities of its views regarding the manner in which such persons ought to be treated. As in previous years, the CPT would welcome comments on this substantive section of its General Report.

21. The Committee wishes to stress at the outset that any standards which it may be developing in this area should be seen as being complementary to those set out in a panoply of other international instruments, including the 1989 United Nations Convention on the Rights of the Child; the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).

The Committee also wishes to express its approval of one of the cardinal principles enshrined in the above-mentioned instruments, namely that juveniles should only be deprived of their

liberty as a last resort and for the shortest possible period of time (cf. Article 37 b. of the Convention on the Rights of the Child and Rules 13 and 19 of the Beijing Rules).

Safeguards against the ill-treatment of juveniles

22. Given its mandate, the CPT's first priority during visits to places where juveniles are deprived of their liberty is to seek to establish whether they are being subjected to deliberate ill-treatment. The Committee's findings to date would suggest that, in most of the establishments which it visits, this is a comparatively rare occurrence.

23. However, as is the case for adults, it would appear that juveniles run a higher risk of being deliberately ill-treated in police establishments than in other places of detention. Indeed, on more than one occasion, CPT delegations have gathered credible evidence that juveniles have featured amongst the persons tortured or otherwise ill-treated by police officers.

In this context, the CPT has stressed that it is during the period immediately following deprivation of liberty that the risk of torture and ill-treatment is at its greatest. It follows that it is essential that all persons deprived of their liberty (including juveniles) enjoy, as from the moment when they are first obliged to remain with the police, the rights to notify a relative or another third party of the fact of their detention, the right of access to a lawyer and the right of access to a doctor.

Over and above these safeguards, certain jurisdictions recognise that the inherent vulnerability of juveniles requires that additional precautions be taken. These include placing police officers under a formal obligation themselves to ensure that an appropriate person is notified of the fact that a juvenile has been detained (regardless of whether the juvenile requests that this be done). It may also be the case that police officers are not entitled to interview a juvenile unless such an appropriate person and/or a lawyer is present. The CPT welcomes this approach.

24. In a number of other establishments visited, CPT delegations have been told that it was not uncommon for staff to administer the occasional "pedagogic slap" to juveniles who misbehaved. The Committee considers that, in the interests of the prevention of ill-treatment, all forms of physical chastisement must be both formally prohibited and avoided in practice. Inmates who misbehave should be dealt with only in accordance with prescribed disciplinary procedures.

25. The Committee's experience also suggests that when ill-treatment of juveniles does occur, it is more often the result of a failure adequately to protect the persons concerned from abuse than of a deliberate intention to inflict suffering. An important element in any strategy to prevent such abuse is observance of the principle that juveniles in detention should as a rule be accommodated separately from adults.

Examples of a failure to respect this principle which have been observed by the CPT have included: adult male prisoners being placed in cells for male juveniles, often with the intention that they maintain control in those cells; female juveniles being accommodated together with adult women prisoners; juvenile psychiatric patients sharing accommodation with chronically ill adult patients.

The Committee accepts that there may be exceptional situations (e.g. children and parents being held as immigration detainees) in which it is plainly in the best interests of juveniles not to be separated from particular adults. However, to accommodate juveniles and unrelated adults together inevitably brings with it the possibility of domination and exploitation.

26. Mixed gender staffing is another safeguard against ill-treatment in places of detention,

in particular where juveniles are concerned. The presence of both male and female staff can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention.
Mixed gender staffing also allows for appropriate staff deployment when carrying out gender sensitive tasks, such as searches. In this respect, the CPT wishes to stress that, regardless of their age, persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender; these principles apply a fortiori in respect of juveniles.
27. Lastly, in a number of establishments visited, CPT delegations have observed custodial staff who come into direct contact with juveniles openly carrying batons. Such a practice is not conducive to fostering positive relations between staff and inmates. Preferably, custodial staff should not carry batons at all. If, nevertheless, it is considered indispensable for them to do so, the CPT recommends that the batons be hidden from view.

VIII. Women deprived of their liberty
Extract from the 10th General Report [CPT/Inf (2000) 13]

Preliminary remarks
21. In certain of its previous general reports, the CPT has set out the criteria which guide its work in a variety of places of detention, including police stations, prisons, holding centres for immigration detainees, psychiatric establishments and detention centres for juveniles.
Naturally, the Committee applies the above-mentioned criteria in respect of both women and men who are deprived of their liberty. However, in all Council of Europe member States, women inmates represent a comparatively small minority of persons deprived of their liberty. This can render it very costly for States to make separate provision for women in custody, with the result that they are often held at a small number of locations (on occasion, far from their homes and those of any dependent children), in premises which were originally designed for (and may be shared by) male detainees. In these circumstances, particular care is required to ensure that women deprived of their liberty are held in a safe and decent custodial environment.
In order to highlight the importance which it attaches to the prevention of ill-treatment of women deprived of their liberty, the CPT has chosen to devote this chapter of its 10th General Report to describing some of the specific issues which it pursues in this area. The Committee hopes in this way to give a clear indication to national authorities of its views regarding the manner in which women deprived of their liberty ought to be treated. As in previous years, the CPT would welcome comments on this substantive section of its General Report.
22. It should be stressed at the outset that the CPT's concerns about the issues identified in this chapter apply irrespective of the nature of the place of detention. Nevertheless, in the CPT's experience, risks to the physical and/or psychological integrity of women deprived of their liberty may be greater during the period immediately following apprehension. Consequently, particular attention should be paid to ensuring that the criteria enunciated in the following sections are respected during that phase.
The Committee also wishes to emphasise that any standards which it may be developing in this area should be seen as being complementary to those set out in other international

instruments, including the European Convention on Human Rights, the United Nations Convention on the Rights of the Child, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

Mixed gender staffing

23. As the CPT stressed in its 9th General Report, mixed gender staffing is an important safeguard against ill-treatment in places of detention. The presence of male and female staff can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention.

Mixed gender staffing also allows for appropriate staff deployment when carrying out gender sensitive tasks, such as searches. In this context, the CPT wishes again to emphasise that persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender.

Separate accommodation for women deprived of their liberty

24. The duty of care which is owed by a State to persons deprived of their liberty includes the duty to protect them from others who may wish to cause them harm. The CPT has occasionally encountered allegations of woman upon woman abuse. However, allegations of ill-treatment of women in custody by men (and, more particularly, of sexual harassment, including verbal abuse with sexual connotations) arise more frequently, in particular when a State fails to provide separate accommodation for women deprived of their liberty with a preponderance of female staff supervising such accommodation.

As a matter of principle, women deprived of their liberty should be held in accommodation which is physically separate from that occupied by any men being held at the same establishment. That said, some States have begun to make arrangements for couples (both of whom are deprived of their liberty) to be accommodated together, and/or for some degree of mixed gender association in prisons. The CPT welcomes such progressive arrangements, provided that the prisoners involved agree to participate, and are carefully selected and adequately supervised.

Equality of access to activities

25. Women deprived of their liberty should enjoy access to meaningful activities (work, training, education, sport etc.) on an equal footing with their male counterparts. As the Committee mentioned in its last General Report, CPT delegations all too often encounter women inmates being offered activities which have been deemed "appropriate" for them (such as sewing or handicrafts), whilst male prisoners are offered training of a far more vocational nature.

In the view of the CPT, such a discriminatory approach can only serve to reinforce outmoded stereotypes of the social role of women. Moreover, depending upon the circumstances, denying women equal access to regime activities could be qualified as degrading treatment.

Ante natal and post natal care

26. Every effort should be made to meet the specific dietary needs of pregnant women prisoners, who should be offered a high protein diet, rich in fresh fruit and vegetables.

27. It is axiomatic that babies should not be born in prison, and the usual practice in Council of Europe member States seems to be, at an appropriate moment, to transfer pregnant women prisoners to outside hospitals.

Nevertheless, from time to time, the CPT encounters examples of pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynaecological examinations and/or delivery. Such an approach is completely unacceptable, and could certainly be qualified as inhuman and degrading treatment. Other means of meeting security needs can and should be found.

28. Many women in prison are primary carers for children or others, whose welfare may be adversely affected by their imprisonment.1 One particularly problematic issue in this context is whether--and, if so, for how long--it should be possible for babies and young children to remain in prison with their mothers. This is a difficult question to answer given that, on the one hand, prisons clearly do not provide an appropriate environment for babies and young children while, on the other hand, the forcible separation of mothers and infants is highly undesirable.

29. In the view of the CPT, the governing principle in all cases must be the welfare of the child. This implies in particular that any ante and post natal care provided in custody should be equivalent to that available in the outside community. Where babies and young children are held in custodial settings, their treatment should be supervised by specialists in social work and child development. The goal should be to produce a child-centred environment, free from the visible trappings of incarceration, such as uniforms and jangling keys.

Arrangements should also be made to ensure that the movement and cognitive skills of babies held in prison develop normally. In particular, they should have adequate play and exercise facilities within the prison and, wherever possible, the opportunity to leave the establishment and experience ordinary life outside its walls.

Facilitating child-minding by family members outside the establishment can also help to ensure that the burden of child-rearing is shared (for example, by the child's father). Where this is not possible, consideration should be given to providing access to creche-type facilities. Such arrangements can enable women prisoners to participate in work and other activities inside the prison to a greater extent than might otherwise be possible

Hygiene and health issues

30. The Committee also wishes to call attention to a number of hygiene and health issues in respect of which the needs of women deprived of their liberty differ significantly from those of men.

31. The specific hygiene needs of women should be addressed in an adequate manner. Ready access to sanitary and washing facilities, safe disposal arrangements for blood-stained articles, as well as provision of hygiene items, such as sanitary towels and tampons, are of particular importance. The failure to provide such basic necessities can amount, in itself, to degrading treatment.

32. It is also essential that the health care provided to persons deprived of their liberty be of a standard equivalent to that enjoyed by patients in the outside community.

Insofar as women deprived of their liberty are concerned, ensuring that this principle of equivalence of care is respected will require that health care is provided by medical practitioners and nurses who have specific training in women's health issues, including in gynaecology.

Moreover, to the extent that preventive health care measures of particular relevance to women, such as screening for breast and cervical cancer, are available in the outside community, they should also be offered to women deprived of their liberty.

Equivalence of care also requires that a woman's right to bodily integrity should be respected in places of detention as in the outside community. Thus, where the so-called "morning after" pill and/or other forms of abortion at later stages of a pregnancy are available to women who are free, they should be available under the same conditions to women deprived of their liberty.

33. As a matter of principle, prisoners who have begun a course of treatment before being incarcerated should be able to continue it once detained. In this context, efforts should be made to ensure that adequate supplies of specialist medication required by women are available in places of detention.

As regards, more particularly, the contraceptive pill, it should be recalled that this medication may be prescribed for medical reasons other than preventing conception (e.g. to alleviate painful menstruation). The fact that a woman's incarceration may -- in itself -- greatly diminish the likelihood of conception while detained is not a sufficient reason to withhold such medication.

INTER-GOVERNMENTAL ORGANISATIONS (IGOS)

1. African Commission on Human and Peoples' Rights
31 Bijilo Annex Layout, Kombo North District
Western Region P.O. Box 673 Banjul
The Gambia
Tel: +220 441 0505, +220 441 0506
Fax: +220 441 0504
Email: au-banjul@africa-union.org
www.achpr.org

2. Council of Europe
Avenue de l'Europe
F-67075 Strasbourg-Cedex
France
Tel: +33 3 88 41 2000
http://hub.coe.int

3. Inter-American Commission on Human Rights
Organization of American States
1889 F St NW
Washington, DC, 20006
United States
Tel: +1 202 370 9000
Fax: +1 202 458 3992 / +1 202 458 3650
Email: cidhdenuncias@oas.org
www.oas.org/en/iachr

4. Inter-American Court of Human Rights
Avenida 10, Calles 45 y 47
Los Yoses, San Pedro, San José
Costa Rica
Tel: +506 2527 1600
Fax: +506 2234 0584
Email: corteidh@corteidh.or.cr
www.corteidh.or.cr

5. Inter-American Institute of Human Rights
Av 8, st 43-41,
Los Yoses, Montes de Oca, San Pedro, San José
Costa Rica
ZIP: 10.081-1000
Tel: +506 2234 0404
Fax: +506 2234 09 55
Email: instituto@iidh.ed.cr
www.iidh.ed.cr

6. Office of the UN High Commissioner for Human Rights
OHCHR-UNOG
CH 1211 Geneva 10, Switzerland
Tel: +41 22 917 9000
Fax: +41 22 917 0099
Email: webadmin.hchr@unog.ch
www.unhchr.ch

7. Organization for Security and Co-operation in Europe
Office for Democratic Institutions and Human Rights
Ul. Miodowa 10
00-251 Warsaw
Poland
Tel: +48 22 520 0600
Fax: +48 22 520 0605
Email: office@odihr.pl
www.osce.org/odihr

NON-GOVERNMENTAL ORGANISATIONS (NGOS) AND PROFESSIONAL ASSOCIATIONS

8. Amnesty International (AI)
International Secretariat
1 Easton St
London WC1X 8DJ
United Kingdom
Telephone: +44 20 7413 5500
Fax: +44 20 7956 1157
Email: amnestyis@amnesty.org
www.amnesty.org

9. Association pour la Prévention de la Torture (APT)
Route de Ferney 10
Case postale 2267
CH-1211 Geneva 2
Switzerland
Telephone: +41 22 734 2088
Fax: +41 22 734 5649
Email: apt@apt.ch
www.apt.ch

10. Federation Internationale des Ligues des Droits de l'homme (Fidh)
17 Passage de la Main d'Or
75011 Paris
France
Tel: +33 1 43 55 2518
Fax: +33 1 43 55 1880
Email: fidh@csi.com
www.fidh.imaginet.fr

11. Human Rights Watch (HRW)
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
United States
Tel: +1 212 290 4700
Fax: +1 212 736 1300
Email: hrwnyc@hrw.org
www.hrw.org

12. International Association of Judges
Palazzo di Giustizia
Piazza Cavour
00193 Roma
Italy
Tel: +39 06 6883 2213
Fax: +39 06 687 1195
Email: secretariat@iaj-uim.org
www.iaj-uim.org

13. International Bar Association
4th Floor
10 St Bride Street
London EC4A 4AD
United Kingdom
Tel: +44 20 7842 0090
Fax: +44 20 7842 0091
www.ibanet.org

14. International Commission of Jurists
PO Box 216
81a Avenue de Chatelaine
1219 Geneva
Switzerland
Tel: +41 22 979 3800
Fax: +41 22 979 3801
Email: info@icj.org
www.icj.org

15. International Committee of the Red Cross
19 Avenue de la Paix
CH 1202 Geneva
Switzerland
Tel: +41 22 734 6001
Fax: +41 22 733 2057 (Public Information Centre)
Email: webmaster.gva@icrc.org
www.icrc.org

16. International Rehabilitation Centre for Torture Victims (IRCT)
PO Box 2107
DK-1014 Copenhagen K
Denmark
Tel: +45 33 76 0600
Fax: +45 33 76 0500
Email: irct@irct.org
www.irct.org

17. International Service for Human Rights
1 Rue de Varembé
PO Box 16
Ch-1211 Geneva CIC
Switzerland
Tel: +41 22 733 5123
Fax: +41 22 733 0826
www.ishr.ch

18. Lawyers Committee for Human Rights (LCHR)
333 Seventh Avenue, 13th Floor
New York, NY 10001
United States
Tel: +1 212 845 5200
Fax: +1 212 845 5299
Email: lchrbin@lchr.org
www.lchr.org

19. Penal Reform International
60-62 Commercial Street
London E1 6LT
United Kingdom
Phone: +44 20 7247 6515
Fax: +44 20 7377 8711
Email: info@penalreform.org
www.penalreform.org

20. Physicians for Human Rights (PHR)
Physicians for Human Rights
2 Arrow Street Suite 301
Cambridge, MA 02138
United States
Tel: +1 617 301 4200
Fax: +1 617 301 4250
Email: phrusa@igc.apc.org
www.phrusa.org

21. Redress
3rd Floor
87 Vauxhall Walk
London SE11 5HJ
United Kingdom
Tel: +44 20 7793 1777
Fax: +44 20 7793 1719
Email: redresstrust@gn.apc.org
www.redress.org

22.World Medical Association (WMA)
PO Box 63
01212 Ferney-Voltaire Cedex
France
Tel: +33 4 50 40 7575
Fax: +33 4 50 40 5937
Email: info@wma.net
www.wma.net

23.World Organisation Against Torture/Organisation Mondiale Contre La Torture (OMCT) International Secretariat
PO Box 21
8, Rue du Vieux-Billard
1211 Geneva 8
Switzerland
Tel: + 41 22 809 4939
Fax: + 41 22 809 4929
Email: omct@omct.org
www.omct.org

ARTICLE 5 OF THE AMERICAN CONVENTION

Article 5 – Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

I – Court's Jurisprudence on Article 5 of the American Convention

a) Case *VELÁSQUEZ RODRÍGUEZ* – Judgment of 26 June 1989

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

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
> 2. No one shall be subjected to torture or to cruel inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention.

"187. The disappearance of Manfredo Velásquez violates the right to personal integrity recognized by Article 5 of the Convention (supra 156). First, the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) to treatment respectful of his dignity. Second, although it has not been directly shown that Manfredo Velásquez was physically tortured, his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1(1) to ensure the rights under Article 5(1) and 5(2) of the Convention. The guarantee of physical integrity and the right of detainees to

treatment respectful of their human dignity require States Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected."

b) Case *LOAYZA-TAMAYO* – Judgment of 17 September 1997

"57. Accordingly, the declarations signed in the presence of a notary and presented by the victim should be admitted into evidence. The Court has the discretionary authority to weigh the declarations or statements presented to it, both written and otherwise. Like any court, it can properly weigh the evidence, applying the rule of "sound criticism" that enables judges to arrive at a decision as to the truth of the facts alleged, while bearing in mind the object and purpose of the American Convention (Paniagua Morales et al. Case, Judgment of March 8, 1998. Series C No. 37, para. 76)."

"58. One of the documents challenged by the State was the "Preliminary Report". Peru's argument was that the report had not been signed by the individual responsible for issuing it. However, the Court has seen the original document submitted by the victim, which bears the signature of Ms. Eliana Horvitz, psychiatrist with the Mental Health Team, and is written on letterhead paper of the "Fundación de Ayuda Social de Fieles de las Iglesias Cristianas"

PART 2 – INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

II – Article 1

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

III – Article 2

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

IV – Article 3

The following shall be held guilty of the crime of torture:

a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

V – Article 4

The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.

VI – Article 5

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

VII – Article 6

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

VIII – Article 7

The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.

IX – Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

X – Article 9

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.

XI – Article 10

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.

XII – Article 11

The States Parties shall take the necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

XIII – Article 12

Every State Party shall take the necessary measures to establish its jurisdiction over the

crime described in this Convention in the following cases:

a. When torture has been committed within its jurisdiction;

b. When the alleged criminal is a national of that State; or

c. When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

XIV – Article 13

The crime referred to in Article 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between States Parties. The States Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them.

Every State Party that makes extradition conditional on the existence of a treaty may, if it receives a request for extradition from another State Party with which it has no extradition treaty, consider this Convention as the legal basis for extradition in respect of the crime of torture. Extradition shall be subject to the other conditions that may be required by the law of the requested State.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such crimes as extraditable offences between themselves, subject to the conditions required by the law of the requested State.

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

XV – Article 14

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.

XVI – Article 15

No provision of this Convention may be interpreted as limiting the right of asylum, when appropriate, nor as altering the obligations of the States Parties in the matter of extradition.

XVII – Article 16

This Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture.

XVIII – Article 17

The States Parties undertake to inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavor in its annual report to analyze the existing situation in the member

states of the Organization of American States in regard to the prevention and elimination of torture.

XIX – Article 18

This Convention is open to signature by the member states of the Organization of American States.

XX – Article 19

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

XXI – Article 20

This Convention is open to accession by any other American state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

XXII – Article 21

The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions.

XXIII – Article 22

This Convention shall enter into force on the thirtieth day following the date on which the second instrument of ratification is deposited. For each State ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day following the date on which that State deposits its instrument of ratification or accession.

XXIV – Article 23

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

XXV – Article 24

The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication, in accordance with the provisions of Article 102 of the United Nations Charter. The General Secretariat of the Organization of American States shall notify the member states of the Organization and the States that have acceded to the Convention of signatures and of deposits of instruments of ratification, accession, and denunciation, as well as reservations, if any.

1. CONSTITUTION OF THE FEDERAL REPUBLIC OF BRAZIL, PROMULGATED ON 5 OCTOBER 1988

Article 1

The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:

1. sovereignty;
2. citizenship;
3. the dignity of the human person;
4. the social values of labour and of the free enterprise;
5. political pluralism.

Sole paragraph - All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution.

Article 4

The international relations of the Federative Republic of Brazil are governed by the following principles:

1. national independence;
2. prevalence of human rights;
3. self-determination of the peoples;
4. non-intervention;
5. equality among the states;
6. defense of peace;
7. peaceful settlement of conflicts;
8. repudiation of terrorism and racism;
9. cooperation among peoples for the progress of mankind;
10. granting of political asylum.

Sole paragraph - The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations.

Article 5

All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

III - no one shall be submitted to torture or to inhuman or degrading treatment;

XLI - the law shall punish any discrimination which may attempt against fundamental rights and liberties;

XLIII - the practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty, and their principals, agents and those who omit

themselves while being able to avoid such crimes shall be held liable;
XLVII - there shall be no punishment:
a) of death, save in case of declared war under the terms of article 84, MX;
b) of life imprisonment;
c) of hard labour;
d) of banishment;
e) which is cruel;
XLIX - prisoners are ensured of respect to their physical and moral integrity;
LIII - no one shall undergo legal proceeding or sentencing save by the competent authority;
LVI - evidence obtained through illicit means are unacceptable in the process;
LXI - no one shall be arrested unless in flagrante delicto or by a written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law;
LXII - the arrest of any person as well as the place where he is being held shall be immediately informed to the competent judge and to the family of the person arrested or to the person indicated by him;
LXIII - the arrested person shall be informed of his rights, among which the right to remain silent, and he shall be ensured of assistance by his family and a lawyer;
LXIV - the arrested person is entitled to identification of those responsible for his arrest or for his police questioning;
LXV - illegal arrest shall be immediately remitted by the judicial authority;
LXVIII - habeas corpus shall be granted whenever a person suffers or is in danger of suffering violence or coercion against his freedom of locomotion, on account of illegal actions or abuse of power;
LXXV - the State shall compensate a convict for judicial error, as well as a person who remains imprisoned for a period longer than the one established by the sentence;

2. LAW NO. 9.455, 7 APRIL 1997 – THE CRIME OF TORTURE AND ITS RESPECTIVE PUNISHMENTS (IN PORTUGUESE)

Artigo 1º
Constitui crime de tortura:
I - constranger alguém com emprego de violência ou grave ameaça, causando-lhe sofrimento físico ou mental:
a) com o fim de obter informação, declaração ou confissão da vítima ou de terceira pessoa;
b) para provocar ação ou omissão de natureza criminosa;
c) em razão de discriminação racial ou religiosa;

II - submeter alguém, sob sua guarda, poder ou autoridade, com emprego de violência ou grave ameaça, a intenso sofrimento físico ou mental, como forma de aplicar castigo pessoal ou medida de caráter preventivo.Pena - reclusão, de dois a oito anos.
§ 1º Na mesma pena incorre quem submete pessoa presa ou sujeita a medida de segurançaa sofrimento físico ou mental, por intermédio da prática de ato não previsto em lei ou nãoresultante de medida legal.

§ 2º Aquele que se omite em face dessas condutas, quando tinha o dever de evitá-las ou apurá--las, incorre na pena de detenção de um a quatro anos.

§ 3º Se resulta lesão corporal de natureza grave ou gravíssima, a pena é de reclusão de quarto a dez anos; se resulta morte, a reclusão é de oito a dezesseis anos.

§ 4º Aumenta-se a pena de um sexto até um terço:
I - se o crime é cometido por agente público;
II – se o crime é cometido contra criança, gestante, portador de deficiência, adolescente ou maior de 60 (sessenta) anos; (Redação dada pela Lei nº 10.741, de 2003)
III - se o crime é cometido mediante seqüestro.

§ 5º A condenação acarretará a perda do cargo, função ou emprego público e a interdição para seu exercício pelo dobro do prazo da pena aplicada.

§ 6º O crime de tortura é inafiançável e insuscetível de graça ou anistia.

§ 7º O condenado por crime previsto nesta Lei, salvo a hipótese do § 2º, iniciará o cumprimento da pena em regime fechado.

Artigo 2º
O disposto nesta Lei aplica-se ainda quando o crime não tenha sido cometido em
território nacional, sendo a vítima brasileira ou encontrando-se o agente em local sob jurisdição
brasileira.

Artigo 3º
Esta Lei entra em vigor na data de sua publicação.

Artigo 4º
Revoga-se o art. 233 da Lei nº 8.069, de 13 de julho de 1990 - Estatuto da Criança e do Adolescente.

3. LAW NO. 4.898, 9 DECEMBER 1965 (IN PORTUGUESE)

Artigo 3º
Constitui abuso de autoridade qualquer atentado:
i) à incolumidade física do indivíduo;

Artigo 4º
Constitui também abuso de autoridade:
a) ordenar ou executar medida privativa da liberdade individual, sem as formalidades legais ou com abuso de poder;
b) submeter pessoa sob sua guarda ou custódia a vexame ou a constrangimento não autorizado em lei;

c) deixar de comunicar, imediatamente, ao juiz competente a prisão ou detenção de qualquer pessoa;

4. DECREE-LAW NO. 2.848, 7 DECEMBER 1940 – BRAZILIAN PENAL CODE
Artigo 61. (IN PORTUGUESE)

São circunstâncias que sempre agravam a pena, quando não constituem ou qualificamo crime:(Redação dada pela Lei nº 7.209, de 11.7.1984)

II - ter o agente cometido o crime: (Redação dada pela Lei nº 7.209, de 11.7.1984)
d) com emprego de veneno, fogo, explosivo, tortura ou outro meio insidioso ou cruel, ou de que podia resultar perigo comum;
f) com abuso de autoridade ou prevalecendo-se de relações domésticas, de coabitação ou de hospitalidade, ou com violência contra a mulher na forma da lei específica)redação dada pela Lei nº11.340, de 2006)

5. LAW NO. 8.072, 25 JULY 1990 – RELATING TO SERIOUS CRIMES IN TERMS OF ARTICLE 5, CLAUSE 43, OF THE FEDERAL CONSTITUTION, AND DETERMINING OTHER THINGS (IN PORTUGUESE)

Artigo 2º
Os crimes hediondos, a prática da tortura, o tráfico ilícito de entorpecentes e drogas afins e o terrorismo são insuscetíveis de:
I - anistia, graça e indulto;
II - fiança e liberdade provisória.

§ 1º A pena por crime previsto neste artigo será cumprida inicialmente em regime fechado.

§ 2º A progressão de regime, nos casos dos condenados aos crimes previstos neste artigo, dar-se-á após o cumprimentos de 2/5(dois quintos) da pena, se o operado for primário, e de 3/5(três quintos) se reincidente (redação dada pela Lei nº11.464, de 2007)

§ 3º Em caso de sentença condenatória, o juiz decidirá fundamentadamente se o réu poderá apelar em liberdade.

§ 4º A prisão temporária, sobre a qual dispõe a Lei nº 7.960, de 21 de dezembro de 1989, nos crimes previstos neste artigo, terá o prazo de trinta dias, prorrogável por igual período em caso de extrema e comprovada necessidade.(redação dada pela Lei nº11.464, de 2007)

6.LAW NO. 7.210, 11 JULY 1984 (IN PORTUGUESE)

Artigo 40.
Impõe-se a todas as autoridades o respeito à integridade física e moral dos condenadose dos presos provisórios.

Artigo 45.
Não haverá falta nem sanção disciplinar sem expressa e anterior previsão legal ou regulamentar.

§ 1º As sanções não poderão colocar em perigo a integridade física e moral do condenado.
§ 2º É vedado o emprego de cela escura.
§ 3º São vedadas as sanções coletivas.

Artigo 58.
O isolamento, a suspensão e a restrição de direitos não poderão exceder a trinta dias, ressalvada a hipótese do regime disciplinar diferenciado. (Redação dada pela Lei nº 10.792, de 1º.12.2003)

Parágrafo único. O isolamento será sempre comunicado ao Juiz da execução.

Artigo 59.
Praticada a falta disciplinar, deverá ser instaurado o procedimento para sua apuração, conforme regulamento, assegurado o direito de defesa.

Parágrafo único. A decisão será motivada.

Artigo 60.
A autoridade administrativa poderá decretar o isolamento preventivo do faltoso pelo prazo de até dez dias. A inclusão do preso no regime disciplinar diferenciado, no interesse da disciplina e da averiguação do fato, dependerá de despacho do juiz competente. (Redação dada pela Lei nº 10.792, de 1º.12.2003)

Artigo 66.
Compete ao Juiz da execução:
VII - inspecionar, mensalmente, os estabelecimentos penais, tomando providências para o adequado funcionamento e promovendo, quando for o caso, a apuração de responsabilidade;
VIII - interditar, no todo ou em parte, estabelecimento penal que estiver funcionando em condições inadequadas ou com infringência aos dispositivos desta Lei;

Artigo 67.
O Ministério Público fiscalizará a execução da pena e da medida de segurança, oficiando no processo executivo e nos incidentes da execução.

Artigo 68.
Incumbe, ainda, ao Ministério Público:
II - requerer:
b) a instauração dos incidentes de excesso ou desvio de execução;

Parágrafo único. O órgão do Ministério Público visitará mensalmente os estabelecimentos penais, registrando a sua presença em livro próprio.

Artigo 185.
Haverá excesso ou desvio de execução sempre que algum ato for praticado além dos limites fixados na sentença, em normas legais ou regulamentares.

Artigo 186.
Podem suscitar o incidente de excesso ou desvio de execução:
I - o Ministério Público;
II - o Conselho Penitenciário;
III - o sentenciado;
IV - qualquer dos demais órgãos da execução penal.

Artigo 198.
É defesa ao integrante dos órgãos da execução penal, e ao servidor, a divulgação deocorrência que perturbe a segurança e a disciplina dos estabelecimentos, bem como exponha o preso à inconveniente notoriedade, durante o cumprimento da pena.

Artigo 199.
O emprego de algemas será disciplinado por decreto federal.

7. DECREE-LAW NO. 3.689, 3 OCTOBER 1941 – BRAZILIAN PENAL PROCEDURES CODE (IN PORTUGUESE)

Artigo 21.
A incomunicabilidade do indiciado dependerá sempre de despacho nos autos e somente será permitida quando o interesse da sociedade ou a conveniência da investigação o exigir.

Parágrafo único.
A incomunicabilidade, que não excederá de três dias, será decretada por despacho fundamentado do Juiz, a requerimento da autoridade policial, ou do órgão do Ministério Público, respeitado, em qualquer hipótese, o disposto no artigo 89, inciso III, do Estatuto da Ordem dos Advogados do Brasil (Lei n. 4.215, de 27 de abril de 1963) (Redação dada pela Lei nº5.010, de 30.5.1966)

Artigo 185.
O acusado que comparecer perante a autoridade judiciária, no curso do processo penal, será qualificado e interrogado na presença de seu defensor, constituído ou nomeado. (Redação dada pela Lei nº 10.792, de 1º.12.2003)
§ 1º O interrogatório do réu preso será realizado, em sala própria, no estabelecimento em que estiver recolhido, desde que estejam garantidas a segurança do juiz, do membro do Ministério Público e dos auxiliares bem como a presença do defensor e a publicidade do ato. (Redação dada pela Lei nº 11.900, de 2009)
§ 2º Excepcionalmente, o juiz, por decisão fundamentada, de ofício ou a requerimento das partes, poderá realizar o interrogatório do réu preso por sistema de videoconferência ou outro recurso tecnológico de transmissão de sons e imagens em tempo real, desde que a medida seja necessária para atender a uma das seguintes finalidades: (Redação dada pela Lei nº11.900, de 2009)
I - prevenir risco à segurança pública, quando exista fundada suspeita de que o preso integreorganização criminosa ou de que, por outra razão, possa fugir durante o deslocamento; (Incluído pela Lei nº 11.900, de 2009)

II - viabilizar a participação do réu no referido ato processual, quando haja relevante dificuldade para seu comparecimento em juízo, por enfermidade ou outra circunstância pessoal; (Incluído pela Lei nº 11.900, de 2009)
III - impedir a influência do réu no ânimo de testemunha ou da vítima, desde que não seja possível colher o depoimento destas por videoconferência, nos termos do art. 217 deste Código;(Incluído pela Lei nº 11.900, de 2009)
IV - responder à gravíssima questão de ordem pública. (Incluído pela Lei nº 11.900, de 2009)

[This document, drafted by the São Paulo-based NGO Conectas and partner organizations, contains a step-by-step roadmap for how to effectively tackle the problem of human rights violations in the prison system. It presents 10 urgent measures that need to be taken by the state and federal authorities.]

1. Break with the policy of mass incarceration, promoting the application of alternative penalties, reparative justice, the decriminalization of behavior and reinforcing the ultima ratio principle of criminal law.
2. Social control of the prison system, by creating a national mechanism (Bill No. 2442/11) and a state-level mechanism (a bill has already been presented to the São Paulo State Department of Justice) to prevent and combat torture that are independent and whose members are selected through a public hearing, in the molds of the UN's "Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (ratified by Brazil in 2007); by creating a federal statute that regulates the system and grants access to prisons so human rights organizations can conduct inspections at any detention facility; by supporting the effective implementation of Community Councils in all judicial districts where there are prisons; and by strengthening/creating internal affairs units and ombuds offices for the prison system, which must be external.
3. Put an end to the abusive use of pre-trial detention and create "custodial hearings", calling on the Judiciary and the Public Prosecutor's Offices to effectively apply the provisions of Federal Law No. 12,403/11, which establishes alternatives to pre-trial detention; encourage the actions of the National Justice Council (CNJ) in monitoring the abuse of pre-trial detention; approve Bill No. 554/11 that creates "custodial hearings" and sets a time frame of 24 hours for suspects to see a judge, in the presence of their lawyer, to analyze the need for imprisonment (this will also serve to prevent any mistreatment upon arrest).
4. Access to Justice, by strengthening the federal and state-level Public Defender's Offices and assuring their financial independence; by increasing the number of public defenders – giving priority to public defender vacancies inside prison facilities – and their support staff (social workers, psychologists, sociologists); and by setting up a system inside detention facilities for prisoners to keep track of all stages of their legal cases.
5. Reduce the impact of the drug law in the prison system, by improving medical services and treatment for drug addicts; by creating objective legal categories that clearly define who are users, who are small-time dealers and who are major traffickers; and by decriminalizing the use/possession of drugs, through support for the judgment of Special Appeal No. 635,659 currently pending before the Supreme Court.
6. Dignified treatment of imprisoned women, by installing amenities and equipment that consider the specifics of gender; by effectively providing access to healthcare (prevention and treatment), maintaining family relationships and offering adequate material assistance; and by stopping the oppressive searches of prisoners' relatives (in both male and female prisons).
7. Place more value on education and employment inside the prison system, which ought to be viewed as two of the primary instruments for rehabilitation, underpinned by public policy

to encourage them and, more importantly, to provide them, while avoiding the exploration of indecent work.

8. Significant increase in funding for public policies for ex-prisoners, to help them re-enter the job market and provide them and their families with adequate psychosocial treatment; promotion of the effective implementation of the system of patronage, under the terms of the Criminal Enforcement Law.

9. Realization of the constitutional right of access to health, transferring the administration of healthcare in the prison system to SUS (Brazil's public healthcare system) and providing material assistance to prisoners in sufficient quantity and quality.

10. Forensic Autopsy Centers that operate independently from the Public Security Departments, guaranteeing independence and autonomy for pathologists to conduct the necessary examinations.

Expert Opinion of the UN Special Rapporteur on Torture of the Constitutionality of the Differentiated Disciplinary Regime in Brazil

UN Office for the High Commissioner for Human Rights

Washington D.C., June 20 2013

To Honourable Madam Justice of the Brazilian Supreme Federal Court of Brazil
Justice ROSA WEBER, Rapporteur of the Direct Unconstitutionality Action (ADIN) No. 4,162

Ref.: CONSTITUTIONALITY OF THE DIFFERENTIATED DISCIPLINARY REGIME IN BRAZIL

Legal opinion letter. Juan E. Méndez is the United Nations Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 16/23.[1]

This submission is drafted on a voluntary basis to the Brazilian Supreme Court in the case regarding the constitutionality of the Law 10792, which contemplates a differentiated disciplinary regime in an individual cell for up to 360 days, for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Pursuant to U.N. Human Rights Council resolution 16/23 (A/HRC/RES/16/23), Méndez acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine, and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning torture and other cruel, inhuman, or degrading treatment or punishment.

Professor Méndez is the author, with Marjory Wentworth, of TAKING A STAND (New York: Palgrave-MacMillan, October 2011), which examines the uses of arbitrary detention, torture, disappearances, rendition, and genocide in countries around the world.

He was Co-Chair of the Human Rights Institute of the International Bar Association, London in 2010 and 2011; and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague from mid-2009 to late 2010. Until May 2009, Méndez was the

1. Counsel of record for all parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amicus or his counsel made a monetary contribution to this brief's preparation or submission.

President of the International Center for Transitional Justice (ICTJ). Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003 he was a member of the Inter-American Commission on Human Rights of the Organization of American States, and its President in 2002. He directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996).

He teaches human rights at American University in Washington D.C. and at Oxford University in the United Kingdom. He previously taught at Notre Dame Law School, Georgetown, and Johns Hopkins.

Honourable Madam Justice,

I, hereby, as the Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment of the United National Human Rights Council (UNHRC), express my critical stance regarding the Differentiated Disciplinary Regime in Brazil (RDD, in its original acronym), whose constitutionality is currently being challenged in the present Direct Unconstitutionality Action by the Federal Council of the Bar Association of Brazil, representing the main issue in the present case before the Supreme Court.

Within the scope of my mandate, I have asserted that the use of solitary confinement should be abolished or, at least, be only accepted in very exceptional circumstances, as a last resort and for as short a time as possible. In all cases, however, the use of prolonged solitary confinement, its use as punishment, or its application – of any length - to persons with mental disabilities or juveniles should be prohibited. The reason for this is that solitary confinement can lead to severe pain and suffering that can amount to cruel, inhuman, and degrading treatment or punishment, or even torture. Furthermore, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.

In accordance with the definition established in the Istanbul Statement on the Use and Effects of Solitary Confinement, I have defined solitary confinement as the physical and social isolation of individuals confined to their cells between twenty-two to twenty-four hours per day.[2] The RDD in Brazil, which provides for the isolation of detained person in an individual cell for up to 360 days, without prejudice to extensions of similar length for new offences and up to one sixth of the prison term, constitutes solitary confinement. In fact, I have already expressed concern about this regime in my thematic report on solitary confinement that is attached to this letter.[3]

The RDD in Brazil may constitute a violation of Brazil's international obligation pursuant to the absolute prohibition of torture and cruel, inhuman and degrading treatment for various reasons. Accordingly, the RDD is a clear example of prolonged solitary confinement, it allows for the use of solitary confinement as punishment, and it allows for its application during pre-trial detention. In my experience, and as identified in my thematic report, these are all situations in which the use of solitary confinement can intensify the possible harm and negative psychological effect caused by isolation to levels that reach the threshold of cruel, inhuman, and degrading treatment, or even torture and, therefore, must be prohibited.

2. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 25.
3. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 24.

The RDD as prolonged solitary confinement

While the use of solitary confinement for short periods of time may be justified in certain circumstances, determined on a case-by-case basis, the use of prolonged or indefinite solitary confinement can never constitute a legitimate instrument of the State. Based on the conclusions of several scientific studies, I have defined prolonged solitary confinement as isolation that lasts for more than fifteen days.[4] According to those studies, after fifteen days the adverse effects of isolation on the person's mental health are more acute and can be irreversible.[5] Such harmful effects include psychotic disturbances, anxiety, depression, anger, perceptual distortions, paranoia and self-harm.[6] Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.

Such concept, herein defended, that 15 days constitute the maximum limit for the use of solitary confinement is based on the scientific literature on this field, according to which, after this threshold, the harmful psychological effects of isolation become too intense, or even irreversible. This limit of 15 days is a proposal still open to debate with experts. Nevertheless, my main point is that the time limit for the use of solitary confinement must be considered in light of the risk of submitting the individual to torture or cruel, inhuman, or degrading treatment or punishment.

Based on the above considerations, I have concluded that prolonged solitary confinement always constitutes cruel, inhuman, and degrading treatment or even torture and must, therefore, be prohibited.[7] In this sense, a law and practice like the one being reviewed in this case by the Supreme Court, which allows for an individual to be confined to a cell for a period of 360 days and, furthermore, permits extensions in the event of subsequent offenses up to one-sixth of the length of the sentence without judicial review, is in violation of Article 7 of the International Covenant on Civil and Political Rights, Articles 1 and 16 of the Convention against Torture, and Article 5 of the American Convention on Human Rights.

The Inter-American Court of Human Rights, whose binding jurisdiction was accepted by Brazil, has established that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being."[8] Likewise, Principle XXII(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas affirms that prolonged use of solitary confinement amounts to acts torture or cruel, inhuman, or degrading treatment or punishment.

Another issue likely to play a prominent role in the debate regarding the present "ADIN" is the lack of access to meaningful human contact within the prison, and contact with the outside world. Social interaction is a vital component of mental health of persons under confinement, especially those subjected to this regime for long periods of time, such as in the case of Brazil. In many jurisdictions, such as in Brazil, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. The reduction in stimuli is

4. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 26.
5. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 26.
6. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 62.
7. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 76.
8. *Velázquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Series C, No. 4, para. 156 (1988).

not only quantitative but also qualitative. Meaningful contact with other people is typically reduced to a minimum. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.[9]

In my report above mentioned submitted to the United Nations Human Rights Council, I noted that the European Court of Human Rights recognized that: *"complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason"*.[10] [11]

Within prisons this contact could be with health professionals, prison guards or other prisoners. Contact with the outside world could include, for instance, visits, mail, and phone calls from legal counsel, family and friends, and access to reading material, television or radio. Article 17 of the International Covenant on Civil and Political Rights grants prisoners the right to family and correspondence. Additionally, the Standard Minimum Rules for the Treatment of Prisoners provide for various external stimuli (Article 21 on exercise and sport; Articles 37-39 on contact with the outside world; Article 40 on books; Articles 41-42 on religion; Articles 71-76 on work; Article 77 on education and recreation; and Articles 79-81 on social relations and after-care).[12]

The RDD and solitary confinement as punishment

In addition to its prolonged aspect, the RDD in Brazil provides for the use of solitary confinement as punishment or disciplinary measure in cases where the detained person has committed crimes while in custody. This constitutes another reason for concern that may implicate a violation of the prohibition of torture.

In my study, I have stated that solitary confinement, as a punitive measure, may never be justified for any reason due to the severe mental pain and suffering caused to the individual, regardless of the severity of the crime.[13] Even in the event of a breach of prison rules and regulations, individuals should not be subjected to such measures as it inflicts suffering on the prisoner beyond what is necessary for a reasonable punishment, and is contrary to the objective of rehabilitation.[14]

In a similar way, Principle XXII(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas affirms that solitary confinement should be strictly prohibited in punishment cells. Member States of the Inter-American System, including Brazil, must take into consideration those Principles. This document, adopted by the Inter-American Commission on Human Rights, "sets up general principles, principles relating to conditions of deprivation of liberty and principles relating to the systems of deprivation of liberty, among which the following principles stand out: humane treatment, equality and non-discrimination, impartiality, personal liberty, legality and due process of law. It also presents a number of fundamental rights and guarantees recognized in

9. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 25.
10. Ilascu and others v. Moldova and Russia, Application No. 48787/99, European Court of Human Rights (2004), para. 432.
11. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 55.
12. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 53.
13. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 84.
14. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 72.

international human rights treaties and the jurisprudence of the Inter-American system. It covers, in addition, several good practices, preventive measures and protection for persons deprived of liberty in various circumstances" .[15]

The Principle XXII(3) deals specifically with solitary confinement, as seen below:

"The law shall prohibit solitary confinement in punishment cells.

(...)

Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.

In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control, since its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment".[16] *(Emphases added)*

Furthermore, it is of particular concern that the RDD appears to provide insufficient due process guarantees for the application of these sanctions. In my report I have highlighted that the lack of due process standards places individuals at greater risk of additional acts of torture and ill treatment while in solitary confinement. Due process guarantees require that an individual have the ability to challenge the reasons and duration of solitary confinement.[17]

In this sense, I have emphasized the need for ensuring compliance with minimum procedural guarantees, both internal and external, in order to ensure respect for the inherent dignity of all persons deprived of liberty. A documented system of regular review of the justification for the imposition of solitary confinement should be in place, and must be carried out by an independent body, with participation and notice to the person detained and his or her lawyer, and should be duly documented.[18] In addition, detained persons held in solitary confinement must be afforded genuine opportunities to challenge before a court both the nature of their confinement and its underlying justification.[19]

Solitary Confinement and pre-trial detention

The RDD also raises concerns because it allows for the use of solitary confinement during pre-trial detention.[20] I have recommended States to take necessary steps to put an end to this practice.

Prolonged or indefinite isolation of individuals during pre-trial detention for preventive purposes may violate due process guarantees and, thus, cannot be justified. When isolation is used intentionally as a mean to pressure detainees to cooperate or extract a confession, such isolation has been found contrary to internationally recognized principles of human

15. IACHR. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II.131. Doc. 38. March 13th 2008. Approved by the Commission during its 131st regular period of sessions. Presentation.
16. IACHR. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II.131. Doc. 38. March 13th 2008. Approved by the Commission during its 131st regular period of sessions.
17. UN. General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraphs 92-98.
18. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 95.
19. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 98.
20. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 85.

rights.[21] In addition, the use of solitary confinement during pre-trial detention can elevate

the risk of being subjected to other forms of torture and cruel, inhuman, and degrading treatment. Also, the United Nations Committee against Torture ("UNCAT") has concluded that the use of solitary confinement should be abolished, especially in circumstances when isolation is used as a preventive measure during pre-trial detention.[22]

"Conclusions

The Special Rapporteur stresses that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions. He finds solitary confinement to be contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society. The Special Rapporteur defines prolonged solitary confinement as any period of solitary confinement in excess of 15 days.

Depending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture. In addition, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.

Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment..."[23]

Finally, I reiterate two recommendations I had made in the final report addressed to all UN Member States, including Brazil:

"The Special Rapporteur urges States to prohibit the imposition of solitary confinement as punishment — either as a part of a judicially imposed sentence or a disciplinary measure. He recommends that States develop and implement alternative disciplinary sanctions to avoid the use of solitary confinement." [24]
"Indefinite solitary confinement should be abolished."[25]

Juan E. Méndez
Special Rapporteur on torture and other cruel,
inhuman or degrading treatment or punishment

21. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 85.
22. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 31.
23. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraphs 79-81.
24. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 84.
25. UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 87..

BIBLIOGRAPHY

BIBLIOGRAPHY

Amnesty International, *Ethical Codes and Declarations Relevant to the Medical Professions* (4th edn, Amnesty International 2000)

— *Combating Torture: a manual for action* (Amnesty International 2003)

Association for the Prevention of Torture, *Optional Protocol: A Manual for Prevention* (APT 2005)

— *Establishment and Designation of National Preventive Mechanisms* (APT 2006)

Barreto F Costa Oliveira, *Flagrante e Prisão Provisória em casos de furto, da presunção de inocência à antecipação de pena* (Instituto Brasileiro de Ciencias Criminais 2007)

Brody R, and Ratner M, (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International 2000)

Dowdney L, *Children of the drug trade, a case study of children in organised armed violence in Rio de Janeiro* (7Letras 2003)

Evans M, and Morgan R, *Preventing Torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (OUP 1998)

Foley C, (ed), *Another system is possible: reforming Brazilian justice* (International Bar Association and Brazilian Ministry of Justice 2012)

Ginbar Y, *Why Not Torture Terrorists? Moral, Practical and Legal Aspects of the 'Ticking Bomb' Justification for Torture* (OUP 2008)

Goodwin-Gill G S, and McAdam J, *The Refugee in International Law* (3rd edn, OUP 2007)

Greco R, *Código Penal Comentado* (Impetus 2010)

Greenberg K J, (ed), *The Torture Debate in America* (Cambridge University Press 2006)

Hannum H, (ed), *Guide to International Human Rights Practice* (4th edn, Transnational Publishers 2004)

Henckaerts J-M, and Doswald-Beck L, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge University Press 2005)

Ingelse C, *The UN Committee against Torture: An Assessment* (Kluwer Academic Publishers 2001)

Penal Reform International, *Making Standards Work: an international handbook on good prison practice* (2nd edn, PRI 2001)

Pierangeli J H, and Zaffaroni E R, *Manual de Direito Penal Brasileiro – Parte Geral* – Vol 1 – 9ª Ed 2011 –, (Revista Dos Tribunais 2011)

Prillaman W C, Crime, *Democracy, and Development in Latin America*, (Centre for Strategic and International Studies, Policy Papers on the Americas, Volume XIV, Study 6, June 2003)

Rodley N S, and Pollard M, *The Treatment of Prisoners under International Law* (3rd edn, Oxford University Press 2011)

Schietti R Machad Cruz, *Prisão Cautelar: dramas, princípios e alternativas*, (Lumen Juris Editora 2006)

United Nations, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations 2004)

— Office of the United Nations High Commissioner for Human Rights, *25 Years Rebuilding Lives: United Nations Voluntary Fund for Victims of Torture* (United Nations Publications 2006)

Universidade de Brasília, *Tráfico de drogas e Constituição, Um estudo jurídico-social do tipo do art.33 da Lei de Drogas diante dos princípios constitucionais-penais* (Universidade Federal do Rio de Janeiro e Universidade de Brasília 2009)

Weiss C, *Direitos Humanos Contemporâneos* (Malheiros Editores 2011)

Weissbrodt D, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Kluwer Law International 2001)

DEFENSORIA PÚBLICA
DO ESTADO DE SÃO PAULO

Enfam
Escola Nacional de Formação e Aperfeiçoamento de Magistrados
Ministro Sálvio de Figueiredo Teixeira

CNJ CONSELHO NACIONAL DE JUSTIÇA

OAB CONSELHO FEDERAL

Secretaria de
Reforma do Judiciário

Secretaria de
Direitos Humanos

Ministério da
Justiça

GOVERNO FEDERAL
BRASIL
PAÍS RICO É PAÍS SEM POBREZA