

# Seeking Remedies for Torture Victims

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the CAT Committee

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## A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES

Preface by Manfred Nowak



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The World Organisation Against Torture (OMCT) coordinates the activities of the SOS-Torture Network, which is the world's largest coalition of non-governmental organisations fighting against torture and ill-treatment, arbitrary detention, extrajudicial executions, forced disappearances, and other serious human rights violations. OMCT's growing global network currently includes 282 local, national and regional organisations in 92 countries spanning all regions of the world. An important aspect of OMCT's mandate is to respond to the advocacy and capacity-building needs of its network members, including the need to develop effective international litigation strategies to assist victims of torture and ill-treatment in obtaining legal remedies where none are available domestically, and to support them in their struggle to end impunity in states where torture and ill-treatment remain endemic or tolerated practices. In furtherance of these objectives, OMCT has published a *Handbook Series* of four volumes, each one providing a guide to the practice, procedure, and jurisprudence of the regional and international mechanisms that are competent to examine individual complaints concerning the violation of the absolute prohibition of torture and ill-treatment. This *Handbook* on seeking remedies for torture victims through the individual complaints procedure of the UN treaty bodies is the fourth volume of the series.

**SEEKING REMEDIES FOR TORTURE VICTIMS:  
A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES  
OF THE UN TREATY BODIES**

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## **Note to Readers**

This *Handbook* is meant to support NGOs, advocates, lawyers and indeed, the victims of torture themselves, in developing effective litigation strategies before the UN Treaty Bodies in respect of violations of the prohibition of torture and ill-treatment. As such, OMCT has striven for comprehensive coverage of the relevant areas of substance and procedure but also for clarity and accessibility. We are continuously looking for ways to improve our materials and enhance their impact. Please help us do this by submitting your comments on this book to: [handbook@omct.org](mailto:handbook@omct.org).

Readers are also encouraged to visit our website ([www.omct.org](http://www.omct.org)), featuring a Companion Webpage devoted to the *OMCT Handbook Series* which contains further reference materials of interest to litigants.

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*Boris Wijkström*  
*Series Editor*  
*November 2006*

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The views expressed in this book are solely those of the authors. They do not represent the views of any organisation, institution or Government.

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13. Written submissions to the UK House of Lords by Third Party Interveners in the case of *A. and Others v. Secretary of State for the Home Department* and *A and Others (FC) and another v. Secretary of State for the Home Department* [2004] EWCA Civ 1123; [2005] 1 WLR 414
14. *Information Sheet* on the Committee on the Rights of the Child
15. *Information Sheet* on the Working Group on Enforced or Involuntary Disappearances

## PREFACE

Each act of torture and ill-treatment, inflicted by one human being upon another, permanently scars all those touched by it and destroys our sense of common humanity. The practice of torture is so fundamentally at odds with the notion of civilized life that its legal prohibition is absolute: there exist no circumstances whatsoever which justify its use. It is one of those few norms under international law that has attained the status of *jus cogens*, sharing this position with only a handful of other inviolable rules including the prohibition of genocide and slavery.

Despite the absolute nature of the prohibition, it is a sad fact that torture and other forms of cruel, inhuman or degrading treatment continue to occur in various places around the world. Sometimes ill-treatment occurs openly, but most often it is deliberately hidden from public scrutiny, and perpetrators are readily able to control and eliminate the evidence of their misdeeds. Indeed, one of the purposes of torture and ill-treatment is to terrorise victims into silence so that the crime never emerges into the open. This implies that all those who struggle to end practices of torture, to ensure the right to a remedy for victims and to ensure that perpetrators are punished often face especially difficult challenges. Notwithstanding these obstacles, the fight against torture and ill-treatment is fuelled and strengthened by the courage of those who speak out against it. These voices are critical to the struggle against torture and other forms of ill-treatment because they remove acts of torture from the darkness and bring them into the light, exposing them for what they are and seeking to hold those who perpetrate them accountable.

I therefore welcome the publication of this *Handbook* written by eminent experts on the work of the United Nations treaty bodies. Its laudable aim is to assist individual victims of torture and their representatives in holding torturers accountable, by facilitating access to processes available under international human rights law. It focuses on the relevant procedures and jurisprudence of three of the central United Nations human rights treaty bodies: the Human Rights Committee, the Committee Against Torture, and the Committee on the Elimination of Discrimination against Women.

The individual complaints mechanisms of these treaty bodies empower an individual to obtain from an international body redress and justice against a State that has violated international human rights norms. These bodies thus serve a critically important function in situations where domestic legal systems

fail to hold perpetrators to account for their actions. This *Handbook* therefore represents a crucial contribution to the struggle against torture and ill-treatment worldwide, by providing practical information to victims and advocates that will enhance and increase the utilisation of vital United Nations mechanisms.

*Manfred Nowak*  
*United Nations Special Rapporteur on Torture*  
*November 2006*

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## INTRODUCTION

The purpose of this *Handbook* is to give guidance on how to seek redress in respect of violations of the prohibition of torture and ill-treatment from the United Nations human rights treaty bodies. Torture and other cruel, inhuman or degrading treatment or punishment is absolutely prohibited in international law, and is not tolerated in any circumstances whatsoever.<sup>1</sup> The UN treaties offer a significant avenue of global recognition and protection regarding this fundamental human right. Parts I to V of this *Handbook* focus on the procedures and jurisprudence of the three bodies established under three core UN human rights treaties, namely the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Discrimination against Women.

Torture and other cruel, inhuman or degrading treatment or punishment is prohibited under Article 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 7 is supplemented by Article 10, which recognises a right of humane treatment for persons in all forms of detention, a particularly vulnerable group of people. The rights in the ICCPR are supervised and monitored at the international level by the Human Rights Committee (HRC).

Torture and other cruel, inhuman or degrading treatment is also addressed, and prohibited, by an issue-specific treaty, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT), which is monitored and supervised at the international level by the Committee against Torture (CAT Committee).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is primarily concerned with achieving equality between men and women through the elimination of discriminatory policies and practices. As such, it does not contain a substantive prohibition against torture or ill-treatment. Nevertheless, the CEDAW Convention may offer an alternative avenue for redress in specific contexts where discrimination constitutes a central aspect of the underlying violation.

In Part I, the ICCPR and the CAT, as well as the HRC and the CAT Committee, are introduced. In Part II, the procedures of these two respective treaty bodies are described. Part 2.1 will focus on the individual complaints

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<sup>1</sup> See Section 1.1.

procedures under the ICCPR and CAT. Under these procedures, an individual may submit complaints to the respective treaty bodies, who may ultimately find that the rights of that individual have been violated by a State and that he/she is entitled to a remedy in respect of that violation from that State. Part 2.1 goes through issues such as the admissibility criteria for complaints, which must be satisfied before the substance of a complaint can be considered, practical guidance on how to submit a complaint, and the process by which the respective treaty body examines a complaint.

Part 2.2 addresses the issue of interim measures. In certain situations, a person may not be able to wait for a treaty body to make a decision on whether he or she has suffered from a human rights violation; there may be a situation of urgency where interim protection must be guaranteed to ensure that irreparable harm is not done to a person while he/she awaits the final decision of the relevant committee. The process by which interim measures are requested, and the situations in which they are granted, are addressed in Part 2.2.

Part 2.3 focuses on other procedures available in the UN, such as reporting procedures, the inquiry procedure available under CAT, the new procedures available under the Optional Protocol to CAT, the mandate of the Special Rapporteur on Torture, and the Working Group on Arbitrary Detention. Part 2.4 focuses on the follow-up procedures of the HRC and the CAT Committee.

Part III focuses on the jurisprudence, that is the law developed from cases and other sources, of the HRC under the ICCPR on the issue of torture, and cruel, inhuman or degrading treatment and punishment. Part IV performs the same function with regard to the jurisprudence of the CAT Committee.

Part V discusses the CEDAW Convention and the procedures for filing individual complaints under its Optional Protocol. Existing patterns of discrimination against women affect women's ability to enjoy their rights, not least their right to be free from torture and other forms of ill-treatment. Moreover, discriminatory laws and policies may affect women's abilities to seek redress before national courts for such violations. As explained in this part of the *Handbook*, individual complaints arising in both of these contexts are admissible before the CEDAW Committee.

There are three *Textboxes*, two *Tables* and twelve *Appendices* in this *Handbook*. *Textbox i* contains a flowchart showing the various stages of consideration of a complaint filed before the Human Rights Committee. *Textbox ii* contains a model complaint of torture and cruel, inhuman or degrading treatment under Articles 7 and 10 of the ICCPR. The purpose of this model complaint is to

demonstrate how a complaint should be structured, the types of arguments that should be raised and the types of evidence that should be submitted, in order to maximise one's chance of success. *Textbox iii* contains information on the mandate and working methods of the Special Rapporteur on Violence against Women. The two *Tables* contain lists of countries that have ratified the Optional Protocols to the ICCPR and CEDAW and made declarations under Article 22 of the CAT (authorising individual complaints) and the relevant dates of such ratifications. These tables are usefully referred to in determining whether a country is subject to a particular complaints procedure and the dates after which jurisdiction arises.

The Appendices contain crucial reference materials for readers, namely the relevant treaties and other international documents. Appendices 1 and 2 contain copies of the ICCPR and the Optional Protocol to the ICCPR; Appendix 3 contains a copy of the CAT; Appendices 4 and 5 contain the Rules of Procedure of the Human Rights Committee and the Committee against Torture. The CEDAW Convention and its Optional Protocol are included in Appendices 6 and 7. Given their relevance to the jurisprudence of the Human Rights Committee and the Committee against Torture, Appendices 9 and 10 contain copies of the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, respectively. Appendices 11 and 12 contain sample pleadings which may constitute useful reference materials in *non-refoulement* cases or for applicants proceeding before the CEDAW Committee, respectively. Throughout the text, references are made to the appendices wherever they are particularly relevant to the issue being discussed.

We must notify readers of some of the terminology used in this *Handbook*: The International Covenant on Civil and Political Rights will be referred to as “the ICCPR”; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment will be referred to as “the CAT” or “the Convention against Torture”; the Convention on the Elimination of All Forms of Discrimination Against Women will be referred to as “the CEDAW Convention”. The Human Rights Committee, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women will be referred to as “the HRC”, “the CAT Committee” and the “the CEDAW Committee” respectively, or generically, especially when they are discussed in tandem, as a “Committee”, “treaty body”, or a “treaty monitoring body”. A country is referred to as a “State”, and a State which is a party to a treaty is referred to as a “State party” to that treaty. An individual complaint is referred

to as either a “complaint” or a “communication”. The person who submits such a complaint, or in whose name a complaint is submitted, is referred to as either an “author” or a “complainant”.<sup>2</sup>

We do not use the official UN document number in order to cite cases decided under the respective treaties, nor do we use such numbers for General Comments.<sup>3</sup> Such citation would be unwieldy given the large number of cases cited, and the large number of times that particular General Comments are cited. Cases under the Optional Protocol to the ICCPR will use the following format: *Quinteros v. Uruguay* (107/81). The first name is the name of the author or complainant, and the second name is the State against whom the complaint is made. The first number refers to the order in which the case was registered – this case was the 107<sup>th</sup> registered case for the HRC. The second number refers to the year in which the case was submitted (i.e. not the year in which it was decided). CAT cases follow a similar format, except that they are labelled clearly as CAT cases to distinguish them from HRC cases (e.g. *Tala v. Sweden* (CAT 43/96)). The vast majority of General Comments referred to in Parts I - IV are those of the HRC, and they are referred to as “General Comment xx”, with the number referring to the order of its adoption by the HRC. For example, “General Comment 20” denotes the twentieth such comment issued by the HRC. There is only one General Comment by the CAT Committee, and it is clearly noted as “General Comment 1 (CAT)” in relevant parts of the *Handbook*. The CEDAW Committee has issued 25 General Recommendations; they are referred to as “General Recommendation xx”, with the number at the end indicating the order in which the recommendation was adopted.<sup>4</sup>

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2 An author or complainant can authorise another to act on his/her behalf. See Section 2.1.2(b).

3 General Comments are explained in Section 1.5.3.

4 The CEDAW Committee has issued only a handful of decisions and the full citation (e.g. “Communication No. 2/2003, *A.T. v. Hungary*, views adopted on 26 January 2005, 31st Session”) is used when referring to their cases.

## **PART I**

### **OVERVIEW OF THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE**



## 1.1 The International Prohibition of Torture and other Ill-treatment<sup>5</sup>

This *Handbook* is designed to provide guidance on the process of seeking redress for violations of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment primarily under the ICCPR and the CAT. Before describing the relevant processes and jurisprudence under these treaties, it is important to bear in mind the fundamental nature of the prohibition of torture and ill-treatment under international law.

The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments.<sup>6</sup> It is also a firmly rooted principle of customary international law, and as such, it is binding on all states at all times, irrespective of whether States have assumed additional treaty obligations in respect of the prohibition.<sup>7</sup>

All international instruments that contain the prohibition of torture and ill-treatment recognise its absolute, non-derogable character.<sup>8</sup> In the ICCPR, the prohibition is contained in Article 7 which states in relevant part: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 4(2) of the ICCPR provides that the prohibition in Article 7 is non-derogable, “even in times of public emergency which threatens the life of the nation.” Thus, Articles 7 and 4(2) in conjunction, establish the prohibition as absolute under the treaty.

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5 Section 1.1 describing the status of the prohibition of torture under international law borrows from the Joint Third Party intervention in the case of *Ramzy v. The Netherlands*, submitted to the European Court of Human Rights on 22 November 2005, which is reproduced in full in Appendix 11.

6 Universal Declaration of Human Rights (Article 5); ICCPR (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples’ Rights (Article 5), Arab Charter on Human Rights (Article 13), CAT and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The prohibition against torture is also reflected throughout international humanitarian law, in e.g. the Regulations annexed to the Hague Convention IV of 1907, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

7 See discussion below on the *jus cogens* status of the prohibition under customary international law.

8 The prohibition of torture and ill-treatment is specifically excluded from derogation provisions: see Article 4(2) of the ICCPR; Articles 2(2) and 15 of the CAT; Article 27(2) of the American Convention on Human Rights; Article 4(c) Arab Charter of Human Rights; Article 5 of the Inter-American Convention to Prevent and Punish Torture; Article 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The African Charter of Human and Peoples’ Rights prohibits torture and ill-treatment in Article 5; the African Charter does not contain a derogation provision.

In General Comment 20, the HRC further emphasised that:

“The text of article 7 [of the ICCPR] 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 ... [N]o justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons.”<sup>9</sup>

The absolute nature of the prohibition is also enshrined in the Convention against Torture. Article 2(2) of the CAT provides:

“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.”

The non-derogability of the prohibition has consistently been reiterated by human rights monitoring bodies, human rights courts, and international criminal tribunals including the HRC, the CAT Committee, the European Court of Human Rights, the Inter-American Commission and Court and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>10</sup>

The prohibition of torture and other forms of ill-treatment does not therefore yield to other societal or political interests however compelling those interests may appear to be. In particular, the treaty provisions discussed above make clear that it is not permissible, under international law, to balance national

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9 General Comment 20 § 3.

10 See General Comment 20 § 3 (cited in text above); General Comment 29; Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 14; CAT’s consideration of the Reports of: the Russian Federation, (2002) UN doc. CAT/C/CR/28/4, § 90, Egypt, (2002) UN Doc. CAT/C/CR/29/4 A/57/54, § 40, and Spain, (2002) UN Doc. CAT/C/SR.530 A/58/44, § 59; Inter-American cases, e.g. *Castillo-Petrucci et al. v. Peru*, Series C, No 52, judgment of the Inter-American Court of Human Rights of 30 May 1999, § 197; *Cantoral Benavides v. Peru*, Series C, No. 69, judgment of the Inter-American Court of Human Rights of 18 August 2000, § 96; *Maritza Urrutia v. Guatemala*, Series C, No 103, judgment of the Inter-American Court of Human Rights of 27 November 2003, § 89; European Court of Human Rights’ cases, e.g. *Tomasi v. France*, No. 12850/87, Eur. Ct. of Hum. Rts. (17 August 1992); *Aksoy v. Turkey*, No. 21987/93, Eur. Ct. of Hum. Rts. (18 December 1996); and *Chahal v. the United Kingdom*, No. 22414/93, Eur. Ct. of Hum. Rts. (15 November 1996); ICTY cases, e.g. *Prosecutor v. Furundzija*, ICTY Trial Chamber, IT-95-171/1-T (10 December 1998).

security interests against the right to be free from torture and other ill-treatment.<sup>11</sup>

The absolute nature of the prohibition of torture under treaty law is reinforced by its higher *jus cogens* status under customary international law. *Jus cogens* status connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, “intransgressible.”<sup>12</sup> There is ample international authority recognising the prohibition of torture as having *jus cogens* status.<sup>13</sup> The prohibition of torture also imposes obligations *erga omnes*, and every State has a legal interest in the performance of such obligations which are owed to the international community as a whole.<sup>14</sup>

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- 11 The HRC, the CAT Committee, the European Court of Human Rights, the Special Rapporteur on Torture, the UN Security Council and General Assembly, and the Committee of Ministers of the Council of Europe, among others, have all recognised the undoubted difficulties States face in countering terrorism, yet made clear that all anti-terrorism measures must be implemented in accordance with international human rights and humanitarian law, including the prohibition of torture and other ill-treatment. A recent United Nations World Summit Outcome Document (adopted with the consensus of all States) in para. 85 reiterated the point. See e.g. *Klass and Others v. Germany*, No. 5029/71, Eur. Ct. of Hum. Rts. (6 September 1978); *Leander v. Sweden*, No. 9248/81, Eur. Ct. of Hum. Rts. (26 March 1987), and *Rotaru v. Romania*, No. 28341/95, Eur. Ct. of Hum. Rts. (4 May 2000); General Comment 29, § 7, and Concluding observations on Egypt’s Report, (2002) UN doc. CAT/C/CR/29/4, § 4; CAT’s Concluding observations on Israel’s Report, (1998) UN doc. CAT/C/33/Add.2/Rev.1, §§ 2-3 and 24; Report to the General Assembly by the Special Rapporteur on Torture, (Mr T. Van Boven), (2004) UN doc. A/59/324, § 17, and *Statement in connection with the events of 11 September 2001*, (2001) UN doc. A/57/44, § 17; General Assembly Resolutions 57/27(2002), 57/219 (2002) and 59/191 (2004); Security Council Resolution 1456 (2003) Annex, § 6; Council of Europe Guidelines on Human Rights and the Fight Against Terrorism (2002); Special Rapporteur on Torture, *Statement to the Third Committee of the GA*, (2001) UN doc. A/RES/55/89. Other bodies pronouncing on the issue include, for example, Human Rights Chamber for Bosnia and Herzegovina (see e.g. *Boudellaa and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, no. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691 (11 October 2002), §§ 264 to 267.
  - 12 Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, General List No. 131, ICJ (9 July 2004), § 157. See also Article 5,3 Vienna Convention on the Law of Treaties (1969) which introduces and defines the concept of “peremptory norm.”
  - 13 See e.g. the first report of the Special Rapporteur on Torture, (Mr. P.Kooijmans), (1986) UN doc. E/CN.4/15, § 3; ICTY judgments *Prosecutor v. Delalic and others*, ICTY Trial Chamber, IT-96-21 (16 November 1998), *Prosecutor v. Kunarac*, ICTY Trial Chamber, IT-96-23&23/1 (22 February 2001), § 466, and *Prosecutor v. Furundzija*, ICTY Trial Chamber, IT-95-171/1-T (10 December 1998); and *Al-Adsani v. the United Kingdom*, No. 35763/97, Eur. Ct. of Hum. Rts. (21 November 2001).
  - 14 See ICJ Reports: *Barcelona Traction, Light and Power Company, Limited*, Second Phase (1970, § 33); *Case Concerning East Timor* (1995, § 29); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1996, § 31). See also Articles 40-41 of the International Law Commission’s Draft Articles on State Responsibility (“ILC Draft Articles”) and the commentary to the Draft Articles. See ICTY case *Prosecutor v. Furundzija*, ICTY Trial Chamber, IT-95-171/1-T (10 December 1998), § 151; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2000, § 155); and General Comment 31, § 2.

The principal consequence of its higher rank as a *jus cogens* norm is that the principle or rule cannot be derogated from by States through any laws or agreements not endowed with the same normative force.<sup>15</sup> Thus, no treaty can be made nor law enacted that conflicts with a *jus cogens* norm, and no practice or act committed in contravention of a *jus cogens* norm may be “legitimated by means of consent, acquiescence or recognition”; any norm conflicting with such a provision is therefore void.<sup>16</sup> It follows that no interpretation of treaty obligations that is inconsistent with the absolute prohibition of torture is valid in international law.

The fact that the prohibition of torture is *jus cogens* and gives rise to obligations *erga omnes* also has important consequences under basic principles of State responsibility, which provide for the interest and in certain circumstances the obligation of all States to prevent torture and other forms of ill-treatment, to bring it to an end, and not to endorse, adopt or recognise acts that breach the prohibition.<sup>17</sup> Any interpretation of the ICCPR or the CAT must be consistent with these obligations under broader international law.

There are two corollaries that flow from the prohibition’s absolute nature: the *non-refoulement* rule, which prohibits states from returning individuals to countries where they face a risk of torture, and the exclusionary rule, which prohibits the use of evidence extracted under torture in any kind of judicial, administrative or other formal proceedings.

The expulsion (or ‘*refoulement*’) of an individual where there is a real risk of torture or other ill-treatment is prohibited under both international treaty and customary law.<sup>18</sup> It is explicitly prohibited under Article 3 of CAT which provides:

“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.”

The jurisprudence of the HRC and other international human rights bodies has recognized the *non-refoulement* rule to constitute an inherent part of the gen-

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15 See Article 53 of the Vienna Convention on the Law of Treaties 1969; also ICTY *Furundzija*, ICTY Trial Chamber, IT-95-171/1-T (10 December 1998), §§ 153-54.

16 Jennings and Watts, *Oppenheim’s International Law* (Vol. 1, Ninth ed.) 8 (1996). See also Article 53, Vienna Convention.

17 See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes*); see also Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, General List No. 131, ICJ (9 July 2004), § 159. In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see General Comment 31, § 2.

18 For a detailed discussion of the sources, scope and application of the *non-refoulement* principle, see Appendix 11, Joint Third Party intervention in *Ramzy v. The Netherlands*, 22 November 2005.

eral and absolute prohibition of torture and other forms of ill-treatment.<sup>19</sup> The Special Rapporteur on Torture<sup>20</sup> and a number of human rights experts and legal commentators<sup>21</sup> have specifically noted the customary nature of *non-refoulement* and asserted that the prohibition against *non-refoulement* under customary international law shares its *jus cogens* and *erga omnes* character.

The exclusionary rule, which prohibits the use of evidence extracted under torture, is also inherent in the absolute prohibition of torture and has been codified in Article 15 of the CAT which provides:

“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.”

To date, no State Party to CAT has made a reservation to Article 15, reflecting the universal acceptance of the exclusionary rule and its status as a rule of customary international law.<sup>22</sup> Both the HRC and CAT have concluded that the exclusionary rule forms a part of the general and absolute prohibition of torture.<sup>23</sup>

The obligations outlined above therefore create a global interest and standing against acts of torture and other forms of ill-treatment and those who perpetrate them, ensuring a united front against torture. It is against this background that the individual complaints mechanisms of the Treaty Bodies create a powerful tool for international enforcement of this universally recognized right in situations where municipal law and/or domestic courts have failed to give it effect.

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19 General Comment 20, § 9; *Chitat Ng v. Canada* (469/91) § 16.4; *Loizidou v. Turkey*, No. 15318/89, Eur. Ct. of Hum. Rts. (18 December 1996); *Soering v. United Kingdom*, No. 14038/88, Eur. Ct. of Hum. Rts. (7 July 1989); *Chahal v. the United Kingdom*, No. 22414/93, Eur. Ct. of Hum. Rts. (15 November 1996); African Commission: *Modise v. Botswana* Communication 97/93, (AHG/229XXXVII), §91. For further analysis, see CINAT recommendations on the Torture Resolution of the U.N. Commission on Human Rights, March/April 2005, at <http://www.apt.ch/cinat.htm>

20 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Interim Report to the General Assembly, (2004) UN Doc. A/59/324, § 34; see also, Interim Report to the General Assembly, (2005) UN Doc. A/60/316.

21 See E. Lauterpacht and D. Bethlehem (2001), §§ 196-216.

22 See <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>

23 General Comment 20, § 12; *P.E. v. France*, (CAT 193/01), § 6.3; *G.K. v. Switzerland*, (CAT 219/02), § 6.10. For further detailed analysis of the history, scope and application of the exclusionary rule, see Appendix 13, Written submissions to the UK House of Lords by Third Party Interveners in the case of *A. and Others v. Secretary of State for the Home Department and A and Others (FC) and another v. Secretary of State for the Home Department* [2004] EWCA Civ 1123; [2005] 1 WLR 414, pp. 35-59. See also Report of the Special Rapporteur on Torture, (2006) UN doc. A/61/259, discussing the significance of Article 15 of CAT and expressing concern that the “absolute prohibition of using evidence extracted by torture has recently [...] come into question notably in the context of the global fight against terrorism”, p. 10.

## 1.2 The International Covenant on Civil and Political Rights

The ICCPR was adopted by the UN General Assembly in 1966, and came into force in 1976. As of 1 November 2006, it had 160 States parties, representing well over three quarters of recognised States in the world. The ICCPR is an international treaty, and therefore it imposes legally binding obligations on States parties.

The ICCPR makes up a part of what is known as the International Bill of Rights. The International Bill of Rights comprises the Universal Declaration on Human Rights (UDHR) 1948, the ICCPR and its Protocols, as well as the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR). The UDHR was adopted by the United Nations in 1948 in the wake of the Second World War. Whereas “human rights” had largely been thought of as “internal” State matters prior to the Second World War, the horrors of that conflict awoke the world to the fundamental nature of human rights, and the need to recognise and protect these rights at the international level. The UDHR was not however legally binding at the time of its creation in 1948.<sup>24</sup> Over the next eighteen years, the provisions of that declaration were translated into legally binding treaty form in the two International Covenants, both adopted in 1966.

The ICCPR recognises and protects “civil and political” rights. It is reproduced in full at Appendix 1. The substantive rights are listed in Part I<sup>25</sup> and Part III of the treaty. Such rights include fundamental rights such as freedom from slavery and freedom of speech. Article 7 prohibits torture, and other cruel, inhuman or degrading treatment. Article 10 supplements Article 7, and provides for humane treatment for a particular vulnerable group, detainees. Breaches of Article 7 and 10 often occur in conjunction with other ICCPR violations. In particular, the following rights are often simultaneously violated:

- Article 6: the right to life
- Article 9: freedom from arbitrary detention and right to security of the person
- Article 14: the right to a fair trial
- Article 2(1) and 26: freedom from discrimination

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24 It is arguable that the Universal Declaration of Human Rights now represents customary international law binding on all States: see, e.g., L. B. Sohn, ‘The New International Law: Protection of the Rights of Individuals rather than States’, (1982) 32 *American University Law Review* 1, p. 17.

25 Part I contains only Article 1, which recognises the right of self-determination. This Article is exceptional as it attaches to peoples rather than individuals. It is also the only right which is contained in both Covenants.

The substantive meanings of Articles 7 and 10 are discussed in Part III of this *Handbook*.

In addition to the substantive rights in the ICCPR, there are important “supporting guarantees” in Part II of the treaty. In particular, Article 2 states:

“1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

State parties must therefore:

- Immediately guarantee the enjoyment of rights in the ICCPR for people “within its territory and jurisdiction”<sup>26</sup> without discrimination.
- States parties must ensure that the rights in the ICCPR are protected by domestic laws and other measures.
- States parties must ensure that a person who has suffered a breach of his or her rights has access to an effective domestic remedy in respect of that breach.
- States parties should ensure that the domestic remedy is properly enforced.

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26 See Section 2.1.1(b)(iii).

There are two Optional Protocols to the ICCPR. A State party to the ICCPR can choose whether to ratify one or both Optional Protocols: it does not have to ratify either. It is not possible for a State to become a party to either Optional Protocol if it is not a party to the ICCPR. The First Optional Protocol was adopted by the UN General Assembly in 1966, and came into force in 1976. Ratification by a State of the First Optional Protocol permits the submission of individual complaints about violations of the ICCPR by that State to the HRC. As at 1 November 2006, there were 108 States parties to the First Optional Protocol. It is discussed extensively in this *Handbook*. The Second Optional Protocol was adopted by the UN General Assembly in 1989 and came into force in 1991. It prohibits the death penalty. The death penalty is not totally prohibited under the ICCPR itself.<sup>27</sup> As at 1 November 2006, there were 59 States parties to the Second Optional Protocol.

### 1.3 The Human Rights Committee

The “Human Rights Committee” (HRC) is established under Article 28 of the ICCPR. Its functions are outlined in Part IV of the treaty. It has the role of monitoring and supervising the implementation by States parties of their obligations under the treaty. The HRC is composed of 18 members. Each member is nominated by a State party, and is elected by secret ballot by the States parties. Each member serves a four year term, and may be re-elected if renominated. States parties should ensure that there is an equitable geographic mix of HRC members. Members “shall be persons of high moral character and recognised competence in the field of human rights”.<sup>28</sup> A member serves in his or her personal capacity, rather than as a representative of his or her nominating State.<sup>29</sup>

The HRC meets three times a year, twice at UN headquarters in Geneva, and once at the main headquarters in New York City. Each meeting lasts for three weeks. Working Groups of the HRC, which perform various functions, convene for one week prior to each main meeting. Therefore, the HRC operates on a part time rather than a full time basis.

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<sup>27</sup> See Articles 6(2)-6(6), ICCPR. See also Sections 3.2.10 and 4.5.

<sup>28</sup> Article 28(2), ICCPR.

<sup>29</sup> Article 28(3), ICCPR.

The HRC performs its function of supervising and monitoring implementation of the ICCPR in four ways:

- Reporting Function
- Consideration of Individual Complaints
- Issuance of General Comments
- Consideration of Interstate Complaints

### 1.3.1 Reporting Function

A State party to the ICCPR must submit an initial report one year after the ICCPR comes into force for that State. Thereafter, the State party must submit periodic reports at intervals dictated by the HRC. States parties are generally required to submit a report every five years. A State may occasionally be required to report at an earlier time, particularly in a crisis situation.<sup>30</sup>

The report should detail the State party's implementation at the national level of the various rights in the ICCPR. The report should refer to relevant laws, policies and practices, as well as any problems in implementation. The report is examined in public session by the HRC in a dialogue with representatives of the State party. During this dialogue, the HRC will seek clarifications and explanations from the State representatives on the contents of the report, as well as on apparent omissions from the report. The HRC members commonly receive information regarding the State from non-governmental sources, and even from international bodies, which assist the members in conducting an informed dialogue with the State.

After the conclusion of a relevant dialogue, the HRC will debate in closed session the contents of its "Concluding Observations" on the State. Concluding Observations are then issued for each State party whose report has been examined in a particular session at the end of that session. Concluding Observations resemble a "report card" for the relevant State.<sup>31</sup> For example, the Concluding Observations will outline positive and negative aspects of a State's record in regard to implementation of the ICCPR. The Concluding Observations are

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30 See, on emergency reports, S. Joseph, 'New procedures concerning the Human Rights Committee's examination of State reports', (1995) 13, *Netherlands Quarterly of Human Rights*, p. 5, pp.13-22.

31 S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights*, 2nd edn., Oxford University Press, 2004, § 1.39.

publicly available, and are for example available via the UN “Treaty Bodies Website” at <http://www.unhchr.ch/tbs/doc.nsf>. Priority areas of concern are identified within the Concluding Observations, and are followed up by the Committee between reporting cycles.

The reporting process is discussed in more detail below in Section 2.3.1.

### **1.3.2 Individual Complaints Process**

If a State party to the ICCPR ratifies the First Optional Protocol (OP), it means that it will permit individuals to submit complaints of violations of the ICCPR by that State to the HRC. The complaints process is quite complex, and is extensively discussed in Part 2.1 of this *Handbook*. Here, we will make only a few general observations about the complaints process.

Individual complaints, also known as “individual communications”, must satisfy certain admissibility criteria before they will be considered in full by the HRC. If a complaint is found to be admissible, the HRC will then consider the merits of the complaint. It will ultimately decide whether or not the facts alleged give rise to a violation or violations of the ICCPR, or whether no violations have arisen. It communicates its “final views” to both the State and the individual concerned under Article 5(4) of the OP. Its final views are eventually made public. If any violation is found, a State party is expected to inform the HRC within 90 days of the remedy it proposes to address the situation. The HRC will then follow up on the State’s response to the finding/s of violation.

*Table 1 Ratifications of the Optional Protocol to the ICCPR and Declarations under Article 22 of CAT (Countries by Region)<sup>i</sup>*

<b>Country (by region)</b>	<b>Optional Protocol to the ICCPR<sup>ii</sup></b>	<b>Article 22 of the CAT<sup>iii</sup></b>
<b>Africa</b>		
Algeria	12 September 1989	12 September 1989
Angola	10 January 1992	
Benin	12 March 1992	
Burkina Faso	4 January 1999	
Burundi		10 June 2003
Cameroon	27 June 1984	12 October 2000
Cape Verde	19 May 2000	
Central African Republic	8 May 1981	
Chad	9 June 1995	
Congo	5 October 1983	
Ivory Coast	5 March 1997	
Democratic Republic of the Congo	1 November 1976	
Djibouti	5 November 2002	
Equatorial Guinea	25 September 1987	
Gambia	9 June 1988	
Ghana	7 September 2000	7 September 2000
Guinea	17 June 1993	
Lesotho	6 September 2000	
Libyan Arab Jamahiriya	16 May 1989	
Madagascar	21 June 1971	
Malawi	11 June 1996	
Mali	24 October 2001	
Namibia	28 November 1994	
Niger	7 March 1986	

i Table compiled using information available on the UN Treaty Bodies Database (see <http://www.unhchr.ch/tbs/doc.nsf>); information in table current as of 1 November 2006.

ii For States which ratified the Optional Protocol to the ICCPR before its entry into force on 23 March 1976, the present Protocol entered into force three months from this date. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession (Article 9, Optional Protocol to the ICCPR).

iii For States which ratified the CAT before it entered into force on 26 June 1987, the present Convention entered into force thirty days after this date. For each State ratifying the Convention or acceding to it after its entry into force, the present Convention entered into force thirty days after the date of the deposit of its own instrument of ratification or accession (Article 27, CAT).

Senegal	13 February 1978	16 October 1996
Seychelles	5 May 1992	6 August 2001
Sierra Leone	23 August 1996	
Somalia	24 January 1990	
South Africa	28 August 2002	10 December 1998
Togo	30 March 1988	18 November 1987
Tunisia		23 September 1988
Uganda	14 November 1995	
United Republic of Tanzania		
Zambia	10 April 1984	
<b>Americas</b>	<b>Optional Protocol to the ICCPR</b>	<b>Article 22 of the CAT</b>
Antigua & Barbuda		
Argentina	8 August 1986	24 September 1986
Barbados	5 January 1973	
Bolivia	12 August 1982	14 February 2006
Brazil		26 June 2006
Canada	19 May 1976	13 November 1989
Chile	27 May 1992	15 March 2004
Colombia	29 October 1969	
Costa Rica	29 November 1968	27 February 2002
Dominican Republic	4 January 1978	
Ecuador	6 March 1969	6 September 1988
El Salvador	6 June 1995	
Guatemala	28 November 2000	25 September 2003
Guyana	10 May 1993 <sup>iv</sup>	
Honduras	7 June 2005	
Jamaica	<sup>v</sup>	
Mexico	15 March 2002	15 March 2002
Nicaragua	12 March 1980	
Panama	8 March 1977	

iv The Government of Guyana had initially acceded to the Optional Protocol on 10 May 1993. On 5 January 1999, the Government of Guyana informed the Secretary-General that it had decided to denounce the Optional Protocol. However, on the same date, the Government of Guyana re-acceded to the Optional Protocol with a reservation that the HRC will not be competent to receive and consider complaints from any prisoner who is under sentence of death.

v The Government of Jamaica had initially acceded to the Optional Protocol on 3 October 1975. On 23 October 1997, the Government of Jamaica notified the Secretary-General of its denunciation of the Protocol.

Paraguay	10 January 1995	29 May 2002
Peru	3 October 1980	7 July 1988
Saint Vincent and the Grenadines	9 November 1981	
St Kitts and Nevis		
Suriname	28 December 1976	
Trinidad and Tobago	<sup>vi</sup>	
Uruguay	1 April 1970	27 July 1988
Venezuela	10 May 1978	26 April 1994
<b>Asia</b>	<b>Optional Protocol to the ICCPR</b>	<b>Article 22 of the CAT</b>
Australia	25 September 1991	28 January 1993
Maldives	19 September 2006	
Mauritius	12 December 1973	
Mongolia	16 April 1991	
Nepal	14 May 1991	
New Zealand	26 May 1989	10 December 1989
Philippines	22 August 1989	
Republic of Korea	10 April 1990	
Sri Lanka	3 October 1997	
<b>Europe/Central Asia</b>	<b>Optional Protocol to the ICCPR</b>	<b>Article 22 of the CAT</b>
Andorra	22 September 2006	22 September
Armenia	23 June 1993	
Austria	10 December 1987	29 July 1987
Azerbaijan	27 November 2001	4 February 2002
Belarus	30 September 1992	
Belgium	17 May 1994	25 June 1999
Bosnia and Herzegovina	1 March 1995	4 June 2003
Bulgaria	26 March 1992	12 May 1993
Croatia	12 October 1995	12 October 1992
Cyprus	15 April 1992	8 April 1993

<sup>vi</sup> The Government of Trinidad and Tobago had initially acceded to the Optional Protocol on 14 November 1980. On 26 May 1998, the Government informed the Secretary-General that it denounced the Optional Protocol with effect from 26 August 1998. On 26 August 1998, the Government decided to re-accede to the Optional Protocol with a reservation. However, on 27 March 2000, the Government informed the Secretary-General of its decision to denounce the Optional Protocol with effect from 27 June 2000.

Czech Republic	22 February 1993	3 September 1996
Denmark	6 January 1972	27 May 1987
Estonia	21 October 1991	
Finland	19 August 1975	30 August 1989
France	17 February 1984	23 June 1988
Georgia	3 May 1994	30 June 2005
Germany	25 August 1993	19 October 2001
Greece	5 May 1997	6 October 1988
Hungary	7 September 1988	13 September 1989
Iceland	22 August 1979	23 October 1996
Ireland	8 December 1989	11 April 2002
Italy	15 September 1978	10 October 1989
Kyrgyzstan	7 October 1994	
Latvia	22 June 1994	
Liechtenstein	10 December 1998	2 November 1990
Lithuania	20 November 1991	
Luxembourg	18 August 1983	29 September 1987
Malta	13 September 1990	13 September 1990
Monaco		6 December 1991
Montenegro	23 October 2006	
Netherlands	11 December 1978	21 December 1988
Norway	13 September 1972	9 July 1986
Poland	7 November 1991	12 May 1993
Portugal	3 May 1983	9 February 1989
Romania	20 July 1993	
Russian Federation	1 October 1991	1 October 1991
San Marino	18 October 1985	
Serbia	6 September 2001	12 March 2001
Slovakia	28 May 1993	17 March 1995
Slovenia	16 July 1993	16 July 1993
Spain	25 January 1985	21 October 1987
Sweden	6 December 1971	8 January 1986
Switzerland		2 December 1986
Tajikistan	4 January 1999	
The Former Yugoslav Republic of Macedonia	12 December 1994	
Turkey		2 August 1988
Turkmenistan	1 May 1997	
Ukraine	25 July 1991	12 September 2003
Uzbekistan	28 September 1995	

### 1.3.3 General Comments

The HRC is empowered under Article 40 of the ICCPR to issue “General Comments”. It had issued 31 such General Comments by 1 September 2006. General Comments are directed to all States parties, and provide detailed clarification of aspects of their duties under the ICCPR. Most often, a General Comment has been an expanded interpretation of a particular right in the ICCPR. However, General Comments have also related to numerous miscellaneous issues, such as the State’s rights of reservation,<sup>32</sup> denunciation,<sup>33</sup> and derogation<sup>34</sup> under the ICCPR. General Comments have also related to a theme<sup>35</sup> and to reporting obligations.<sup>36</sup>

General Comments are extremely useful tools for interpreting the ICCPR. The most relevant General Comments on the issue of torture, cruel inhuman or degrading treatment and punishment are General Comments 20 (on Article 7) and 21 (on Article 10). The meaning of Articles 7 and 10 of the ICCPR is analysed in Part III, which contains many references to those General Comments.

### 1.3.4 Interstate Complaints

Under Article 41 of the ICCPR, a State party may declare that the HRC is competent to hear complaints about violations of the ICCPR by that State party from another State party. Article 41 sets out a complex procedure for the resolution of such complaints. This procedure will not be discussed in this *Handbook* as it has never been used.

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32 General Comment 24. A reservation is entered by a State upon ratification of a treaty. It signals that the State wishes to modify the treaty obligations, and normally signals an intention not to be bound by certain provisions.

33 General Comment 26. A State party ‘denounces’ a treaty by withdrawing from it. Denunciation means that a State is no longer bound by a treaty that it was once party to. Basically, the HRC has held that States parties have no right to withdraw from the ICCPR or the Second Optional Protocol once they have ratified one or both of those treaties. They do have a right to denounce the OP.

34 General Comment 29. States may sometimes ‘derogate’ from, or suspend, certain treaty provisions, in times of crisis or public emergency.

35 See, e.g., General Comment 15 on the Position of Aliens under the ICCPR.

36 See General Comments 1, 2 and 30.

## 1.4 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is an international human rights treaty which aims to eradicate the practice of torture in all countries across the world. The CAT represents the most detailed international codification of standards and practices which aim to protect individuals from torture and other cruel, inhuman or degrading treatment or punishment. The CAT is reproduced in full at Appendix 3.

The seeds from which the CAT evolved can be traced back to the global affirmation of the existence and value of human rights which emerged after the atrocities of the Second World War. However the real momentum for a treaty aimed specifically at the eradication of torture began in December 1973 at the first International Conference on the Abolition of Torture, convened by Amnesty International.<sup>37</sup> At this conference the

“three hundred delegates declared that the use of torture is a violation of freedom, life and dignity [and] urged governments to recognise that torture is a crime against human rights [and] to respect, implement and improve the national and international laws prohibiting torture.”<sup>38</sup>

The Conference was successful in bringing global attention to the disturbing fact that torture had not disappeared in mediaeval times, but was in fact a modern day human rights problem. In the following years, Amnesty International continued to keep torture on the international agenda.<sup>39</sup> The next major development in the global campaign against torture was the adoption in 1975 by the UN General Assembly of the “Declaration Against Torture”. This Declaration was not binding but it was of crucial significance, representing the “first [targeted] international condemnation of torture.”<sup>40</sup>

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37 Amnesty International, Conference for the Abolition of Torture: Final Report (1973).

38 M. Lippman, “The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, (1994) 17 *Boston College International & Comparative Law Review* 275, p. 296.

39 One of the major achievements of Amnesty International during this period was the development of Codes of Conduct. The aim of these Codes was to ensure that certain professional groups would not be involved in any practice of torture, including doctors, law enforcement personnel and members of the legal profession. See *ibid.*, p. 296.

40 *Ibid.*, p. 303.

In spite of this international condemnation, acts of torture continued to occur in States around the world, as evidenced in the reports of different groups monitoring and documenting these acts.<sup>41</sup> These reports clearly highlighted that further action needed to be taken to mount an effective fight against torture. In particular Amnesty's second report argued that there was a need to adopt a legally binding treaty in order to address many of the gaps in the Declaration.<sup>42</sup>

As a result of the growing recognition of the continued existence of the global scourge of torture, the UN General Assembly adopted the CAT on 10 December 1984. The CAT entered into force in June 1987 and by 1 November 2006 there were 142 States parties to the treaty.<sup>43</sup>

Part I of the CAT outlines the substantive obligations of States parties, including in particular the duty not to torture or perpetrate cruel, inhuman or degrading treatment or punishment, as well as the duty to take measures to ensure that such treatment or punishment does not occur. These duties are discussed in detail in Part IV of this *Handbook*.

An Optional Protocol to the CAT was adopted by the UN General Assembly in 2002, and came into force on 22 June 2006 with 20 States parties. As at 4 November 2006, there were 28 States parties (and 54 Signatories). It establishes mechanisms for monitoring places of detention within States parties to the Optional Protocol. This Optional Protocol is discussed in more detail in Section 2.3.3.

## 1.5 The Committee against Torture

The Committee against Torture ("CAT Committee") is established under Article 17 of the CAT. Its functions are set out in Part II of the treaty. It has

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41 For example; Amnesty International, "Report on Allegations of Torture in Brazil", (1976) 3; Argentine National Commission on the Disappeared, *Nunca Mas xi*, Writers and Scholars International Ltd. Trans., (1986); Amnesty International, "Political Imprisonment in South Africa", (1978), pp. 18-19, 22-23, 36, 56-57; Amnesty International's second report on torture was released in 1984 and reflected the continued practice of torture, containing allegations of torture and ill-treatment against 98 countries see Amnesty International, "Torture in the Eighties", (1984).

42 See M. Lippman, "The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1994) 17 *Boston College International & Comparative Law Review* 275, p. 308.

43 For further information on the background of the CAT see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: a Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Kluwer Academic Publishers, 1988.

the role of monitoring and supervising the implementation by States parties of their obligations under the treaty. The CAT Committee is composed of ten members. Each member is nominated by a State party, and is elected by secret ballot by the States parties. Each member serves a four year term, and may be re-elected if renominated. States parties should ensure that there is an equitable geographic mix of CAT Committee members. Members shall be persons “of high moral standing and recognised competence in the field of human rights”.<sup>44</sup> A member serves in his or her personal capacity, rather than as a representative of his or her nominating State.<sup>45</sup>

The CAT Committee operates on a part time basis. It generally meets twice each year, once for three weeks and once for two weeks, while a pre-sessional working group meets for one week.

The CAT Committee performs its function of supervising and monitoring implementation of the CAT in six ways:

- Reporting Function
- Consideration of Individual Complaints
- Issuance of General Comments
- Consideration of Interstate Complaints
- Special Inquiries
- Duties under the Optional Protocol

The performance of the first four functions operates very similarly to performance of the same functions by the HRC. In this introductory commentary, we will only identify where practices are materially different from those of the HRC with regard to those first four functions.

### 1.5.1 Reporting Function

The process of reporting is very similar to that within the HRC. The main difference is that reports are generally supposed to be submitted every four years rather than every five years. The reporting process is discussed in Section 2.3.1 of this *Handbook*.

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<sup>44</sup> Article 17(1), CAT.

<sup>45</sup> Article 17(1), CAT.

### **1.5.2 Individual Complaints Process**

If a State party to the CAT makes a relevant declaration under Article 22 thereof, individuals may submit complaints of violations of the CAT by that State to the CAT Committee. The complaints process is discussed in Section 2.1 of this *Handbook*. For a list of States parties that have made the declaration under Article 22, *see* Table 1 above.

### **1.5.3 General Comments**

The CAT Committee is empowered to issue General Comments, directed to all States parties. By 1 September 2006, the CAT Committee had only issued one such comment, on Article 3 of CAT. This General Comment is an invaluable tool for interpreting the relevant part of the CAT.

### **1.5.4 Interstate Complaints**

Under Article 21 of the CAT, a State party may declare that the CAT Committee is competent to hear complaints about violations of the CAT by that State party from another State party. This procedure will not be discussed in this *Handbook* as it has never been used.

### **1.5.5 Inquiry Procedure**

Under Article 20 of the CAT, the CAT Committee may undertake an inquiry into a State party if it receives credible information indicating that torture is being systematically practiced in that State. This procedure is discussed in Section 2.3.2 of this *Handbook*.

### **1.5.6 Duties under the Optional Protocol**

Most tasks under the Optional Protocol are conferred upon a new body, known as the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture. The Subcommittee is discussed in Section 2.3.3(b). The CAT Committee maintains some role under the Optional Protocol. Once a year it should hold its meeting

at the same time as the Subcommittee.<sup>46</sup> It receives the public annual report of the Subcommittee.<sup>47</sup> It also may publicise the Subcommittee’s findings under the Optional Protocol, or make a public statement about a State, if requested to do so by the Subcommittee due to a State’s lack of cooperation.<sup>48</sup>

## 1.6 The Impact of the International Covenant on Civil and Political Rights and the Convention Against Torture

As noted above, there are opportunities for the HRC and the CAT Committee to “judge” the performance of a State party with regard to its implementation of the relevant treaty. For example, the HRC may find a State in violation of the ICCPR in an individual complaint. Or a Committee can condemn certain State practices in Concluding Observations issued pursuant to that State party’s report. Or it may be patently obvious that a State is acting in a way that is contrary to the clear recommendations in a General Comment. In addition to substantive violations of the treaties, a State party may fail to fulfil its procedural duties. For example, a State may fail to submit a report on time, and/or it may submit a completely misleading report. Once a State party is found to be underperforming in regard to its treaty obligations, how are those obligations enforced?

The Committees are not courts. Rather, they are “quasi-judicial” bodies. Their decisions and views are not legally binding. However, the provisions of the ICCPR and CAT are legally binding. As the Committees are the pre-eminent authoritative interpreters of their respective treaties, rejection of their recommendations is evidence of bad faith by a State towards its human rights treaty obligations.<sup>49</sup>

Nevertheless, it is unfortunately true that numerous States have failed to comply with their duties under the ICCPR and the CAT. Indeed, no State party has a perfect human rights record. However, some of the facts regarding non-compliance are truly alarming. For example, the level of “perfect” compliance with HRC views under the OP is arguably as low as 20%.<sup>50</sup> Some States systemi-

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46 Article 10(3), Optional Protocol to CAT.

47 Article 16(3), Optional Protocol to CAT.

48 Article 16(4), Optional Protocol to CAT.

49 S. Joseph, ‘Toonen v Australia: Gay Rights under the ICCPR’, (1994) 13 *University of Tasmania Law Review* 392, p. 401.

50 See Section 2.4.3.

cally and egregiously violate the CAT and the ICCPR, including its prohibitions on torture, cruel, inhuman or degrading treatment. Some States have dreadful records in failing to submit reports on time. Many reports are completely inadequate. And there is little the Committees can do in the face of brazen non-compliance beyond continual public rebukes to a recalcitrant State. There is no other sanction for non-compliance prescribed in the UN human rights treaties. Given this occasionally depressing picture of State compliance, what is the use of the ICCPR and the CAT? Do they offer a useful avenue of reparations for a torture victim?

The ICCPR and the CAT serve numerous significant purposes. First, the views, recommendations, and other jurisprudence of the Committees have had the effect of materially changing the behaviour of States on a number of occasions. Such changes may occur immediately, or later (even much later), for example after a State has undergone a transition from dictatorial to democratic government. They may have a “slow boil” effect, as State governments slowly reform themselves. They may galvanise opposition to an abusive government, both at home and abroad. They can inject human rights issues into domestic debates, and provide indicators for future reform. The views and recommendations of UN committees may at least force a government to engage with those views and to clearly explain its non-compliance. Finally, they may provide an important measure of vindication to a victim.

One must not underestimate the effect that “shaming” can have on a delinquent State. It shines an uncomfortable spotlight on a State, which is in itself an important form of accountability. No State likes to be embarrassed by adverse human rights findings. It is particularly mortifying for a State to be labelled a torturer under either the ICCPR or the CAT, or both. Adverse findings of torture or other human rights violations under the ICCPR or the CAT helps to build pressure upon a State, which may eventually bear fruit by prompting that State to abandon torture as a policy. It may even bear more immediate fruits by leading to the provision of a remedy for victims.

The jurisprudence of the HRC under the ICCPR also serves functions beyond enforcement. It provides important indicators of the meaning of the various rights in the ICCPR. For example, that jurisprudence helps us to identify the practices which classify as torture, or cruel inhuman or degrading treatment, and which do not. The jurisprudence helps to determine the human rights status of certain phenomena, such as amnesty laws or corporal punishment. Such interpretations are of use to all States, rather than only the State and the individual concerned in a particular case; it is of course crucial to understand and

recognise the contexts in which torture occurs in order to combat it. In this respect, the decisions of the HRC and the CAT Committee influence national courts and governments all over the world.

Finally, the ICCPR, CAT, and the jurisprudence developed under those treaties reinforce the crucial message that all acts of torture and cruel, inhuman, degrading treatment and punishment are simply unacceptable in all circumstances. And indeed, States rarely attempt to argue otherwise. Rather, a State will deny that such practices take place. Though such denials may constitute lies and cover-ups, the virtually uniform recognition by States that torture is in fact intolerable is an important step forward for human rights recognition and enforcement.



## **PART II**

### **PROCEDURES OF THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE**



## 2.1 Individual Complaints Procedure

In Part II, we address the most important aspects of the processes relating to the individual complaints procedures under both the ICCPR and the CAT.

### 2.1.1 Admissibility Criteria

Any successful complaint must satisfy the admissibility criteria of the respective treaty. The admissibility criteria under the ICCPR and the CAT are almost identical. The large majority of the case law on admissibility issues arises from the case law of the HRC. It seems likely that the CAT Committee will, if given the opportunity, follow the HRC's decisions on admissibility. Differences in interpretation, or possible differences, are highlighted in the commentary below.

#### (a) Standing Rules

Article 1 of the OP to the ICCPR requires that the complaint relate to one or more violations of a particular victim's rights under that treaty. The same requirement is specified in Article 22(1) of CAT. It is therefore not permissible to bring a complaint unless it concerns an actual violation of an identified person's rights under the relevant treaty. For example, it is not permissible for person A to submit a complaint regarding the appalling conditions in a prison if A has never been an inmate of that prison, unless A is authorised to do so on behalf of one of X's inmates or former inmates.<sup>51</sup> It is not permissible to challenge a law or policy in the abstract, without an actual victim.<sup>52</sup>

The victim must be an individual. That is, he or she must be a natural person, rather than an artificial person such as a corporation, a trade union or a non-governmental organisation ("NGO").<sup>53</sup>

In General Comment 15, the HRC held that ICCPR rights must be extended to:

"all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the State Party."<sup>54</sup>

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51 See Section 2.1.2(b).

52 See *Mauritian Women's Case* (35/78), § 9.2.

53 See e.g., *Mariategui v. Argentina* (1371/05).

54 General Comment 31, § 10.

Therefore, one may submit complaints against a State party under the treaties' individual complaints mechanisms even if one is not a national of that State.

It is not possible to submit a complaint anonymously. The relevant Committee however will normally agree, if requested, to suppress the name of the alleged victim in published documents. It is not possible however to keep the name of the alleged victim from the relevant State, as the State cannot investigate the allegations if it does not know who that person is.

The violation does not have to continue throughout the deliberation of the complaint, and indeed the violation can cease prior to submission of the complaint.<sup>55</sup> For example, a complaint about the appalling conditions of a prison can be submitted on behalf of a former inmate who experienced and suffered from those conditions, but who has since been released and therefore does not experience those conditions anymore. However, a complaint is inadmissible if a violation has been recognised and remedied by the State in question.

The HRC has stated that it has “no objection to a group of individuals, who claim to be similarly affected, collectively to submit a complaint about alleged breaches of their rights”.<sup>56</sup> Therefore, it is possible to have a complaint decided on behalf of a group of individuals suffering from like circumstances. However, even when proceeding as a group, each individual complainant must identify him- or herself, and agree to the complaint being brought on his or her behalf if represented by another person, such as an advocate. In *Hartikainen v. Finland* (40/78), the complainant was a teacher in a school in Finland and the General Secretary of the Union of Free Thinkers in Finland. The complainant submitted the communication on his own behalf and also on behalf of the Union of Free Thinkers. The HRC held that it could not consider the complaint submitted on behalf of the organisation unless he provided the names and addresses of all the persons he claimed to represent and written authority confirming that he could act on their behalf.

The HRC has also held that domestic legislation may threaten a person even if it has not been directly implemented against that person; that person may still be classified as a “victim” for the purposes of admissibility under the OP.<sup>57</sup> For example, in *Toonen v. Australia* (488/92), the complainant argued that the existence of Tasmanian laws which criminalized sexual relations between men

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55 See *Van Duzen v. Canada* (50/79).

56 *Ominayak, Chief of the Lubicon Lake Band v. Canada* (167/84), § 32.1.

57 Joseph, Schultz, and Castan, above note 31, § 3.36.

stigmatized him as a gay man, despite the fact that the laws had not been implemented for many years. Furthermore, he lived with the constant possibility of arrest under the laws. The HRC found the claim to be admissible, stating that:

“the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally.”<sup>58</sup>

It is possible for somebody to be a victim of a human rights abuse entailed in an act perpetrated upon another. In such cases, the former individual might be termed the “indirect victim” while the latter is the “direct” victim.<sup>59</sup> For example, in *Quinteros v. Uruguay* (107/81), the complaint arose out of the kidnap, torture, and continued detention (and indeed disappearance) of one Elena Quinteros Almeida by Uruguayan security forces. A violation was also found in regard to the woman’s mother, who submitted the complaint on behalf of her daughter and herself, due to the anguish, stress, and uncertainty caused by her daughter’s continued disappearance: that mental trauma was found to constitute ill-treatment contrary to Article 7 ICCPR.<sup>60</sup> In *Schedko v. Belarus* (886/99), a similar violation of Article 7 was found in respect of the mother of a man who had been executed by the authorities, as those authorities failed to inform her of the date, hour, place of execution, and site of burial. The HRC stated:

“The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities’ initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son’s grave amounts to inhuman treatment of the author, in violation of Article 7 of the Covenant.”<sup>61</sup>

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58 *Toonen v. Australia* (488/92), § 5.1.

59 See also U. Erdal, H. Bakirci, *Article 3 of the European Convention on Human Rights: A Practitioner’s Handbook*, OMCT, 2006, p. 85.

60 *Quinteros v. Uruguay* (107/81), § 14.

61 *Schedko v. Belarus* (886/99), § 10.2; see also Section 3.2.7.

In some circumstances, a victim is simply unable to submit or authorise the submission of a complaint. For example, the victim may be dead or may be incarcerated in incommunicado detention (where he or she is unable to make contact with the outside world). If this is the case, another person has standing to bring the complaint if he or she can establish that the victim would be likely to have consented to his/her representation before the relevant Committee. A close family connection will normally suffice in this regard. It is less likely that the Committees will recognise the standing of people who are not family members in such a situation.<sup>62</sup> In *Mbenge v. Zaire* (16/77), for example, the HRC held that the author of the complaint could represent his relatives but he could not represent either his driver or his pharmacist.

If circumstances change so that a victim who has been unable to authorise a complaint becomes able to authorise it, then that victim must give his or her authorisation for the consideration of the complaint to continue. For example, in *Mpandanjila et al v. Zaire* (138/83), the complaint was originally submitted on behalf of 13 people detained incommunicado. These people were released while the HRC's decision was pending. The complaint continued only in respect of 9 of the 13 people, as four people did not explicitly give any authorisation for the complaint to continue on their behalf.<sup>63</sup>

If a complaint is in the process of being considered by the relevant Committee, and the author dies, an heir of the author may proceed with the complaint.<sup>64</sup> If no heir instructs that Committee, the case will be discontinued.<sup>65</sup>

## (b) Jurisdictional Requirements

### *i. Ratione Materiae*

A person must have a claim under one of the substantive rights of the respective treaty before his/her case can be deemed admissible. For example, a claim over a breach of the right to property could not be brought under either treaty, as the right to property itself is not protected under either treaty.<sup>66</sup> Allegations

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62 T. Zwart, *The Admissibility of Human Rights Petitions*, Martinus Nijhoff, 1994, p. 76.

63 Joseph, Schultz, and Castan, above note 31, § 3.27.

64 See *Croes v. The Netherlands* (164/84); *Hopu and Bessert v. France* 549/1993; *Arenz v. Germany* (1138/02).

65 See e.g., *Wallen v. Trinidad and Tobago* (576/94), § 6.2.

66 See e.g., *O.J. v. Finland* (419/90).

regarding torture, cruel inhuman or degrading treatment or punishment clearly raise issues under both the ICCPR and the CAT. However, the ICCPR protects many more rights, so it is advisable to submit a complaint to the HRC (if the relevant State is a party to the OP) rather than the CAT Committee if one's allegations go beyond the issue of torture and cruel treatment, and extend for example to the issues of arbitrary detention or discrimination.

Even a case regarding torture, cruel, inhuman or degrading treatment or punishment may be dismissed for failure to raise a substantive claim if the alleged ill-treatment is not so severe as to be classified as torture or one of the other prohibited forms of ill-treatment. In this regard, readers should refer to Parts III and IV of this *Handbook* for the law on the meaning of torture, cruel, inhuman or degrading treatment or punishment under, respectively, the ICCPR and the CAT. For example, an insult by a police officer may seem to be degrading to the target of that insult but is probably not severe enough of itself to be deemed a breach of either instrument.<sup>67</sup>

Finally, a person may simply fail to submit enough evidence to establish the admissibility of his or her claims.<sup>68</sup> Readers are referred to Section 2.1.2 for advice on how to submit a complaint and the type of evidence that might help to establish a case, as well as *Textbox ii* for a model complaint.

### *ii. Ratione Temporis*

Under Article 1 of the OP, complaints may only be submitted against States parties to the OP. Similarly, complaints may only be submitted under CAT against States that have made a declaration under Article 22 of that treaty. One consequence of these requirements is that the violation must relate to an incident that takes place after a particular date. That particular date is:

- with regard to the ICCPR, the date at which the OP enters into force for the State. This date is three months after the State ratifies or accedes to the OP.
- with regard to the CAT, the date at which the Article 22 declaration enters into force for the State.

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67 The insult itself could breach human rights if it had an element of vilification. See in this regard, Article 20 of the ICCPR and Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination 1966.

68 See e.g., *Bazarov v. Uzbekistan* (959/00), § 7.3.

Therefore, if a violation, such as an act of torture, occurs prior to the relevant date, any complaint in respect of that violation is inadmissible. This is known as the “*ratione temporis*” rule.

Importantly, the respective relevant dates relate to the dates at which adherence to the relevant individual complaints mechanism comes into force, rather than the dates at which the respective treaty comes into force. For example, a complaint under the OP will be inadmissible if the violation occurs prior to the entry into force for the State of the OP, even if that date is after entry into force for the State of the ICCPR. See Table 1 above for the dates of entry into force of the individual complaints mechanisms of the ICCPR and the CAT.

There is one exception to the *ratione temporis* rule. A complaint may be admissible if it concerns a violation that began prior to the relevant date, if the violation continues after that relevant date, or if the violation generates effects which themselves violate the treaty.<sup>69</sup> In *Könye and Könye v. Hungary* (520/92), the HRC held that:

“a continuing violation is to be interpreted as an affirmation, after the entry into force of the OP, by act or by clear implication, of the previous violations of the State Party.”<sup>70</sup>

For example, if one is imprisoned in appalling conditions prior to the relevant date, but the incarceration in those conditions continues after the relevant date, one may submit a complaint in respect of those conditions, claiming a violation from the relevant date. Another example arose in *Sankara et al v. Burkina Faso* (1159/03). The victim complained about the State party’s failure to investigate the assassination of her husband, which had occurred in 1987. Proceedings in respect of that assassination commenced in 1997, and continued after 1999, the year in which the OP came into force for Burkina Faso. The State’s continued failure in those proceedings to properly investigate the death, as well as its continued failure to inform the family of the circumstances of the death or the precise location of the remains of the deceased, or to change the death certificate which listed “natural causes” (a blatant lie) as the cause of death, all amounted to breaches of Article 7 which began before but continued to take place after 1999.<sup>71</sup>

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69 Joseph, Schultz, and Castan, above note 31, § 2.06.

70 *Könye and Könye v. Hungary* (520/92), § 6.4.

71 *Sankara et al v. Burkina Faso* (1159/03), §§ 6.3 and 12.2.

*iii. Ratione Loci*

Article 2(1) of the ICCPR states that a State party is responsible for respecting and ensuring the ICCPR rights of individuals “within its territory and subject to its jurisdiction”. Article 1 of the OP and Article 22 of the CAT allow complaints to be heard from individuals “subject to [the relevant State’s] jurisdiction”.

One may submit a complaint against a State party regarding past violations even if one is not inside that State at the time of the submission.<sup>72</sup>

Unless a declaration is made to the contrary, a State’s ratification of a treaty will extend to a State’s entire territory including its colonies.<sup>73</sup> For example, *Kuok Koi v. Portugal* (925/00) concerned the application of the OP to Macao, a former Portuguese territory. Portugal has ratified both the ICCPR and the OP. The HRC held that the OP had applied to Macao when it was under Portuguese authority, stating that:

“as the intention of the OP is further implementation of Covenant rights, its non-applicability in any area within the jurisdiction of a State party cannot be assumed without any express indication (reservation/declaration) to that effect.”<sup>74</sup>

As such, the OP applied to Macao prior to its transfer to the People’s Republic of China in 1999.<sup>75</sup>

A State party is clearly obliged to respect and ensure the treaty rights of those within its sovereign territory. The State party’s obligations also extend to territory over which it has effective control. The State party has to respect the rights of all individuals within “the power or effective control of that State party, even if not situated within the territory of the State party.”<sup>76</sup> For example, Israel not only has an obligation to those within Israel under the UN human rights treaties that it has ratified, but also to those within the Occupied Territories in the West Bank and Gaza.<sup>77</sup> The CAT Committee emphasised this rule in Concluding Observations on the U.S. in 2006. It stated:

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72 See e.g., *Gorji-Dinka v. Cameroon* (1134/02).

73 See Vienna Convention on the Law of Treaties 1969, Article 29.

74 *Kuok Koi v. Portugal* (925/00), § 6.3.

75 Considerable complexities arose in this case as the fact scenario straddled the transition of Macao from Portuguese to Chinese control. These complexities are not relevant to this *Handbook*.

76 General Comment 31, § 10.

77 Concluding Observations on Israel, (2003) UN doc. CCPR/CO/78/ISR, § 11.

“The Committee notes that a number of the Convention’s provisions are expressed as applying to ‘territory under [the State party’s] jurisdiction’ (Articles 2, 5, 13, 16). The Committee reiterates its previous view that this includes all areas under the de facto effective control of the State party, by whichever military or civilian authorities such control is exercised. ...”<sup>78</sup>

Therefore, for example, the U.S. is responsible for any acts of torture which occur in its detention facility in Guantanamo Bay in Cuba, as well as other detention facilities in Iraq and Afghanistan.<sup>79</sup> The CAT Committee added that “intelligence activities, notwithstanding their author, nature *or location*, are acts of the State party, fully engaging its international responsibility”.<sup>80</sup>

The HRC has also held that:

“[the State party is responsible for] 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.”<sup>81</sup>

In this regard, the HRC has expressed concern in relation to the behaviour of Belgian soldiers in Somalia, and the behaviour of Dutch soldiers in the events surrounding the fall of Srebrenica in Bosnia and Herzegovina.<sup>82</sup>

A State’s responsibility under the treaties sometimes extends beyond its borders to territories outside its control. For example, in *López Burgos v. Uruguay* (52/79), the victim was kidnapped and detained in Buenos Aires, Argentina, by members of the Uruguayan Security and Intelligence Forces before being transported across the border to Uruguay where he was detained incommunicado for three months. The HRC held that although the arrest and the initial detention of the victim took place on foreign territory, the HRC was not barred

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78 Concluding Observations on U.S., (2006) UN doc. CAT/C/USA/CO/2, § 15. See also the HRC’s Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 10.

79 See on Guantanamo Bay, Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 22. See also Concluding Observations on UK, (2004) UN doc. CAT/C/CR/33/3, §§ 3-5.

80 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 17 (emphasis added).

81 General Comment 31, § 10.

82 See, respectively, Concluding Observations on Belgium, (1998) UN doc. CCPR/C/79/Add.99, § 14 and Concluding Observations on the Netherlands, (2001) UN doc. CCPR/CO/72/NET, § 8.

from considering these allegations against Uruguay. The HRC listed the following reasons for allowing that part of the complaint to be heard:<sup>83</sup>

- The acts were perpetrated by Uruguayan agents acting on foreign soil.
- The reference in the OP to “individuals subject to its jurisdiction” refers to the relationship between the individual and the State regardless of where the violations occurred.
- Nothing in Article 2(1) explicitly asserts that a State party cannot be held accountable for violations of rights which its agents commit upon another state’s territory.
- Article 5(1) of the ICCPR states that:
  - “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.”
- It would be unconscionable to assert that a State party can violate its ICCPR obligations on another State’s territory.

In *Montero v. Uruguay* (106/81), the victim’s Uruguayan passport was confiscated by the Uruguayan consulate in West Germany. He alleged that the confiscation amounted to a breach of his rights under Article 12 (freedom of movement) of the ICCPR. Although the act took place in West Germany, the HRC held that “the issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is “subject to the jurisdiction” of Uruguay for that purpose.”<sup>84</sup>

Therefore, the case law of the HRC and the CAT Committee indicates that States are responsible for violations of rights perpetrated by their agents when those agents operate abroad, at least so long as those agents are acting in their official capacity.

#### *iv. Ratione Personae*

States parties are generally responsible for the acts of their own agents. This is so even if the act is perpetrated by an agent who exceeds his or her authority

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83 *López Burgos v. Uruguay* (52/79), § 12.1-12.3.

84 *Montero v. Uruguay* (106/81), § 5.

or disobeys instructions.<sup>85</sup> For example, the HRC found that the State party was responsible for a “disappearance” perpetrated by a corporal who kidnapped the victim in *Sarma v. Sri Lanka* (950/00), despite the State’s contention that the corporal acted beyond authority and without the knowledge of his superior officers.<sup>86</sup>

Furthermore, under the ICCPR, States parties must take reasonable steps to prevent private actors (whether they be natural or artificial persons like corporations) from abusing the Covenant rights of others within their jurisdiction. For example, the HRC has stated that:

“it is ... implicit in Article 7 that States parties have to take positive measures to ensure that private citizens or entities do not inflict torture or cruel, inhuman, or degrading treatment or punishment on others within their power”.<sup>87</sup>

It is possible that the ICCPR is broader than the CAT in this regard, as the CAT is explicitly limited to acts “inflicted by or at the instigation of or with the consent or acquiescence of a public official”.<sup>88</sup> It is uncertain whether a failure to take reasonable steps to prevent private acts of torture constitutes “acquiescence”.<sup>89</sup> Therefore, it seems sensible to pursue an individual complaint under the ICCPR rather than the CAT in this respect, if both avenues are open to a prospective complainant.

At present, it seems unlikely that a State is responsible under either treaty for the acts of its private citizens committed outside the territory over which a State has legal or effective control.<sup>90</sup> However, a State probably is so liable when private actors are acting under its authority, such as pursuant to a military contract. For example, the HRC recently expressed concern to the U.S. over the compatibility of certain interrogation techniques, which were authorised to be used by private military contractors, with Article 7.<sup>91</sup>

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85 See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its Fifty-third Session, (2001) UN doc. A/CN.4/L.602/Rev.1, Article 7.

86 *Sarma v. Sri Lanka* (950/00), § 9.2.

87 General Comment 31, § 8.

88 See Articles 1 and 16, CAT.

89 See Section 4.1.2(e).

90 Joseph, Schultz, and Castan, above note 31, § 4.17.

91 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 13.

In *H.v.d.P v. The Netherlands* (217/86), the complaint related to the recruitment policies of the European Patent Office. The complainant argued that as France, Italy, Luxembourg, the Netherlands and Sweden were State parties to both the European Patent Convention and the OP to the ICCPR, the HRC was competent to hear the case. The HRC found the case to be inadmissible “the .... grievances...concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party” to the ICCPR and the OP.<sup>92</sup> It therefore appears that States are not liable under the UN treaties for the acts of international organizations to which they belong.

States parties are not liable for violations of ICCPR and CAT rights by other States. However, a State can be liable under the treaties if it takes action which exposes a person to a reasonably foreseeable violation of his or her rights by another State. An example of such a violation is when a State deports a person to another State in circumstances where the deportee faces a real risk of torture in the receiving State. Such actions are prohibited under Article 3 of CAT and Article 7 of the ICCPR. In such cases, it is the act of deportation that breaches the treaty, rather than any act of torture which might occur in the receiving State.<sup>93</sup>

### (c) Exhaustion of Domestic Remedies

Article 5(2)(b) of the OP states:

“the Committee shall not consider any communication from an individual unless it has ascertained that...the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.”

A similar admissibility requirement is found in Article 22(5)(2) of CAT. Article 22(5)(2) adds that a person does not have to exhaust domestic remedies if they are “unlikely to bring effective relief to the person who is the victim of the violation of this Convention”. Therefore, in order for a complaint to be considered by either Committee, it must be shown that the complainant has genuinely attempted to utilise all available and effective means within the relevant State to gain a remedy for the breach of his or her rights.

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92 *H.v.d.P v. The Netherlands* (217/86), § 3.2.

93 If an act of torture subsequently takes place in the receiving State, that State breaches the CAT and/or the ICCPR, depending on whether it is a party to those treaties. For further detail on the *non-refoulement* rule, see discussion in Section 1.1 and Appendix 11.

Sometimes no remedy is available. For example, it may be that certain human rights violations are explicitly authorised by a State's law, and that the law cannot be challenged for any reason in a court. For example, a person is not required to appeal an action if it is clearly authorised by domestic legislation and if there is no avenue to challenge the municipal validity of that legislation.<sup>94</sup>

It may be that domestic remedies are not exhausted at the time of the submission of a complaint, but are exhausted by the time the admissibility of the complaint is actually considered by the relevant Committee. In this situation, the Committee will almost always decide that Article 5(2)(b) has been satisfied. There is little point in deeming such a complaint inadmissible on the basis of Article 5(2)(b), as the complainant can simply resubmit an identical complaint.<sup>95</sup>

If a complaint is deemed to be inadmissible as domestic remedies were not exhausted, the complaint may be resubmitted if available domestic remedies are subsequently exhausted without satisfaction.

### *i. Types of Remedies*

Complainants are generally expected to exhaust domestic judicial remedies.<sup>96</sup> The Committees are often more lenient with regard to the need to exhaust administrative remedies, as the quality and nature of such remedies vary widely across States. The relevance of an administrative remedy to the domestic remedies rule will depend in each case on its perceived effectiveness. The Committees are not likely to require the exhaustion of highly unusual or “extraordinary” remedies which are outside the mainstream of the relevant State's justice system.<sup>97</sup> Administrative remedies will be deemed ineffective, meaning a person does not have to exhaust them, if they are highly discretionary. For example, in *Singarasa v. Sri Lanka* (1033/01), the failure to seek a presidential pardon in respect of a long prison sentence was not a domestic remedy that needed to be exhausted in order for the complaint to be admissible.<sup>98</sup>

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94 Joseph, Schultz, and Castan, above note 31, § 6.20.

95 An exception arose in *Kuok Koi v. Portugal* (925/00), due to the unusual circumstance of the relevant territory, Macao, changing hands from Portugal to China throughout the currency of the complaint.

96 Joseph, Schultz, and Castan, above note 31, §§ 6.02-6.03; see for example *Patiño v. Panama* (437/90), § 5.2.

97 *Muhonen v. Finland* (89/81). See also M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd edn., N.P. Engel, Publisher, 2005, pp. 886-888.

98 *Singarasa v. Sri Lanka* (1033/01), § 6.4.

In *Vicente et al v. Colombia* (612/95), the HRC held that it is necessary to look at the nature of the alleged violation in order to ascertain whether a remedy is effective. If an alleged violation is serious, such as the breach of a person's right to life, administrative and disciplinary measures alone are unlikely to be considered either adequate or effective.<sup>99</sup> One can assume that a similar requirement exists with regard to allegations of torture, cruel, inhuman or degrading treatment or punishment, given the grave nature of such abuses.

*ii. How is One Supposed to Exhaust Domestic Remedies?*

In general, a person who wishes to submit a complaint to the HRC or the CAT Committee must raise the substance of his or her complaint before the local authorities in order for the complaint to be admissible.<sup>100</sup> In *Grant v. Jamaica* (353/88), the complaint related to conditions of detention on death row. The HRC held that domestic remedies had not been exhausted because the complainant had not shown the HRC what steps he had taken in order to bring his complaints to the attention of the prison authorities, nor had he outlined whether any investigations had been carried out in response to his complaints.<sup>101</sup> In *Perera v. Australia* (541/93), the complainant submitted a complaint to the HRC on the grounds that his trial was unfair because of the presence of a particular judge, and because he had not been provided with an interpreter. The HRC held that domestic remedies had not been exhausted as the judge's participation was not challenged during the trial, nor was the absence of an interpreter brought to the attention of the court during the trial.<sup>102</sup>

In exhausting domestic remedies, a person need not specifically invoke the relevant international provision so long as the substance of the complaint is addressed.<sup>103</sup> For example, one may successfully exhaust domestic remedies with regard to an allegation of torture without referring explicitly to Article 7 ICCPR or the CAT in domestic proceedings, if those specific provisions have not been incorporated into a State's municipal law.

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99 See also *Coronel et al v. Colombia* (778/97), § 6.2.

100 Joseph, Schultz, and Castan, above note 31, § 6.07.

101 Compare the Model Complaint (*Textbox ii*), § 13.

102 See also *Mazón Costa and Morote Vidal v. Spain* (1326/04).

103 *B.d.B v. Netherlands* (273/89), § 6.3.

### *iii. Procedural Limitations for Domestic Remedies*

A complainant is expected to comply with all reasonable procedural limitations regarding the availability of domestic remedies. For example, a person may have a limited time in which to appeal a lower court's decision to a higher court. If he or she fails to do so, it is likely that any subsequent complaint will be deemed inadmissible due to a failure to exhaust domestic remedies. This is so even if the failure to comply with local procedural requirements is the fault of a privately retained lawyer, rather than the complainant.<sup>104</sup> Furthermore, ignorance of the law is no excuse.<sup>105</sup>

However, the complainant may sometimes be excused from strict application of the domestic remedies rule if his or her publicly appointed lawyer has failed to comply with local procedural requirements. For example, in *Griffin v. Spain* (493/92), the complainant's court-appointed counsel did not contact him at all, and consequently did not inform him of the remedies available to him. Although the complainant did not seek the relevant remedy within the time limit, the case was not held to be inadmissible on these grounds.

If a person makes a genuine and reasonable yet unsuccessful attempt to comply with local procedural requirements and exhaust domestic remedies, such attempts may satisfy the domestic remedies rule. For example, in *J.R.T. and the W.G. Party v. Canada* (104/81), the complainant failed to file his application for judicial review within the legal time limit because the time limits in question were conflicting and ambiguous. As the complainant had made a reasonable effort to exhaust domestic remedies, the HRC held that he had complied with the requirements of Article 5(2)(b) of the OP.<sup>106</sup>

### *iv. Futile Remedies*

A person need not pursue futile appeals. This exception to the normal domestic remedies rule is explicitly found in Article 22(5)(2) of CAT. The exception has also been recognised with regard to the ICCPR by the HRC in its case law.

For example, in *Pratt and Morgan v. Jamaica* (210/86, 225/87), the HRC held that complainants are not required to exhaust domestic remedies which objec-

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<sup>104</sup> See e.g., *C.P. and M.P v. Denmark* (CERD 5/1994).

<sup>105</sup> See e.g., *Soltes v. Czech Republic* (1034/01), § 7.4.

<sup>106</sup> See also *Mpandanjila et al v. Zaire* (138/83).

tively have no prospect of success. A person's subjective belief or presumption that a certain remedy is futile does not absolve him/her of the requirement to exhaust all domestic remedies:<sup>107</sup> the relevant remedy must be objectively futile.

It is difficult to establish that a remedy is objectively futile. For example, in *P.M.P.K v. Sweden* (CAT 30/95), the complainant alleged that her proposed expulsion from Sweden to Zaire would expose her to a real chance of torture in Zaire. Within eighteen months, she had already had two applications for asylum rejected. She asserted that a third application would be futile. While she had new evidence of her medical condition, she had no new evidence to counter the grounds upon which she had been previously unsuccessful, that is that she did not face a risk if returned to Zaire. Furthermore, only five percent of new applications were successful. Nonetheless, the CAT Committee found that it could not be conclusively stated that a new application would be ineffective or futile.

In *Arzuaga Gilboa v. Uruguay* (147/83), the HRC stated that "effective" remedies include "procedural guarantees for a fair and public hearing by a competent, independent and impartial tribunal".<sup>108</sup> In this respect, the Committees have recognised that the pursuit of domestic remedies in certain circumstances under certain tyrannical regimes are likely to be futile. The rule of law may simply not apply under such regimes; courts are usually not independent, and may simply act as rubber stamps for governments.<sup>109</sup>

One is not required to exhaust domestic remedies if it is dangerous to do so. In *Phillip v. Jamaica* (594/92), the HRC held that due to the complainant's fear of the prison authorities, he was not required to alert these authorities to the poor conditions in detention.<sup>110</sup>

If the highest domestic tribunal in the land has made a decision in a case where the facts are very similar to those in the relevant case, and if that higher court decision eliminates any prospect of success of an appeal to the domestic courts, complainants will not be required to exhaust that domestic remedy.<sup>111</sup> In *Pratt and Morgan v. Jamaica* (210/86, 225/87), the complainants claimed that their

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107 See *R.T. v. France* (262/87) and *Kaaber v. Iceland* (674/95).

108 *Arzuaga Gilboa v. Uruguay* (147/83), § 7.2.

109 Joseph, Schultz, and Castan, above note 31, § 6.15; see also C. Giffard, *The Torture Reporting Handbook*, Human Rights Centre, University of Essex, 2000, p. 81.

110 *Phillip v. Jamaica* (594/92), § 6.4. See the Model Complaint, *Textbox ii*, § 18.

111 See Joseph, Schultz, and Castan, above note 31, § 6.20.

execution after a long period of time on death row would breach their ICCPR rights. They argued that an appeal to the Supreme Court of Jamaica would inevitably fail due to a prior decision of the Judicial Committee of the Privy Council, the highest court in the Jamaican legal system, which had rejected the legal arguments that the complainants wished to put forward. The HRC held that a constitutional motion in this case “would be bound to fail and there was thus no effective remedy still to exhaust.”<sup>112</sup> In *Faurisson v. France* (550/93), the complainant was not required to appeal his case to the French Court of Appeal as his co-accused had already lost his appeal before that court. On the other hand, the Committees may require the complainant to exhaust this remedy if the relevant superior judgment is a weak precedent. An example of a weak precedent may arise where the higher court judgment is decided by a thin majority, or where the law was largely uncharted prior to that decision.<sup>113</sup>

#### *v. Expensive Remedies*

The Committees sometimes take into account the financial means of the complainant and the availability of legal aid, though the case law in this regard is not entirely clear.<sup>114</sup> In *Henry v. Jamaica* (230/87), the complainant argued that he could not pursue a constitutional remedy in the Jamaican Supreme Constitutional Court due to his lack of funds and the fact that legal aid was not available for constitutional motions. The HRC held that “it is not the author’s indigence which absolves him from pursuing constitutional remedies, but the State party’s unwillingness or inability to provide legal aid for this purpose”.<sup>115</sup> The HRC consequently held that the complainant did not need to pursue the constitutional motion as it was neither available nor effective. On the other hand, in *P.S. v. Denmark* (397/90), the HRC held that simply because a person may have doubts over the financial considerations of a remedy, he or she is not absolved from exhausting that remedy. This case may be distinguished from *Henry* as the complainant did not even attempt to pursue any judicial remedies nor did he show that he was unable to afford to pursue such remedies.<sup>116</sup> If a

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112 *Pratt and Morgan v. Jamaica* (210/86, 225/87), § 12.5. Ironically, the Privy Council did ultimately overturn its previous case law on the relevant issue in a case brought by Pratt and Morgan in *Pratt and Morgan v. Attorney-General for Jamaica* (1993) 2 AC 1. See Section 3.2.10(b).

113 See e.g., *Barbaro v. Australia* (CERD 7/95), § 10.5. This case was decided under the individual complaint mechanism under the International Convention on the Elimination of all forms of Racial Discrimination 1966.

114 Joseph, Schultz, and Castan, above note 31, § 6.27.

115 *Henry v. Jamaica* (230/87), § 7.3.

116 Joseph, Schultz, and Castan, above note 31, § 6.27.

person can afford to pursue an available remedy, he or she must do so even if that remedy is expensive.<sup>117</sup> Furthermore, a person must actively seek and fail to get legal aid (unless there is no provision for legal aid in the relevant State) before he or she can be absolved from seeking a costly remedy.<sup>118</sup>

*vi. Unreasonable Prolongation of Remedies*

The Committees do not expect persons to pursue remedies which are unreasonably prolonged. This exception to the normal domestic remedies rule is expressly found in both the OP and Article 22 of the CAT.

In *R.L. et al v. Canada* (358/89), it was held that even if a complainant anticipates overly lengthy proceedings, he or she must still make a reasonable effort to exhaust domestic remedies. Furthermore, if remedies are prolonged due to the fault of the complainant, then they will not be held to be unduly prolonged.<sup>119</sup>

There is no standard period of time which is applied to determine whether a remedy is “unreasonably prolonged”: the period will vary according to the complexity of the case. In *Fillastre and Bizoarn v. Bolivia* (336/88), the complaint related to the arrest and prolonged detention of two French private detectives by Bolivian authorities. The HRC held that:

“a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was “unreasonably prolonged” within the meaning of Article 5, paragraph 2(b) of the OP”.<sup>120</sup>

As the delays were not caused by the complainants and they could not be justified by the complexity of the case, the requirement to exhaust all available domestic remedies was deemed to have been met. In *V.N.I.M. v. Canada* (CAT 119/98), the complainant had been pursuing remedies in immigration proceedings for more than four years; the CAT Committee considered that any further extension of this time period would be unreasonable.<sup>121</sup> In *Blanco v. Nicaragua* (328/88), the complainant had spent nine years in detention by the time he sub-

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117 See for example, *R.W. v. Jamaica* (340/88), § 6.2.

118 See for example, *G.T. v. Canada* (420/90), § 6.3.

119 See for example, *H.S. v. France* (184/84).

120 *Fillastre and Bizoarn v. Bolivia* (336/88), § 5.2.

121 *V.N.I.M. v. Canada* (CAT 119/98), § 6.2.

mitted the complaint. No remedies were available to him at that point in time. Whilst the complaint was pending, a new government came to power, and released him after ten years in prison. The new government argued that the complainant now had recourse to new remedies to seek recompense for his detention. The HRC held that the complainant could not be required to pursue further remedies as the application of such remedies would entail an unreasonable prolongation of the complainant's quest for vindication.<sup>122</sup>

### *vii. Burden of Proof*

The initial burden is with the complainant to prove that he or she has exhausted or genuinely attempted to exhaust all appropriate domestic remedies. The complainant must substantiate any claim that certain remedies are unavailable, ineffective, futile or unreasonably long. Subsequently, the burden shifts to the State party to provide evidence that domestic remedies are still available and effective. This approach is quite flexible and ensures that the burden is shared between the author and the State party.<sup>123</sup>

### **(d) No Simultaneous Submission to Another International Body**

The ICCPR and CAT will be addressed separately with regard to this ground of inadmissibility, as the rules are materially different.

#### *i. The ICCPR*

Article 5(2)(a) of the OP to the ICCPR states that:

“the Committee shall not consider any complaint from an individual unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.”

Therefore, the HRC will not consider complaints that are being considered *at the same time* by a relevant international body. For example, in *Wright v. Jamaica* (349/89), a violation of the complainant's rights had already been found under the Inter-American Convention on Human Rights; he was nevertheless able to subsequently bring the same complaint before the HRC.

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<sup>122</sup> *Blanco v. Nicaragua* (328/88), § 9.2.

<sup>123</sup> Joseph, Schultz, and Castan, above note 31, § 6.43.

If a complaint is deemed inadmissible under Article 5(2)(a), the complainant can resubmit the complaint once the consideration of his complaint by the other international body has concluded.

A relevant international procedure for the purposes of Article 5(2)(a) is an analogous international individual complaints procedure, such as those available under the European Convention of Human Rights, the American Convention on Human Rights, the African Charter, the CAT, the International Convention on the Elimination of all forms of Racial Discrimination, or the Convention on the Elimination of all forms of Discrimination Against Women. A complaint under Article 26 of the International Labour Organisation Constitution and the special procedure before the International Labour Organisation's Committee on Freedom of Association may also render a complaint inadmissible.<sup>124</sup>

On the other hand, a study by an intergovernmental organisation of a human rights situation in a given country does not render the complaint inadmissible, even if that study touches on issues that arise in a relevant complaint.<sup>125</sup> Nor will a study by a Special Rapporteur, such as the Special Rapporteur on Torture, or a procedure established by an NGO, such as Amnesty International, the International Commission of Jurists, or the International Committee of the Red Cross, amount to a "procedure of international investigation or settlement" for the purposes of Article 5(2)(a).<sup>126</sup>

The HRC has held that the words, "the same matter", in Article 5(2)(a) of the OP, have "to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body."<sup>127</sup> For example, in *Unn et al v. Norway* (1155/03), a complaint about the same matter (compulsory religious education in Norwegian schools) was submitted to both the HRC and the European Court of Human Rights. However, the complaints were submitted by different sets of parents and students, so the complaints did not concern "the same matter".<sup>128</sup> In *Millán Sequeira v. Uruguay* (6/77), a case had been put before the Inter-American Commission on Human Rights relating to hundreds of persons detained in Uruguay; two sentences of that complaint related to the

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124 Nowak, above, note 97 p. 879.

125 *Baboeram et al v. Suriname* (146, 148/154/83), § 9.1.

126 *Baboeram et al v. Suriname* (146, 148/154/83), § 9.1.

127 *Fanali v. Italy* (75/80), § 7.2.

128 *Unn et al v. Norway* (1155/03), § 13.3.

victim in the OP complaint. The HRC held that the OP complaint was not comparable as it described the victim's personal complaint in detail.<sup>129</sup> Therefore, the two cases did not relate to the same matter.

As noted above, Article 5(2)(a) does not preclude the admissibility of a case if a case has been considered under an alternative international complaints mechanism, so long as that consideration is completed. However, numerous European States have entered reservations<sup>130</sup> to the OP to preclude consideration of cases if they have been *previously* considered under the European Convention on Human Rights (ECHR). Therefore, these reservations generally aim to prevent the UN treaty bodies being used to "appeal" European human rights decisions.<sup>131</sup>

The case law on the European reservations is complex.<sup>132</sup> For example, the HRC has apparently tried to limit the application of such reservations when the facts of a relevant case give rise to different claims under the ICCPR and ECHR, due to substantive differences between the respective treaties.<sup>133</sup> Such issues are unlikely to arise with regard to torture, cruel, inhuman or degrading treatment, as both treaties prohibit such acts.<sup>134</sup> Other complexities have arisen with regard to the HRC's interpretation of the exact words of a relevant European reservation. For example, a reservation that prohibits the HRC from considering cases previously "decided" by the European Court of Human Rights is narrower than a reservation which prohibits the consideration of cases previously "submitted" to the European Court of Human Rights. The latter reservation is broader as it seems to catch complaints that were submitted to the European Court but withdrawn prior to the making of any decision. It is therefore advisable for a complainant to the HRC to scrutinise the wording of any relevant reservation by a European State, if the same matter has been previously dealt with in some way under the ECHR. It may be possible to distinguish the fact situation from the situation referred to in the relevant reservation, depending on the language of that reservation.

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129 *Millán Sequeira v. Uruguay* (6/77), § 9.

130 A reservation, which must be entered upon ratification of a treaty, modifies a State's obligations under a relevant treaty. It normally constitutes an intention to opt out of certain provisions of a treaty.

131 P.R. Ghandi, *The Human Rights Committee and the Right of Individual Communication*, Ashgate, 1998, p. 228.

132 Joseph, Schultz, and Castan, above note 31, §§ 5.09-5.17.

133 For example, the ICCPR contains some rights, such as the explicit prohibition on hate speech, which are not in the ECHR.

134 This does not mean that the law under the UN treaties and the ECHR is the same. For example, the HRC and the European Court have taken different views on the death row phenomenon: see Section 3.2.10(b).

*ii. CAT*

Under Article 22(5)(1) of CAT, the CAT Committee may not consider any complaint that has been or is being examined by another procedure of international investigation or settlement. Unlike the ICCPR, this ground of inadmissibility is not limited to situations where a complaint is being simultaneously considered by another international body: the CAT Committee is also precluded from examining complaints that have been considered under an analogous procedure, even if that process is complete. Therefore, the CAT is stricter than the ICCPR in this regard.

It can be expected that the CAT Committee will follow the case law of the HRC with regard to other relevant issues, such as the definition of a relevant international procedure, and the definition of the “same matter”.

**(e) Abuse of the Right of Submission**

Sometimes a complaint will be found inadmissible because it is an abuse of right of submission. This ground of inadmissibility is rarely invoked. It might arise for example if a purported victim deliberately submits false information to a Committee.<sup>135</sup> It might also arise if the complaint is submitted after a very long period of time has elapsed since the incident complained of. The case of *Gobin v. Mauritius* (787/97) was dismissed on this ground. The complaint concerned alleged discrimination against the complainant by the State contrary to Article 26 ICCPR, entailed in its failure to acknowledge his election to the Mauritian legislature. The complaint was submitted five years after the relevant election. Though there is no strict time limit in which one should submit a complaint to the HRC, it stated in this case:

“[T]he alleged violation took place at periodic elections held five years before the communication was submitted on behalf of the alleged victim to the Committee with no convincing explanation in justification of this delay. In the absence of such explanation the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible under Article 3 of the Optional Protocol.”<sup>136</sup>

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135 Nowak, above note 97, p. 853.

136 *Gobin v. Mauritius* (787/97), § 6.3. Five dissenting members of the HRC claimed that the majority decision improperly introduced a “preclusive time limit” to the Optional Protocol.

### **2.1.2 How to Submit a Complaint to the HRC and the CAT Committee**

Individual complaints, sometimes referred to as “individual communications”, can be submitted under the OP to the ICCPR and Article 22 of the CAT regarding alleged violations by States parties of their obligations under the respective treaties with respect to particular individuals.

Individual complaints must be sent to the relevant Committee at the following addresses.

#### **ICCPR**

Human Rights Committee,  
c/o Office of the UN High Commissioner for Human Rights,  
Palais Wilson,  
52 Rue des Pâquis,  
1211 Geneva, Switzerland  
Fax: (41 22) 917-9022  
Email: [tb-petitions.hchr@unog.ch](mailto:tb-petitions.hchr@unog.ch)

or

#### **CAT**

Committee Against Torture,  
c/o Office of the UN High Commissioner for Human Rights,  
Palais Wilson,  
52 Rue des Pâquis,  
1211 Geneva, Switzerland  
Fax: (41 22) 917-9022  
Email: [tb-petitions.hchr@unog.ch](mailto:tb-petitions.hchr@unog.ch)

A complaint regarding an allegation of torture, inhuman or degrading treatment cannot be sent to both Committees at the same time. Therefore, an individual must choose which treaty body to submit the complaint to.<sup>137</sup>

The treaty body to which the complainant wishes to send the complaint must be clearly specified. Complaints must be in writing, and may be submitted by fax or email, but they will not be registered until the Secretariat receives a signed hard copy.

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<sup>137</sup> See Section 2.1.3(c).

### (a) Basic Guide to Submission of a Complaint

A model complaint form is available at <http://www.unhcr.ch/html/menu6/2/annex1.pdf>. It is not compulsory to use this form, but correct completion of this form does ensure that basic necessary information is conveyed to the relevant Committee. The Model Complaint in *Textbox ii*, below, provides an alternative example how to submit a complaint.

The complaint form provided on the OHCHR's website specifies that the following information should be given:

- name of the treaty body to which the complaint is addressed
- name of the person submitting the complaint
- State against whom the complaint is made. (Regarding the ICCPR, a communication can only be submitted against a State if that State has ratified the OP. Regarding CAT, a communication may only be submitted against a State that has made the requisite declaration under article 22 of the treaty.)
- the nationality, date and place of birth, occupation of the author
- signature of the person submitting the complaint
- address for correspondence regarding the complaint
- the name of the victim, if different from the person submitting the complaint. This person is also known as 'the author' or, in this *Handbook*, 'the complainant'. If the victim is uncontactable (e.g. he/she is dead), a person with a close relationship to that victim, such as a close family member, has standing to be the author.<sup>138</sup>
- author's nationality, date and place of birth, and occupation
- author's address, if known
- authorisation for a person (if not the author) to submit the complaint
- explanation as to why there is no such authorisation, if that is the case
- request for anonymity in publication of any decisions, if necessary

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<sup>138</sup> See Section 2.1.1(a).

- a list of the articles of the relevant treaty (ICCPR or CAT) that the person maintains have allegedly been violated. Ensure that the State party has not made reservations to the relevant articles.<sup>139</sup>
- a description of how domestic remedies have been exhausted
- an explanation of why domestic remedies have not been totally exhausted, if that is the case<sup>140</sup>
- a statement that the complaint is not simultaneously before another procedure of international investigation of settlement<sup>141</sup>
- if the events have taken place outside a State's territory, an explanation as to why the State should be held responsible for those events.<sup>142</sup>
- if some or all of the events have taken place prior to entry into force of the individual complaints procedure for a State, an explanation as to why the violations are 'continuing violations'.<sup>143</sup>
- a request for interim measures, if such a request is being made, along with an explanation as to why such measures are being requested.<sup>144</sup>
- a detailed statement of the facts
- a description of the remedy requested
- relevant supporting documentation

### **b) Legal Advice and Representation**

An author may authorise another person to act on his or her behalf in submitting the complaint, and in liaising with the Committee throughout the consideration of the complaint. Such authorisation should be in writing with a signature. There is no formal authorisation form.

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139 If a State enters a 'reservation' to a treaty provision, it is signalling that it does not consider itself bound by that provision. Reservations must be entered upon ratification. Reservations to UN human rights treaties may be found at <http://www.unhchr.ch/tbs/doc.nsf>

140 See Section 2.1.1(c).

141 See Section 2.1.1(d).

142 See Section 2.1.1(b)(iii).

143 See Section 2.1.1(b)(ii).

144 See Section 2.2.

It is not necessary for a communication to be submitted by a qualified lawyer. However, if possible, it is preferable for a victim to seek legal assistance in drafting and submitting his or her complaint. The involvement of a lawyer in the drafting process should improve its quality and therefore its chances of success.<sup>145</sup>

### **c) Costs of Submission**

The process of submitting a complaint is free: there are no costs incurred as such if a UN treaty body should consider one's complaint. However, costs may be incurred in preparing the complaint. For example, costs may be incurred in procuring legal advice or retaining a lawyer to handle the communication, in translating documents, and in obtaining copies of relevant documentation. No legal aid is available from the UN. Access to legal aid will depend on its availability under the relevant national legal system.<sup>146</sup> In some instances local lawyers or NGOs may be willing to assist on a *pro bono* basis.

### **d) Pleadings**

To date, every complaint has been decided on the basis of written submissions. Though the rules of the CAT Committee make provision for the giving of oral evidence,<sup>147</sup> this has never happened.

All of the facts upon which the claim is based should be set out in chronological order and in clear, concise language. It should also be easy to read, so paragraphs should be numbered and, if necessary, cross-referenced,<sup>148</sup> with double spacing. Supporting documentary evidence should be appended to the complaint, such as police records or medical records. If necessary, translated copies should be included. Such evidence is discussed more in Section 2.1.2(e).

There is no time limit within which to bring a claim. However, it is preferable for a complaint to be brought to the relevant Committee as soon as possible after the exhaustion of the final relevant domestic remedy in respect of the

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145 UN Fact Sheet No.7/Rev.1, "Complaint Procedures", at: [www.ohchr.org/english/about/publications/sheets.htm](http://www.ohchr.org/english/about/publications/sheets.htm)

146 "How to Complain about Human Rights Treaty Violations: Introduction to Complaints Procedures" at [http://www.bayefsky.com/complain/9\\_procedures.php](http://www.bayefsky.com/complain/9_procedures.php)

147 Rules of Procedure of the Committee Against Torture, (2002) UN doc. CAT/C/3/Rev.4, (hereinafter referred to as "CAT Rules of Procedure"), Rule 111.

148 See Model Complaint, *Textbox ii*, e.g., §§ 4, 21, 38.

complaint. In *Gobin v. Mauritius* (787/97), the HRC found that an inexplicable delay of five years in submitting the complaint rendered the complaint inadmissible as an abuse of the right of submission.<sup>149</sup> Significant delay in the submission of a complaint can render one's story less credible, as evidence may be very old, and can prejudice the State party's ability to respond.

There is no word limit to a complaint. If it is especially long, it may be advisable to include a short summary of the contents of the complaint.<sup>150</sup>

The complaint should be submitted in one of the working languages of the Committees, which are English, French, Spanish, and Russian.<sup>151</sup> Therefore, the complaint, along with relevant documentation, should be translated into one of these languages. In fact, consideration of a complainant is likely to be delayed if it is submitted in a language other than English, French, or Spanish. With regard to supporting documentation, copies in the original language should also be forwarded.

The author should explain why the facts amount to a breach of named provisions of the relevant treaty. It is not strictly necessary to identify the articles that have allegedly been violated, but it is preferable to do so. If possible, the author should refer to the previous case law or other jurisprudence (e.g. General Comments, Concluding Observations) of the relevant Committee.<sup>152</sup> If there is no such favourable jurisprudence, the author could refer to the favourable jurisprudence of another UN treaty body, a regional human rights court or even a comparative decision from another State's domestic courts.<sup>153</sup> In short, the author should try to include references to legal precedents that support his or her case. If the previous case law of the relevant Committee undermines the author's case, the author should acknowledge that fact and try to distinguish the previous case law, or put forward an argument as to why it should not be followed. The author should also, if possible, point out if the facts raise a novel issue that has not been previously addressed by the relevant Committee.

The author must confirm that the complaint satisfies all of the admissibility criteria. In particular, the author should detail how domestic remedies have

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149 Section 2.1.1(e)

150 Giffard, above note 109, 66-67.

151 Rules Of Procedure of the Human Rights Committee, (2005) UN doc. CCPR/C/3/Rev.8, (hereinafter referred to as "HRC Rules of Procedure"), Rule 28; CAT Rules of Procedure, Rule 26.

152 See, Model Complaint, *Textbox ii*, at, e.g., §§ 40-41.

153 See Model Complaint, *Textbox ii*, § 46.

been exhausted. The author should specify whether he or she has sought a remedy from the highest court of the relevant State; in doing so, the author should not assume that committee members are familiar with the judicial hierarchy in the relevant State.<sup>154</sup> If no relevant domestic remedies were available, that fact should be explained in the account. If domestic remedies have not been exhausted, the author should explain why they were not exhausted.<sup>155</sup> The rule is waived where pursuance of a remedy is clearly futile, or is unreasonably prolonged. The author should explain why a remedy is futile, or why he or she believes it is unreasonably prolonged. Bald assertions (e.g. ‘the courts are unfair’; ‘the courts are corrupt’) in this regard are unlikely to be accepted at face value by the Committees.

The author must also confirm that, in accordance with article 5(2)(a) of the OP, the complaint is not being examined by another procedure of international investigation or settlement.<sup>156</sup>

The author must also be aware of other reasons for inadmissibility, and address them if they are relevant. For example, if the alleged violation takes place before the date for which the relevant individual complaints mechanism came into force for the relevant State, the author must explain why there is a continuing violation on the facts of the case.<sup>157</sup> If the alleged violation takes place outside the territory of the relevant State, the author must explain why the State should be held responsible for those extraterritorial actions.<sup>158</sup>

Many cases before the treaty bodies have concerned allegations which have been tested before a national court, which decides that the allegations are not proven. For example, a person may claim that he or she was tortured by police, and may seek to prove that allegation before a court, which ultimately finds that the allegation is unfounded. Due to the need to exhaust domestic remedies, this scenario has arisen often. In general, the treaty bodies are very unlikely to overrule the decision of a national court if that court has addressed the substance of the complaint. For example, the HRC stated in *R.M. v. Finland* (301/88):

“The Committee ... is not an appellate court and ... allegations that a domestic court has committed errors of fact or law do not in themselves raise questions of violation of the Covenant ...”<sup>159</sup>

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154 See Model Complaint, *Textbox ii*, § 31.

155 See Model Complaint, *Textbox ii*, § 32.

156 See Model Complaint, *Textbox ii*, § 28.

157 Section 2.1.1(b)(ii).

158 Section 2.1.1.(b)(iii).

159 *R.M. v. Finland*, (301/88), § 6.4.

The Committees' fact finding processes compare poorly with those of national courts, which have the benefit of seeing witnesses and assessing their demeanour, and hearing oral evidence. The Committees will generally only 'overrule' a national court's decision if it can be established that the court's decision is clearly arbitrary or manifestly unjust, or has suffered from a procedural defect (e.g. the judge had a conflict of interest). Therefore, if an author must challenge a local court decision in order to have his or her complaint upheld, the author should explain how:

- (a) the court did not address the substance of the complaint before the treaty body,<sup>160</sup>
- (b) the court's decision was manifestly arbitrary or unjust. Such an argument might be made if a decision neglects a crucial piece of evidence. For example, in *Wright v. Jamaica* (349/89), § 8.3, a breach of the right to a fair trial was entailed in the judge's failure, in giving instructions to a jury in a criminal trial, to remind the jury of a potential alibi for the author, who was accused of murder.
- (c) the court's decision suffers from a significant procedural defect, such as the participation in the decision of a decision-maker who has clearly manifested bias against the victim.<sup>161</sup>

It is possible that the CAT Committee, in considering cases under Article 3 of CAT (concerning deportation to a State where a victim faces a real risk of torture), adopts a less deferential approach. It has explicitly stated that in such cases, while it will give "considerable weight" to "findings of fact that are made by organs of the State party concerned" (such as refugee review tribunals), it "is not bound by such findings", and may independently assess the facts and circumstances in every case.<sup>162</sup> Nevertheless, the CAT Committee has departed from domestic court decisions in this regard in only a small portion of Article 3 cases.

Unless a complaint is not registered, or is dismissed by the relevant Committee as clearly inadmissible, the State party will be given an opportunity to respond

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160 This argument could in turn raise issues regarding the exhaustion of domestic remedies. Therefore, the author should explain why the substance of the international complaint was not addressed by a local court. In many cases it will be because the actual issue is not effectively justiciable before a national court (i.e. there is no legal ground to challenge the issue in national law).

161 See, eg, *Karttunen v. Finland* (387/89), § 7.1-7.3.

162 General Comment 1 (CAT), § 9(a) and 9(b).

to the initial complaint. The author will then have an opportunity to respond to the State's submissions, and this process may happen more than once. Often a State party will contest some or even all of the author's assertions. In responding to such contentions, the author should address the State's arguments point by point. The author should highlight any flaws or inconsistencies in the State's reasoning, and any gaps in the evidence that it puts forward (e.g. an absence of relevant documentary evidence).

The author's reply will then be sent to the State, and often the two parties (State and author) will have another 'round' of arguments. A party is always given the opportunity, within time limits, to respond to any new arguments submitted by the other. On each occasion that an author responds to a State, he or she should address its arguments point by point, highlighting flaws and inconsistencies if any.

Finally, an author should inform the Committee of any significant developments which arise during the currency of the complaint such as, for example, the passage of relevant new legislation by a State, developments in an investigation, the release or death of a person, and so on.

### **e) Establishment of Facts**

An author should submit as detailed an account of the facts as possible, even though this might be a painful experience to record. All relevant information, such as relevant dates, names, and locations, should be included.<sup>163</sup> An account is more credible if it includes salient details. For example, it is essential to describe the relevant acts of ill-treatment, rather than to simply say that the victim was subjected to 'torture'. Do not make any assumptions about the implications that the relevant treaty body should draw from the facts as presented. Emotional language, bald assertions without supporting evidence, and assumptions will detract from the credibility of the account.

For example, the following are examples of relevant details in a scenario where a victim is arrested by police, driven to a place of detention, detained in a cell, and subjected to ill-treatment:<sup>164</sup>

- How many police officers were involved in a particular assault?
- What type of vehicle did the officers drive?

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<sup>163</sup> See Model Complaint, *Textbox ii*, §§ 1 – 25.

<sup>164</sup> These details have been adapted from Giffard, above note 109, 40-46.

- What time of day was the victim arrested?
- How long did it take to get from the place of arrest to the place of detention?
- Did anyone witness the arrest?<sup>165</sup>
- What was said to the victim at the time of the arrest?
- Approximately how big was the cell in which the victim was held?<sup>166</sup>
- Was any other detainee in the cell?

Was there any light in the cell?<sup>167</sup>

- Other relevant details of the cell (describe bed, colour and state of walls, fixtures etc)?<sup>168</sup>
- Where did the ill-treatment take place (e.g. in the cell, elsewhere?)<sup>169</sup>
- If a device was used to torture the victim (e.g. a device that delivers an electric shock), describe the device (e.g. size, shape, colour, the way it worked, its effect on the victim)<sup>170</sup>
- What, if anything, was said to the victim at the time of the ill-treatment?<sup>171</sup>
- If possible, identify the perpetrators of the ill-treatment, or describe what they looked like.<sup>172</sup>

In many instances, a torture victim will not be able to supply all of the above information. For example, the victim might be highly disoriented at the time of the torture, and may not remember the colour of a torture device. Nevertheless, it is advisable to record as many details as possible.

In its General Comment 1 (CAT), the CAT Committee outlined, at paragraph 8, the different types of information that help a person establish a violation of Article 3 of the CAT, that is that his or her deportation to another State would expose him or her to torture by that State. Applicants seeking Article 3 *non-*

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165 See Model Complaint, *Textbox ii*, § 2.

166 See Model Complaint, *Textbox ii*, § 3.

167 See Model Complaint, *Textbox ii*, § 3.

168 See Model Complaint, *Textbox ii*, § 3.

169 See Model Complaint, *Textbox ii*, § 4.

170 See Model Complaint, *Textbox ii*, § 4.

171 See Model Complaint, *Textbox ii*, §§ 4, 5.

172 See Model Complaint, *Textbox ii*, § 2.

*refoulement* protection should therefore look carefully at this General Comment.<sup>173</sup>

The author should anticipate the supporting documentation that might be needed to bolster the case. For example, the author should submit copies, including copies translated into a working language if necessary, of relevant local laws that are referred to in his or her narrative.<sup>174</sup> Other types of documentary evidence that might be relevant, depending on the facts, include copies of the following: witness statements, police reports, decisions by local courts or tribunals, photographs, medical and psychological reports including autopsies if relevant, and other official documentation.<sup>175</sup>

If the author cannot submit certain relevant documents, he or she should explain why that is the case. For example, it may be that the details of a certain arrest warrant are relevant to the facts of a complaint. In such a case, it would be advisable, and indeed expected, that a copy of the warrant be submitted. If however a copy of the warrant is not made available to the author by the State party, the author should explain that this is the case.<sup>176</sup>

Ancillary material, which is not specifically related to the facts of the case, may be helpful. For example, an NGO report about conditions inside a particular prison provides support for an author who is alleging that the conditions in that prison are so bad as to violate the rights of a particular detained per-

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173 In General Comment 1 (CAT), the CAT Committee listed the following types of information as pertinent to an Article 3 claim:

- (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights ... ?
- (b) Has the author been tortured or maltreated 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 the past? If so, was this the recent past?
- (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
- (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
- (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
- (f) Is there any evidence as to the credibility of the author?
- (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"

174 See Model Complaint, *Textbox ii*, §§ 6, 19.

175 See *Kouidis v. Greece* (1070/02) for an example of a complaint where the author failed to submit adequate information to bolster his claims. See Model Complaint, *Textbox ii*, List of Annexes.

176 See Model Complaint, *Textbox ii*, § 22.

son.<sup>177</sup> An NGO report, or a report by an international organisation, the media, or a government report (e.g. U.S. State Department human rights report) which highlights the frequency of incidents of torture in a State will bolster an author's contention that the victim has been tortured by agents of that State. However, do not overestimate the effect of such general evidence; it remains crucial to include evidence that relates personally to the victim and the facts of the actual case.<sup>178</sup> It is not enough, for example, to simply establish that one is a member of an ethnic group which has historically suffered from human rights abuses at the hands of a particular State government, without establishing that one has suffered personal abuse.<sup>179</sup>

The Committees recognise that "complete accuracy is seldom to be expected by victims of torture."<sup>180</sup> Nevertheless, the author should be careful in drafting the claim, and in drafting responses to State arguments, to avoid inconsistencies in his or her account of the facts. For example, it is possible that the author might assert in the initial submission that an incident took place on a certain date. The State may respond by proving that it took place on a different date. If inconsistencies do arise inadvertently, they should be acknowledged and, if possible, explained. The CAT Committee has stated that it "attaches importance to the explanations for ... inconsistencies given by the complainant",<sup>181</sup> as well as a person's failure to explain inconsistencies.<sup>182</sup>

In *Kouidis v. Greece* (1070/02), the author failed to establish that he had been mistreated in violation of article 7. The following comments from the HRC demonstrate how the evidence submitted by the author was inadequate:

"The Committee observes that the evidence provided by the author in support of his claims of ill-treatment are a newspaper photograph of poor quality, that he allegedly spent fourteen months in hospital from related medical treatment, the lack of interrogation by the prosecution of the landlords of the apartment mentioned in his confession, and reports of NGOs and the CPT. On the other hand, the State party indicates that the author did not request to be examined by a medical officer with the purpose of establishing ill-treatment, which has not been contested by the author. The Committee further notes that despite spending

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177 See Model Complaint, *Textbox ii*, § 11.

178 See, e.g., *Arkauz Arana v. France* (CAT 63/97) and *A.S. v. Sweden* (CAT 149/99) as examples where both types of evidence were submitted, and the claims ultimately upheld.

179 See, e.g., *Z.Z. v. Canada* (CAT 123/99), § 8.5.

180 *Tala v. Sweden* (CAT 43/96), § 10.3.

181 *Ahmed Karoui v. Sweden* (CAT 185/01), § 10.

182 See, e.g., *H.K.H v. Sweden* (CAT 204/02), § 6.3.

such a long time in hospital so soon after the alleged ill-treatment, and despite being in possession of medical certificates concerning his treatment in hospital of haematuria and arthropathy of his knees, back and spine, these certificates do not indicate that any of these sufferings resulted from actual ill-treatment. Nor do any of these certificates mention any traces or consequences of beatings on the author's head or body. The Committee considers that the author, who had access to medical care, had the possibility of requesting a medical examination and did so for the purpose of proving that he was a drug addict. However, he failed to request a medical examination for the purpose of establishing ill-treatment.

... Finally the NGO and Committee on the Prevention of Torture reports submitted by the author [about torture in Greece] are of a general character and cannot establish ill-treatment of the author."<sup>183</sup>

In *Bazarov v. Uzbekistan* (959/00), one claim related to torture perpetrated during a pre-trial investigation. It was found to be inadmissible as it was largely unsubstantiated. For example, there was no evidence that a medical examination was sought at any stage, or that the alleged victim had complained of torture in his subsequent trial, or that his relatives or his lawyer had complained of any acts of torture during the pre-trial investigation.<sup>184</sup>

Regarding the burden of proof, the author must initially make out a credible prima facie case. If such a case is made out, the State party is expected to properly investigate the claims.<sup>185</sup>

“The Committee has consistently maintained that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the relevant information. It is implicit in article 4, paragraph 2 of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish the Committee the information available to it. In cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the State party”.<sup>186</sup>

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183 *Kouidis v. Greece* (1070/02), §§ 7.3 and 7.4. See also *Singh v. New Zealand* (791/97).

184 *Bazarov v. Uzbekistan* (959/00), § 7.3.

185 *Lanza v. Uruguay* (8/77), § 15.

186 *Bousroual v. Algeria* (992/01), § 9.4. This quote has been repeated in numerous OP cases, such as *Bleier v. Uruguay* (30/78), § 13.3. See also Nowak, above note 97, 873-4.

A State must respond to specific allegations with specific responses and relevant evidence: “denials of a general character do not suffice”.<sup>187</sup>

Therefore, if the State party fails to cooperate with the relevant treaty body in providing information about the author’s allegations, the burden of proof is often effectively reversed.<sup>188</sup>

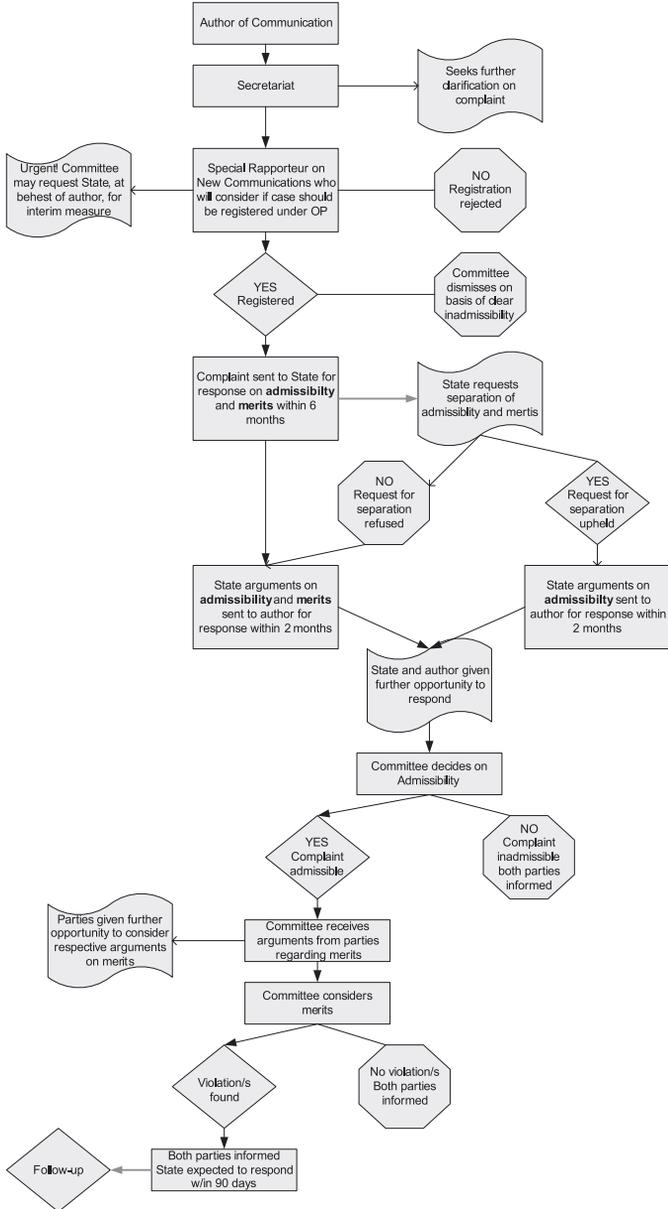
In non-refoulement cases under Article 3 of CAT, the CAT Committee has outlined in General Comment 1 (CAT) the different types of information that

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187 See, e.g., *Weismann v. Uruguay* (8/77), § 15.

188 See, e.g., *Zheikov v. Russian Federation* (889/1999), § 7.2; *Sultanova v. Uzbekistan* (915/2000), § 7.2; see also Nowak, above note 97, 873-4.

*Textbox i: Flowchart Process for Consideration of an OP Complaint*



### 2.1.3 The Process of the Consideration of a Complaint

#### a) Procedure within the Human Rights Committee

The complaint is originally submitted to the Secretariat of the Office of the High Commissioner for Human Rights. An author should explicitly request the complaint to be forwarded to the HRC for consideration under the OP.

The complaint is reviewed by the Secretariat to ensure that it complies with basic informational requirements. The Secretariat may seek clarifications on numerous issues if the author has failed to give crucial information, such as that outlined at Section 2.1.2(a). Therefore, failure to properly outline the complaint can lead to delays or a decision not to register the complaint. The Secretariat may impose a time limit on the submission of clarifying information,<sup>189</sup> but in practice there are no sanctions for non-compliance with such timelines.<sup>190</sup> Nevertheless, it is in the interests of the author to comply with any timelines if possible. Delay will postpone the registration of the case, which delays its consideration by the HRC.

Once the Secretariat believes it has sufficient information to proceed, it forwards a summary of the case to the HRC member serving as the Special Rapporteur on New Communications. The Special Rapporteur decides whether to register the case or whether to request more information prior to registration. The Special Rapporteur will not register a case if it clearly fails to conform with the admissibility criteria set out in the OP.<sup>191</sup>

A complaint is considered in two stages: admissibility and merits. Admissibility criteria are discussed in Section 2.1.1, and every successful complaint must satisfy these criteria. If a case is declared wholly inadmissible, that is the end of its consideration. If a case is found admissible, in whole or in part, the HRC will then consider the “merits” of the case. That is, it will consider whether the facts give rise to a violation of the ICCPR. The ultimate merits decision will contain either a finding or findings of violation, a finding or findings of non-violation, or a mixture of such findings.

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189 HRC Rules of Procedure, Rule 86(2).

190 See “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description” at [http://www.bayefsky.com/complain/10\\_ccpr.php](http://www.bayefsky.com/complain/10_ccpr.php), § 2.

191 See “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description” at [http://www.bayefsky.com/complain/10\\_ccpr.php](http://www.bayefsky.com/complain/10_ccpr.php), § 2.

*i. Preliminary Decisions regarding Registration and Admissibility*

The Special Rapporteur may decide that a case should be registered, but nevertheless recommend immediate dismissal on the basis of inadmissibility to the HRC. The HRC will generally adopt this recommendation. Such recommendations arise when the complaint clearly fails to comply with admissibility requirements.

Otherwise the communication is considered by a Working Group on Communications. This Working Group consists of five Committee members and meets for one week prior to the HRC's regular plenary meetings. This Working Group may also recommend to the HRC that the case be declared inadmissible without seeking a response from the relevant State party if it believes that it clearly fails the admissibility criteria.<sup>192</sup> The HRC tends to adopt such a recommendation, though it can choose to reject it.

Otherwise the complaint is transmitted to the relevant State party for its responses.

*ii. Interim Measures*

In some circumstances, an author may want the HRC to request a State to take interim measures to prevent actions which might cause the author irreparable harm.<sup>193</sup> For example, a person on death row who is challenging that sentence might be executed, or a person challenging his/her deportation might be deported. If so, this request for interim measures should be made clear on the front of the initial communication to the Secretariat.<sup>194</sup> Given the urgency of such situations, a request can be sent in advance of the main complaint, such as by email, and followed up with a hard copy.<sup>195</sup> The Special Rapporteur on New Communications then decides whether a request is warranted in the circumstances. If he or she believes a request is warranted, he or she will request that the relevant State take appropriate interim measures to preserve the author's rights. Interim measures have been requested on most occasions where an author has asked for them, and the record of State parties in comply-

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192 See "How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description" at [http://www.bayefsky.com/complain/10\\_ccpr.php](http://www.bayefsky.com/complain/10_ccpr.php), § 2.

193 See Section 2.2.

194 Giffard, above note 109, p. 83.

195 See "How to Complain about Human Rights Treaty Violations: Introduction to Complaints Procedures" at [http://www.bayefsky.com/complain/9\\_procedures.php](http://www.bayefsky.com/complain/9_procedures.php)

ing with such measures is quite good.<sup>196</sup> A request for interim measures by the Special Rapporteur to the State “does not imply a determination on the merits of the communication”.<sup>197</sup>

*iii. Transmittal to the State Party*

If the complaint is not deemed to be manifestly inadmissible, it will be transmitted by the Special Rapporteur to the State party for a reply. The State party has six months to respond with regard to the issues of both admissibility and the merits.

A State party may request within two months that the issues of admissibility and merits be separated. The Special Rapporteur then considers whether to grant the request, which will only occur in exceptional cases. The State party will generally be given an extension of time regarding its submissions on the merits if the Special Rapporteur agrees to separate the issues of admissibility and merits. Of course, such separation will mean that the process of deciding the complaint will take longer if it proceeds to the merits stage. In most cases, the issues are not separated, so the parties (i.e. the author and the States) are required to submit their observations on both admissibility and merits at the same time.

The author is given two months to respond to the State party’s initial submissions. All subsequent new arguments by either party are transmitted to the other party to give that party an opportunity to respond. The Special Rapporteur, the Working Group, or the HRC itself may request further written responses from both the author and the State party within specified time limits under Rule 97(4) of the HRC’s Rules of Procedure. Eventually, the HRC will decide that it has enough information to make its determinations.<sup>198</sup> Though the relevant time limits are not always strictly enforced, it is in the interests of the author to comply if possible to avoid delay, or to avoid his or her response failing to reach the HRC in time. If compliance with timelines is difficult, it is advisable to warn the HRC of this circumstance.<sup>199</sup>

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196 Joseph, Schultz, and Castan, above note 31, §§ 1.54, 1.55.

197 HRC Rules of Procedure, Rule 91.

198 See “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description” at [http://www.bayefsky.com/complain/10\\_ccpr.php](http://www.bayefsky.com/complain/10_ccpr.php), § 2.

199 Giffard, above note 109, p. 83.

Once enough information has been received by the HRC, the case is prepared by the Secretariat and the Case Rapporteur, who is a Committee member appointed to draft the decision regarding the relevant complaint. The Case Rapporteur's draft is considered by the Working Group. The Working Group may accept or reject the Case Rapporteur's conclusions regarding either the admissibility or (if relevant) the merits.

*iv. Admissibility*

The Working Group, after considering the submissions of the parties regarding admissibility and the recommendations of the Case Rapporteur, may unanimously declare a case to be admissible. Unanimous agreement amongst the Working Group regarding inadmissibility is not decisive, but must be confirmed by the HRC, who may confirm it without formal discussion.<sup>200</sup> If the Working Group cannot reach a unanimous decision regarding the admissibility of the complaint, the decision is taken in plenary session by the HRC. The majority decision will prevail,<sup>201</sup> though members may append separate or dissenting opinions regarding the admissibility of a complaint. All debates and decisions regarding admissibility are taken in closed session. If a complaint is deemed to be wholly inadmissible, that is the final decision. The decision, and the reasons for it, as well as any dissenting or separate opinions, are made public.

Exceptionally, the HRC may reverse its decision that a complaint is admissible. This circumstance may arise if the State party submits further information which establishes that the admissibility requirements have not been satisfied.<sup>202</sup>

*v. Consideration of the Merits of a Complaint*

If the complaint is found to be admissible, and an extension of time has exceptionally been given to the State regarding its submissions on the merits, the State party and the author are given opportunities to make further submissions on the merits after being informed of the admissibility of the decision. A decision that a complaint is admissible is not made public until the merits are decided.

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200 HRC Rules of Procedure, Rule 93.

201 There must be a quorum of twelve HRC members; see HRC Rules of Procedure, Rule 37.

202 Such a reversal occurred, for example, in *Oshivand v. Netherlands* (1289/04).

Normally, the HRC will have all submissions on admissibility and merits at the time of its admissibility decision, and may then proceed to decide the complaint on the merits. Alternatively, the case may be referred back to the Working Group for further recommendations on the merits. If the issues have been separated by decision of the Special Rapporteur, the HRC will then receive merits arguments from both the State and the author, with both parties given a chance to respond to each other's arguments. As with admissibility, the HRC eventually will decide it has enough information to decide the case. The case will then be referred to the Working Group and/or the Case Rapporteur to draft recommendations on the merits for the HRC. The Working Group can accept or reject the recommendations of the Case Rapporteur, and the HRC can accept or reject the recommendations of the Working Group.

All debates regarding the merits by the Working Group or the HRC proceed in closed meetings. Ultimately, the decision of the majority will prevail. However, members commonly append separate and dissenting opinions to the majority decision. The final decision (or "views"), including any separate or dissenting opinions, is transmitted to both the author and the State party under Article 5(4) of the OP, and is eventually made public.

If the HRC finds that a person's rights have been violated, the HRC will request the State to inform them within 90 days (from the date of the transmittal of the decision) of the remedy provided to the victim. The final views may recommend a particular remedy, such as compensation, repeal of particular legislation, the release of a person, or leave the determination of a remedy to the State party.<sup>203</sup>

#### *vi. Follow-up of Views under the Optional Protocol*

The HRC is not a court. Its final views under Article 5(4) of the OP are not strictly binding on a State. However, the HRC is the authoritative interpreter of the ICCPR, which is binding on States parties. Non-compliance by States parties with Committee views is evidence of a bad faith attitude with regard to those obligations.<sup>204</sup> In 1990, the HRC adopted a procedure to "follow-up" its findings of violation under the OP. The follow-up process serves to place sustained pressure on recalcitrant States, and is discussed in Section 2.4.1(b).

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203 See "How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description", [http://www.bayefsky.com/complain/10\\_ccpr.php](http://www.bayefsky.com/complain/10_ccpr.php), § 2.

204 S. Joseph, "Toonen v. Australia: Gay Rights under the ICCPR", (1994) 13 *University of Tasmania Law Review* 392, p. 401.

vii. *Miscellaneous Issues*

The OP process is confidential until a final decision is made (either regarding inadmissibility or merits). However, authors are generally allowed to make their submissions public, though they may be requested to refrain from doing so by the Special Rapporteur in some circumstances.<sup>205</sup> Information furnished in respect of follow-up is not generally confidential, unless the HRC decides otherwise.<sup>206</sup>

Though victims may not be anonymous, published records of the complaint may refer to the victim under a pseudonym, if so requested by the author, as for example occurred in *C v. Australia* (900/99).

There are certain circumstances where a particular HRC member will not take part in the consideration of a complaint. The member must not participate if the complaint is against the State party that nominated the member, if he or she has a personal interest in the case, or if the member has participated somehow in national decisions which are referred to in the complaint.<sup>207</sup> Unusual examples of committee members withdrawing from a complaint have arisen in *Judge v. Canada* (829/98)<sup>208</sup> and *Faurisson v. France* (550/93).<sup>209</sup>

There is no appeal from the final decision of the HRC regarding inadmissibility or merits. Of course, a complaint may be resubmitted if it was originally found to be inadmissible, if the reasons for inadmissibility should cease to apply. For example, if the case is dismissed due to failure to exhaust local remedies, that reason will cease to apply if local remedies should subsequently be exhausted without satisfaction.

**b) Procedure under the Convention against Torture**

The procedure for considering a complaint under the CAT is very similar to that under the ICCPR. The CAT Committee operates with a Working Group on Complaints, which functions very much like the HRC's Working Group on Communications. There is a Rapporteur on New Complaints and Interim

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205 HRC Rules of Procedure, Rule 102(3).

206 HRC Rules of Procedure, Rule 103.

207 HRC Rules of Procedure, Rule 90.

208 The complaint concerned a prospective deportation from Canada to the U.S. The Canadian HRC member did not take part, in accordance with the normal HRC practice. Given the indirect involvement of the U.S. in the case, the U.S. member did not take part either.

209 The U.S. member of the HRC did not take part in this case, which concerned holocaust denial, because he had been a prisoner in a concentration camp in World War II.

Measures whose functions resemble those of the Special Rapporteur for New Communications on the HRC. Case rapporteurs perform similar functions for both Committees. A follow up procedure has been adopted under Rule 114 of the CAT Rules of Procedure. Due to the similarities in procedures, we will focus here only on instances where the CAT procedure is notably different to that of the HRC.

The Working Group on Complaints is established under Rule 105 of the Rules of Procedure of the CAT Committee. It may consist of three to five Committee members. The Working Group may declare a complaint to be admissible by a majority vote,<sup>210</sup> and may declare a complaint to be inadmissible by a unanimous vote.

Under Rule 111 of the CAT Rules of Procedure, it is possible for the CAT Committee to invite the author to submit evidence in closed session in person, that is to submit oral evidence. In such a case, the State party would be invited to send a representative to attend as well. Non-attendance does not prejudice either party. Of course, many authors may not be able to afford to travel to the Committee's sessions. To date (1 September 2006), a Rule 111 oral hearing has never taken place.

#### *i. Interim Measures*

The interim measures procedure functions similarly under CAT as it does under the ICCPR. It is worth noting that interim measures are frequently sought under the CAT, as the majority of its cases have concerned allegations that a proposed deportation will expose the deportee to torture in the receiving State.<sup>211</sup> Interim measures have commonly been requested by the CAT Committee (in practice by the Rapporteur for New Complaints and Interim Measures) to a State to refrain from deporting a particular person until the complaint is concluded, when an author has asked for such a request.

#### **c) Choice of Forum**

An author may often have a choice over whether to refer a complaint to the HRC or to the CAT Committee.

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<sup>210</sup> Of course, a decision that a case is admissible can only be taken after the State party has been given an opportunity to submit arguments regarding admissibility.

<sup>211</sup> See Section 4.3.

In deciding which forum to choose, the following issues should be borne in mind:

- check that the State party allows individual communications under both treaties.
- check the reservations of the State party
- check the case law and other jurisprudence of the relevant body, to see if there are precedents that are favourable or unfavourable to one's case<sup>212</sup>

The admissibility requirements of the two treaties are almost identical. The only difference is that the HRC can examine complaints that have been considered by another international body, so long as that body's deliberations are complete. The CAT Committee cannot consider any complaint that has ever been before another procedure of international investigation or settlement. Clearly, it is preferable for an author to submit a complaint to the HRC instead of the CAT Committee if the complaint has ever been considered by another quasi-judicial or judicial international human rights body.

The CAT has a narrower focus than the ICCPR. Therefore, it is preferable to submit a complaint to the HRC if a fact situation gives rise to violations of other rights beyond the right to be free from torture cruel inhuman or degrading treatment or punishment.<sup>213</sup>

The HRC currently receives many more cases than the CAT Committee, and consequently takes longer to decide cases. Though it has one more meeting per year, that does not make up for the higher number of complaints it must deal with. On average, merits decisions by the HRC take four years, while merits decisions by CAT take only two.<sup>214</sup>

### *i) Regional Treaties*

It is often possible for an author to submit a complaint to a regional treaty body (e.g. the European Court of Human Rights) instead of a UN treaty body.

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212 In this respect, please refer to Parts III and IV of this book, amongst other sources.

213 See "How to Complain about Human Rights Treaty Violations, Choosing a Forum" at [http://www.bayefsky.com/complain/44\\_forum.php](http://www.bayefsky.com/complain/44_forum.php), § 3.

214 How to Complain about Human Rights Treaty Violations, Choosing a Forum, [http://www.bayefsky.com/complain/44\\_forum.php](http://www.bayefsky.com/complain/44_forum.php), § 3.

Relevant considerations, in choosing a regional forum over a UN forum, are summarized as follows from [www.bayefsky.com](http://www.bayefsky.com):<sup>215</sup>

- the likelihood of obtaining a favourable decision
- the substantive reach and content of the treaty
- the competence of the particular body to deal with the substantive issue
- the past practice of the body in dealing with similar cases
- the likelihood that the state party will implement the decision of the particular forum
- the likelihood of obtaining injunctive relief in the form of requests for interim measures in the context of emergencies
- the speed of the process
- the cost of the procedure
- the availability of legal aid
- the availability of oral hearings

It has to be noted that the record of compliance by States with the decisions of the European Court of Human Rights is excellent. The record of State compliance with regard to the decisions of the Inter-American and African bodies is less impressive. Nevertheless, decisions by the Inter-American Court have the advantage of being legally binding. It seems unlikely that a State that refuses to obey a regional court is going to abide by the recommendations of a quasi-judicial UN treaty body. Therefore, it is more probable that a complainant will get a satisfactory remedy after a favourable regional court decision.

On the other hand, it must be noted that the regional bodies generally take a longer time to deal with a case than the UN bodies.<sup>216</sup> Furthermore, it seems that the UN treaty bodies are historically more likely to decide in favour of a complainant.<sup>217</sup> Authors should also be aware of substantive differences between the relevant global and regional treaties, and divergences in jurispru-

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215 See list in, “How to Complain about Human Rights Treaty Violations, Choosing a Forum” at [http://www.bayefsky.com/complain/44\\_forum.php](http://www.bayefsky.com/complain/44_forum.php), § 3.

216 How to Complain about Human Rights Treaty Violations, Choosing a Forum, [http://www.bayefsky.com/complain/44\\_forum.php](http://www.bayefsky.com/complain/44_forum.php), § 3.

217 How to Complain about Human Rights Treaty Violations, Choosing a Forum, [http://www.bayefsky.com/complain/44\\_forum.php](http://www.bayefsky.com/complain/44_forum.php), § 3.

dence, which may shed light on whether a UN forum might be more appropriate than a regional forum. Though such jurisprudential divergences exist, there have not been great divergences in jurisprudence on the issue of torture, or cruel inhuman or degrading treatment or punishment.<sup>218</sup>

## 2.2 Interim Measures

As part of the process of considering individual complaints, the HRC and the CAT Committee are both able to request that a State takes particular action, or refrains from taking certain actions, in order to preserve the status quo for an author, so as to prevent that person from suffering irreparable harm to his or her human rights while the complaint is being considered.<sup>219</sup> A Committee may make such a request to the relevant State when the author requests the Committee to do so: it is however up to the Committee to decide whether such a request is warranted in the circumstances. These positive measures or deliberate acts of restraint constitute “interim measures”. They may also be referred to as “provisional measures”.

The duration and scope of interim measures will depend on the specific circumstances of the case. The relevant Committee will assess the situation and request an interim measure for the period of time necessary to protect the individual/s under threat. Normally, that period lasts throughout the entire process of considering the complaint, that is until the complaint is found inadmissible or until final views on the merits are issued. A request for an interim measure may relate to only one individual, or to a group of individuals.

If a person wishes the relevant Committee to make a request to a State for interim measures, this should be made clear when the individual complaint is submitted. If the situation is particularly urgent, such that measures must be undertaken immediately to prevent irreparable damage to the victim, the com-

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218 The European Court of Human Rights has been more sympathetic to arguments that prolonged periods of time on death row breach the right to be free from inhuman or degrading treatment (see, e.g., *Soering v. UK*, No. 14038/88, Eur. Ct. of Hum. Rts. (7 July 1989)). The HRC has not generally accepted that a prolonged wait on death row is of itself a breach of that right (see *Johnson v. Jamaica* (588/94)). Recent decisions, as well as minority opinions, may indicate that the HRC may depart from its previous case law and embrace the European approach (see *Persaud and Rampersaud v. Guyana* (812/98)). The compatibility of the death row phenomenon with CAT has not yet been tested in an individual complaint. See sections 3.2.10(b) and 4.5.

219 CAT Rules of Procedure, Rule 108 and HRC Rules of Procedure, Rule 92.

plaint should be sent by the fastest means possible (often email) and followed up with a hard copy.<sup>220</sup>

### **2.2.1 In what circumstances might Interim Measures be required?**

Interim measures function to protect the rights of an individual (or individuals) while his or her complaint is processed and considered by the relevant treaty body. A request from the HRC or the CAT Committee to a State for an interim measure to be implemented does not presuppose its final views on the merits of the case.

In practice, requests for interim measures are made by the Special Rapporteur on New Communications within the HRC and the Rapporteur on New Complaints and Interim Measures within the CAT Committee, normally at the time that a complaint is transmitted to the relevant State party.<sup>221</sup> Such requests are prompted by requests from the author; the relevant Rapporteur will only act if he/she believes that the request is warranted in the circumstances.

The State may be given an opportunity to present its perspective on the issue, but there is no obligation for this to occur.<sup>222</sup> The protection of international human rights processes and of the individual in question takes priority over any short term inconvenience caused to the State.

The vast majority of interim measures requests by these two treaty bodies have arisen in two situations. The first situation is when the relevant State party proposes to deport an individual to a country where the deportee claims that he or she faces a foreseeable risk of torture. The deporting State is often requested to refrain from deportation throughout the currency of the complaint. The second situation is when the complainant is facing the death penalty, and seeks to argue that the imposition of this penalty breaches his or her rights. The State is normally requested to refrain from executing the individual throughout the currency of the complaint. While these categories reflect the most common cir-

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220 'How to Complain about Human Rights Treaty Violations: Introduction to Complaints Procedures', [http://www.bayefsky.com/complain/9\\_procedures.php](http://www.bayefsky.com/complain/9_procedures.php). Readers are referred to section 2.1.2 for relevant addresses.

221 Nowak, above note 97, p. 849.

222 J. Pasqualucci, "Interim Measures in International Human Rights: Evolution and Harmonization" (2005) 38 *Vanderbilt Journal of Transnational Law* 1, p 40. Such occurred in *Weiss v. Austria* (1086/02).

cumstances giving rise to a request for interim measures there are many other situations in which they could be required, such as provision of medical assistance to an ill person, or provision of protection for persons at high risk within a community.<sup>223</sup> In *Ominayak v. Canada* (167/84), the HRC requested that the State party take interim measures to prevent irreparable damage being done to the traditional lands of the Lubicon Lake Band; the complaint concerned alleged violations of Article 27 minority rights entailed in the destruction of those homelands by commercial activities authorised by the State.

In deciding whether to request an interim measure, the relevant Committee Rapporteur will consider the imminence of the threat to the individual or group, and whether the consequences of such action would be irreparable. A consequence is considered to be irreparable where it cannot be reversed, and where there would be no remedy which could provide adequate compensation. Thus interim measures will not be issued “where compensation would be an adequate remedy or in deportation cases where the author of the communication would be able to return should there be a favorable finding on the merits”.<sup>224</sup> For example, in *Canepa v. Canada* (558/93), the author challenged his proposed deportation from Canada to Italy. He argued that the anguish he would experience in being separated from his family and from his life in Canada would violate his rights under the ICCPR, and requested that the HRC request an interim measure to prevent his deportation while his situation was considered. His application “was refused ... because he had failed to establish that his deportation would bar his re-entry to Canada in the event that a violation was found.”<sup>225</sup>

### 2.2.2 Purpose of Interim Measures

A request for an interim measure is aimed at protecting the rights and integrity of the individual/s to whom it relates by ensuring that the status quo is preserved thereby preventing actions or omissions which might irreparably damage the person’s rights. Individual human rights complaints can frequently take years to be resolved, whereas this mechanism provides for prompt and preventative temporary action.

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223 *Ibid*, pp. 26-34.

224 J. Harrington, “Punting terrorists, assassins and other undesirables: Canada, the Human Rights Committee and requests for interim measures of protection”, (2003) 48 *McGill Law Journal* 55, p. 62.

225 *Ibid*, p. 62.

The importance of acting expeditiously in these cases was painfully highlighted in *Staselovich and Lyashkevich v. Belarus* (887/1999). In this case a complaint was submitted by the mother of the victim in November 1998. The HRC did not respond until October 1999 when it requested that an interim measure be undertaken by the State. However, the victim had already been executed in March 1999. The HRC subsequently promised that “cases susceptible of being subject of [interim measures] will be processed with the expedition necessary to enable its requests to be complied with”.<sup>226</sup>

### 2.2.3 Legal Status of Interim Measures

Given the quasi-judicial status of the HRC and the CAT Committee it may seem doubtful that interim measures are legally binding upon States. However where a State has accepted the competence of the HRC or CAT to receive and consider individual communications, it surely must comply with any procedures which allow for this mechanism to function. Where a request for an interim measure is not respected the Committee is prevented from fulfilling its role and the individual complaints process is rendered meaningless.<sup>227</sup>

For example, in *Piandong v. Philippines* (869/99), the HRC issued a request that the execution of three men not be carried out while their complaint regarding their death sentences was under consideration. The three men were executed despite that request. The HRC responded by stating that:

“having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its considerations and examination, and the formulation and Communication of its views.”<sup>228</sup>

It emphasized that this breach was “particularly inexcusable”<sup>229</sup> given the request for interim measures. The HRC’s position in this regard has also been reinforced in its Concluding Observations.<sup>230</sup>

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226 *Staselovich v. Belarus* (887/1999), § 1.3.

227 “When States accept the competence of an international enforcement organ to consider individual petitions they commit themselves to support the petition procedure. The *de jure* right to petition international bodies must not be nullified by the State’s *de facto* act or failure to act. The right to petition is a nullity if the participants in the proceedings have died or can be intimidated into withdrawing a complaint”: J. Pasqualucci, “Interim Measures in International Human Rights: Evolution and Harmonization” (2005) 38 *Vanderbilt Journal of Transnational Law* 1, p. 49.

228 *Piandong v. Philippines* (869/99), § 5.2.

229 *Piandong v. Philippines* (869/99), § 5.2.

230 See e.g., Concluding Observations on Uzbekistan, (2005) UN doc. CCPR/CO/83/UZB, § 6.

The CAT Committee has taken a similar position to the HRC. In *Brada v. France* (CAT 195/02), the CAT Committee stated:

“The State party’s action in expelling the complainant in the face of the Committee’s request for interim measures nullified the effective exercise of the right to complaint conferred by Article 22, and has rendered the Committee’s final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under Article 22 of the Convention.”<sup>231</sup>

The CAT Committee made this decision in the face of the State party’s denial of any binding effect of requests for interim orders.<sup>232</sup>

The CAT Committee went further in *Agiza v. Sweden* (CAT 233/03). In that case, the victim was deported to Egypt in breach of Article 3 of CAT. He was deported immediately after the deportation decision was made, which denied him the ability to meaningfully appeal the decision.<sup>233</sup> The CAT Committee also found that the swiftness of the deportation denied the complainant a real opportunity to seek interim measures under CAT, and was therefore a breach of Article 22.<sup>234</sup>

The case law discussed above reflects that adherence to requests for interim measures should be considered as binding by States that have authorised the relevant Committee to receive individual complaints, as non-compliance with interim measures undermines the integrity of those individual complaints systems.

Indeed, the record of compliance regarding interim measures from the HRC and the CAT Committee is quite good in comparison to the general record of States in complying with final views.<sup>235</sup> For example, States Parties had uniformly complied with more than 100 requests for interim measure sent by the HRC before Trinidad and Tobago ignored such an order in *Ashby v. Trinidad and Tobago* (580/94).<sup>236</sup>

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231 *Brada v. France* (CAT 195/02), § 13.4.

232 See France’s arguments at *Brada v. France* (CAT 195/02), § 8.2.

233 This circumstance entailed a separate procedural breach of Article 3. See Section 4.3.8.

234 *Agiza v. Sweden* (CAT 233/03), § 13.9.

235 See statement of Mr Martin Scheinin (HRC member) in “Summary Record of the First Part (Public) of the 487th Meeting”, (2003) UN doc. CAT/C/SR.487, § 3.

236 See “Summary record of the 1352nd meeting: Trinidad and Tobago”, (1996) U.N. Doc. CCPR/C/SR.1352.

**Textbox ii: Model Complaint on Torture****INDIVIDUAL COMPLAINT TO THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL****I. INFORMATION CONCERNING THE PETITION****The Author**

Name: Victim  
 Nationality: X  
 Profession: Unemployed  
 DOB: 12 February 1965.  
 Address: Capital City, X.  
 (See passport at Annex 1)

The author requests that he be identified as ‘V’.

**The Victim**

Name: Victim

**State Party**

X

**Violations**

Articles 7 and 10, in conjunction with Article 2(3) of the ICCPR<sup>237</sup>

**Representation**

Name: Mr. L  
 Nationality: X  
 Address: Law Firm,  
 Capital City, X.  
 (See authorization letter at Annex 2)

**II. STATEMENT OF FACTS****A. CHRONOLOGY OF EVENTS**

1. The author was born on 12 February 1965 in X (see passport at Annex 1). He is represented in this communication by his lawyer, Mr L (see letter of authorization signed by the author at Annex 2)

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<sup>237</sup> This complaint is a hypothetical scenario and is not based on any actual cases. This model complaint in fact raises issues under other provisions of the ICCPR, such as article 9 concerning arbitrary detention. For the purposes of this Handbook, we will limit the model to illustrating presentation and arguments relating to torture and ill-treatment only. An actual complainant would naturally raise the other ICCPR issues.

### *The Arrest*

2. On 23 September 2002, the author was arrested by two police officers in the City Square. The police officers did not inform the author of the reasons for his arrest, nor did they inform the author of his rights at the time of arrest. The police officers were not wearing any form of personal identification at the time of arrest and consequently their identity cannot be confirmed. The author can recall that one of the officers had a scar on his nose. He cannot remember any other distinguishing features of the officers. Three people, who were in the City Square at the time of the arrest, witnessed the arrest of the author (see Annexes 3, 4 and 5 for witness statements of the three witnesses, Mrs. A, Mr. B and Mrs. C).

### *Detention at City Police Station*

3. The author was taken to the detention facility of the City Police Station where he was detained incommunicado for four consecutive days. He was not permitted to contact anybody, including his family or his lawyer. The author was detained in an underground cell which measured one metre by two metres, and had a ceiling height of four metres. A bright light in the cell remained lit at all times. There was no toilet or sink in the cell. The walls of the cell were white and soundproof. The author's only form of contact was with his interrogators and the prison guards. The author's cell had a small, one-way spy-hole through which the prison guards could watch the author. The author was not provided with a mattress or bedding, natural light, recreational facilities, decent food or adequate medical treatment.
4. During these four days, the author was interrogated in an interrogation room several times by the same police officers as had arrested him regarding his alleged involvement in the murder of a high-ranking police officer. The author maintained his innocence which caused the police officers to become enraged and to subject the author to physical and emotional abuse. The author was systematically beaten with clubs and batons which resulted in severe bruises and scarring. On at least two occasions, the author lost consciousness. It is possible and perhaps likely that bones were broken or fractured as healed fractures were subsequently revealed in medical examinations immediately after his release from detention (see below, paragraph 15 and Annex 6 for Dr. H's medical report, dated 13 January 2003). The author was required to stand for great lengths of time whilst being deprived of food and water and he was stripped naked and suspended by his arms for lengthy periods. On one occasion, the author was placed in what appeared to be an electric chair and was falsely led to believe that he was to be executed.
5. On 27 September 2002, the police officers in the detention facility at the City Police Station threatened the author that if he did not sign a piece of paper, he would be exposed to 'even worse' physical abuse, and possibly 'beaten to death'. The police officers provided the author with a pen and showed the author only the line on which he was required to sign his name. The author signed the paper, without being able to read it and without having access to a lawyer (see Annex 7 for a copy of the document signed under duress by the author).

6. This document was a ‘confession’ to the murder of a police officer, an offence which comes within the jurisdiction of the recently amended *National Security and Public Order Act 1998* (see Annex 8 for a copy of the *National Security and Public Order Act 1998*). Interrogation of the author had been authorized by the *National Security and Public Order Act* which ordains that indefinite interrogation is permitted in the case of a threat to the community.

#### *Detention at City Prison*

7. On 27 September 2002, the author was formally charged with murder at the City Magistrate’s Court (see Annex 9 for a copy of the charge sheet). He was then transferred from the detention facility at the City Police Station to City Prison. On the same day, the author’s arrest was recorded in the database of City Prison (see Annex 10 for a copy of the entry in City Prison’s database relating to the author’s arrest).
8. On 27 September 2002, the author was given a cursory medical examination. During the examination, the author was not permitted to remove his clothing. He remained in long pants, long-sleeves, and shoes throughout the examination. The doctor asked the author very few questions, and was not interested in any of the author’s complaints about the abuse that had occurred, and seemed to be ‘going through the motions’. Despite evident bruises on areas of the author’s body that must have been visible to the medical examiner, such as on his face, neck and hands, as well as the traumatized state of the author, the doctor assessed the author to be in a fit and healthy condition (see Annex 11 for a copy of the Prison Doctor’s report).
9. On 27 September 2002, the author’s wife and two sons, and Mr. L, his lawyer, were notified that the author was being held in City Prison. Mr. L was notified that the author had been charged with the murder of a police officer under the *National Security and Public Order Act 1994*. On 28 September 2002, the author’s family and his lawyer visited him in City Prison. The author told both Mr. L and his family of the abuse that he had endured. It was evident to both the author’s family and to Mr. L that the author was in severe physical and mental distress. They noticed severe bruising on his forearms, his face and his neck and he appeared both anxious and depressed.
10. Due to the author’s evident physical and mental distress, on 28 September 2002, the author’s family and Mr. L submitted a request for the author to have an alternative medical examination (see Annex 12 for a copy of the request submitted to the prison authorities for an alternative medical examination). The prison authorities stated that the ‘comprehensive medical examination’ conducted on 27 September 2002 provided incontrovertible evidence that the author did not suffer from either a physical or a mental illness (see Annex 13 for refusal of medical examination by prison authorities).

#### *Conditions at City Prison*

11. The conditions in City Prison were not suitable for human habitation. City Prison is capable of housing four-hundred inmates, however at the time of the author’s internment, City Prison was housing six-hundred and fifty inmates. Prisoners awaiting

trial, prisoners serving sentences, refugees and juvenile prisoners all shared the same facilities and were housed together. Up to fifteen prisoners were housed together in cells measuring fifteen square metres together. There was one toilet and one sink in the corner of the cell which was not enclosed by a partition. Prisoners were not provided with a mattress or bedding, and they had to take turns sleeping as there was insufficient room to lie down. Metal shutters were placed in front of cell windows in order to prevent natural light and ventilation entering the cells. Prisoners were only allowed out of their cell for one hour a day. The author's allegations in this respect are supported by a report on City Prison by the non-governmental organization, NGO, see Annex 14). NGO's report details the testimony of numerous former inmates of City Prison over the period from 2000-2004, which includes the period of time that the author was imprisoned at City Prison. The report details allegations of severe overcrowding, as well as virtually identical descriptions of the cells and the other conditions of detention as those given by the author (see in particular pp 17-25 of that report at Annex 14).

12. In addition to the appalling prison conditions at City Prison, the author was also physically threatened and abused on numerous occasions by the prison guards, namely Mr P and Mr Q. For example, he was subjected to beatings about his head and torso unless he obeyed their orders immediately and without question. Some of the orders made were plainly for the purpose of aggravating the author.
13. The author conveyed his concerns about the prison conditions and the ill-treatment by the prison guards to Mr L, who submitted a formal complaint to the prison authorities on 5 November 2002 (see copy of complaint at Annex 15). The complaint detailed concerns regarding the conditions at City Prison, and about the treatment the author had received at the hands of Messrs P and Q. The author was interviewed one week later on 12 November by the prison governor, who expressed outrage at the 'slanderous comments' about the prison, and about two 'fine upstanding' guards in Messrs P and Q. The author was confined to his cell (for 24 hours instead of 23 hours) as a 'punishment' for submitting the complaint. On the night of 12 November 2002, he was taken from his cell by Mr P, and subjected to his most severe beating, involving multiple blows to his torso, by Messrs P and Q.

#### *Release from City Prison*

14. The author was held in detention at City Prison in appalling conditions, and continued to endure ill-treatment at the hands of Messrs P and Q, for just over three months. On 12 January 2003, the author was released without being told why. It later transpired that all charges against him had been dropped. The police had apparently caught the real perpetrator of the murder of the police officer on 7 January 2003.

#### *Post-Release Medical Examinations*

15. On 13 January 2003, the author was given a medical examination by Dr. H, his physician. Dr H noted that there were signs of fresh bruising on the upper part of his torso, his neck and his head, which indicated that he had been beaten in that anatomical

region. Scars, which were ‘a few months old’, were also noted. X-rays also revealed healed fractures indicating that some of the beatings had either fractured or broken the author’s bones (See Annex 6 for Dr. H’s medical report).

16. On 15 January 2003 the author underwent a psychiatric assessment from Dr J which affirmed that the author had a severe psychotic condition. He has since undergone five more psychiatric assessments, including one by an alternative psychiatrist, Dr K, who was asked for a ‘second opinion’ (see Annexes 16, 17, 18, 19, 20, 21 for all psychiatric reports). The first three reports (two by Dr J and one by Dr K) confirm that the author was extremely depressed and anxious in the first few months after his release. They indicate that his behaviour was not atypical in individuals who have been exposed to severe abuse. Furthermore, the reports indicate that it was evident that the author had not experienced any symptoms prior to his arrest and that he had no family history of mental illness.
17. The author has been treated with anti-depressants since his early psychiatric diagnoses, and his condition has improved, as recorded in the latest report from Dr J dated 14 August 2005 (see Annex 21). He remains however reliant on anti-depressants. On the one time, in January 2005, in which his dosage was decreased, his depression and anxiety levels rose markedly (see Annex 20).

#### *Exhaustion of Domestic Remedies*

18. As noted above (see above, paragraph 13), Mr L complained in writing to prison authorities about the author’s treatment in prison (see Annex 15) This complaint merely resulted in further persecution of the author, and no remedy whatsoever.
19. On 1 October 2002, Mr. L wrote a letter of complaint to the Chief Prosecutor pursuant to the Investigations (Human Rights) Act 1990 outlining the torture and other cruel, inhuman and degrading treatment to which the author was being subjected whilst he was detained at the City Police Station (See Annex 22 for a copy of the letter written by Mr. L and Annex 23 for copy of the Act). Mr. L advised the Chief Prosecutor that ‘a prompt investigation into the issue [was] required in order to ensure that the evidence of the torture of the author did not disappear’. For example, the physical harm would heal. Further, there was a need for urgency due to the (then) ‘pending trial of [the author] for the murder of the police officer, and the need to challenge the veracity of the confession’. Mr. L requested the Chief Prosecutor to investigate the matter, identify the relevant police officers, and hold them responsible for the abuse inflicted on the author during the four days of incarceration at City Police Station. Mr. L submitted that the witnesses to the initial arrest were willing to testify as to the author’s good physical condition immediately prior to his arrest and that the author’s family was willing to testify in relation to the evident signs of abuse, including severe bruising, upon the author’s body. The author too was willing to testify as to the abuse he had suffered. Mr L did not receive a reply from the Chief Prosecutor in respect of the complaint until 5 June 2003 (see annex 24 for copy of reply from Chief Prosecutor).

20. Mr L submitted a fresh complaint to the Chief Prosecutor on 15 January 2003 (see Annex 25 for a copy of the second complaint to the Chief Prosecutor) regarding the author's treatment in prison, outlining the prison conditions and the treatment received from Messrs P and Q, as well as the reaction by the warden to the complaint to prison authorities. The complaint was submitted after the author's release from City Prison, due to the fear of retribution if the author had remained incarcerated at the time of the complaint. This fear of retribution was reasonable, given the retribution suffered as a result of the submission of the complaint to the prison authorities (see above paragraph 13). No reply was received from the Chief Prosecutor in respect of that complaint until 17 September 2003. (see Annex 26 for a copy of the second reply received from the Chief Prosecutor).
21. The investigation into the allegations of ill-treatment at both City Police Station and City Prison by the Chief Prosecutor proceeded extremely slowly. As noted, the replies to both complaints were delayed without any explanation. Indeed, on almost every occasion in which there was communication between the Chief Prosecutor and the author, it was initiated by Mr L on his behalf. That is, the Chief Prosecutor's office rarely contacted the author or Mr L of its own volition, and indeed rarely replied to the communications from Mr L at all (see Annex 27 for diary notes of Mr L, documenting contact with the Chief Prosecutor's office). On the other hand, Mr L contacted the Chief Prosecutor to inquire about the progress of the investigation and to submit evidence, such as the written medical and psychiatric reports of Dr H, Dr J, and Dr K. The letters written by Mr. L are listed below as are the responses from the Chief Prosecutor's Office:
  - I. Letter of Complaint to Chief Prosecutor, dated 1 October 2002 (Annex 22)
  - II. Reply to Letter of Complaint from Chief Prosecutor, dated 5 June 2003 (Annex 24)
  - III. Letter of Complaint to Chief Prosecutor, dated 15 January 2003 (Annex 25)
  - IV. Reply from Chief Prosecutor to Letter of Complaint, dated 17 September 2003 (Annex 26)
  - V. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 7 January 2003 (Annex 28)
  - VI. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of both investigations and including written medical and psychiatric reports of Dr. H, Dr. J and Dr. K, dated 18 March 2003 (Annex 29)
  - VII. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 17 April 2003 (Annex 30)
  - VIII. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 20 June 2003 (Annex 31)
  - IX. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 30 August 2003 (Annex 32)
  - X. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 21 September 2003 (Annex 33)

- XI. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 27 December 2003 (Annex 34)
  - XII. Letter from Chief Prosecutor's Office to organise an interview with the author on 15 March 2004, dated 26 February 2004. (Annex 35) (see below, paragraph 22)
  - XIII. Letter from Mr. L to the Chief Prosecutor requesting a copy of a transcript of the interview between Mr. T and the author, dated 17 March 2004. (Annex 36) (see below, paragraph 22)
  - XIV. Letter of discontinuance from the Office of the Chief Prosecutor informing the author of the Chief Prosecutor's decision to drop the investigations, dated 17 April 2005 (Annex 37)
  - XV. Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 19 April 2005 (Annex 38)
  - XVI. Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 23 June 2005 (Annex 39)
  - XVII. Letter from the Office of the Chief Prosecutor stating its refusal to reopen the investigation, dated 1 August 2005 (Annex 40)
22. The Chief Prosecutor initiated contact on only two occasions. The first occasion was to organize an interview with the author on 15 March 2004 (see Annex 35). At this interview, Mr T, a 'senior investigator' within the Chief Prosecutor's Office, interviewed the author for only ten minutes, and did not query any aspects of his assertions regarding ill-treatment. No transcript of that interview has ever been presented to the author or Mr L, despite requests for such a transcript.
23. The second instance of contact initiated by the Chief Prosecutor occurred on 17 April 2005 when Mr L and the author were informed of the decision to discontinue the investigations for lack of evidence (see annex 37). The Chief Prosecutor's letter explained that the following evidence indicated that the author's claims were ill-founded: evidence from Messrs P and Q, police at City Police Station, and the report of the prison doctor dated 27 September 2002 (see Annex 11). The Chief Prosecutor explained that note had been taken of the documentary evidence submitted on behalf of the author, such as the medical and psychiatric reports of Dr H, Dr J, and Dr K. However, the Chief Prosecutor said that such reports were highly contentious, and that there was nothing to prove that the author had not been assaulted by other prisoners, 'if indeed [he] had been assaulted at all'. Therefore, the Chief Prosecutor inferred that the author had either never been subjected to ill-treatment, or that any such ill-treatment had most likely been perpetrated by other prisoners at City Prison.
24. Mr L followed up this letter of discontinuance with two further communications, pointing out the inadequacies and delays in the investigation, and both formally requesting a reopening of the investigation (see Annexes 38 and 39). The Chief Prosecutor's Office responded with an apparent 'form' letter to the second of these

communications, stating that no such reopening would occur (see Annex 40). No response was received to the first letter.

25. The author submits that the Chief Prosecutor's investigation was grossly inadequate. In particular, none of the witnesses to the author's arrest, nor Dr H, nor either of the psychiatrists, Dr J or Dr K, were contacted by the Chief Prosecutor. Neither Mr L nor any member of the author's family was interviewed. Furthermore, the assertion that any ill-treatment could have been perpetrated by other prisons was never put to the author by Mr T. Indeed, when the author was interviewed, Mr T listened passively to his account and never challenged any aspect of it. The only other witnesses that were personally interviewed by the Chief Prosecutor's office were those who were likely to favour the State (and themselves), such as Messrs P and Q, the police officers at City Police Station, the prison doctor and the prison governor. It is therefore submitted that the investigation was not impartial.

## **B. ADMISSIBILITY**

26. It is submitted that this communication satisfies all of the admissibility requirements under the ICCPR.
27. X ratified the ICCPR on 12 January 1992, and ratified the Optional Protocol on 28 September 1996. The Optional Protocol came into force on 28 December 1996. The facts alleged clearly took place after this date, so the Human Rights Committee is competent to examine the present case. Furthermore, all of the alleged facts took place within the territorial jurisdiction of X.
28. This complaint is not being examined (and has never been examined) by another procedure of international investigation and settlement, and thus complies with the requirements of article 5(2)(a) of the Optional Protocol.
29. Regarding the exhaustion of domestic remedies (article 5(2)(b) of the Optional Protocol), the author's attempts to prompt an investigation by the Chief Prosecutor into his ill-treatment, with a view to obtaining a remedy, are detailed directly above (paragraphs 19-25).
30. The author, in accordance with the procedure set out in Part VI the Human Rights (Investigation) Act (see Annex 23), appealed the Chief Prosecutor's decision to drop the investigation to the Court of Appeal (see Annex 41 for statement of claim). The Court of Appeal dismissed the case without giving detailed reasons on 12 November 2005 (see Annex 42).
31. The author sought leave to appeal the decision of the Court of Appeal to the highest court in X's legal system, the Supreme Court of X (see Annex 43 for statement of claim in Supreme Court). Leave was refused by the Court on 13 April 2006 (see Annex 44). With the refusal of leave to appeal by the highest court in X, the author has exhausted domestic remedies.

32. An application to court for a civil claim to damages is ineffective because, according to the law of X, the civil courts have no powers to identify those responsible for crimes and to hold them responsible and accountable. There are insurmountable hurdles to a civil claim if the perpetrators cannot be identified in the proceedings. Therefore, an application for a civil remedy is neither an adequate nor an available remedy for the purposes of admissibility.
33. The author therefore asserts that this communication complies with the requirements of article 5 of the Optional Protocol.

### **C. DISCUSSION OF RELEVANT PROVISIONS OF THE ICCPR**

34. Article 7 of the ICCPR states that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

35. General Comment 20 of the Human Rights Committee states that:

The aim of the provision of Article 7 of the [ICCPR] 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 the 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 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.

36. It is submitted that the jurisprudence of the Human Rights Committee regarding Article 7 should be influenced by the jurisprudence of the Committee against Torture.
37. The author submits that state X has breached the author's rights under Article 7 of the ICCPR in the following ways:
- (i) In exposing him to severe beatings and other ill-treatment during his interrogation at the City Police Station.
  - (ii) In keeping him in incommunicado detention and solitary confinement for four consecutive days at City Police Station.
  - (iii) In exposing him to beatings and other ill-treatment at City Prison
  - (iv) In exposing him to inhuman and degrading conditions of incarceration at City Prison.
  - (v) In failing to properly investigate his allegations of ill-treatment at both City Police Station and City Prison.

38. In addition, and in the alternative, it is argued that the above circumstances amount to a breach of Article 10 of the ICCPR (see below paragraph 57).

*First Breach of Article 7: Beatings at City Police Station*

39. The author submits that the accumulation of his treatment while in the City Police Station amounts to torture, or at least cruel inhuman and degrading treatment, contrary to Article 7 of the ICCPR.

40. The author was subjected to beatings with club and batons at City Police Station. In *Bailey v. Jamaica* (334/88), the Human Rights Committee held that severe and systematic beatings with clubs, iron pipes and batons, which caused severe physical trauma (including bruises and scarring and probably broken bones) breached Article 7. The lack of medical treatment in *Bailey*, as occurred in the author's circumstances, also breached Article 7. As noted, the author was, at least twice, beaten unconscious, which was found to breach Article 7 in *Linton v. Jamaica* (255/87).

41. At City Police Station, the author was subjected to a mock execution. Mock executions administered with other forms of cruel and inhuman treatment were deemed to amount to cruel and inhuman treatment in *Linton v. Jamaica* (255/87). In General Comment 20, the Human Rights Committee held at paragraph 11 that "State parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment". The City Police Station's possession of a mock electric chair manifestly contradicts this statement. Death threats, as experienced by the author in the form of the mock execution, and on the day that the author signed the false confession, also breach Article 7. For example, in *Hylton v. Jamaica* (407/90), severe beatings coupled with death threats were found to breach Article 7.

42. The author submits that being required to stand for great lengths of time whilst being deprived of food and water amounts at least to inhuman and degrading treatment.<sup>238</sup> The degrading nature of the treatment is exacerbated by the fact that the author was naked at the time, adding to the extreme vulnerability of his situation.

43. State X may argue that as the *National Security and Public Order Act* authorizes the interrogation of individuals in the case of a threat to the community, the interrogation of the author was valid. However, Article 7 is a non-derogable right and consequently State X is obliged, in all circumstances, to respect its obligations under Article 7. In General Comment 20 at paragraph 3, the Human Rights Committee stated 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." Furthermore, Article 2 of the CAT underlines

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<sup>238</sup> *Ireland v. United Kingdom*, No. 5310/71, Eur. Ct. of Hum. Rts. (18 January 1978).

that torture is not permitted in any circumstances. The prohibition of torture is not only a non-derogable right under ICCPR but widely recognized as a peremptory norm (*ius cogens*) of international law.<sup>239</sup>

44. The author was severely traumatized, both physically and mentally, as a result of his detention and treatment at City Police Station. This trauma was evident to his lawyer and his family on 28 September 2002, the day they first visited him after his arrest. The complaint submitted to the Chief Prosecutor by Mr L on 1 October 2002 (see Annex 22) is also evidence of that treatment. The reports upon his release from prison of his physician, as well as the psychiatrists, provide further evidence of the ill-treatment (see Annexes 6 and 16-21).

*Second breach of Article 7: incommunicado detention*

45. The author submits that his incommunicado detention for four consecutive days from 23 September 2002 to 27 September 2002 constituted a breach of Article 7 of the ICCPR. The dates of this detention are supported by the statements of the three eye witnesses to the author's arrest on 23 September (Annexes 3-5), and the date of the formal charge of 27 September (Annex 9).
46. The Human Rights Committee stated in General Comment 20 at paragraph 11 that '[p]rovisions should be made against incommunicado detention'. Though the shortest period of incommunicado detention that has been found to breach Article 7 is eight months (*Shaw v. Jamaica* (704/96)), the Committee Against Torture has held that *incommunicado* detention of up to thirty-six hours, without being brought before a judge, is of concern.<sup>240</sup> At the least, the combination of incommunicado detention with the ill-treatment suffered during that confinement should be found to breach Article 7.<sup>241</sup>
47. Furthermore, incommunicado detention facilitates the practice of torture and ill-treatment. As noted by the Human Rights Committee in *Mojica v. Dominican Republic* (449/91) at paragraph 5.7, 'the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7'. Indeed, the author's effective disappearance for four days facilitated gross breaches of his rights under Article 7.

239 See, eg, *Prosecutor v. Furundzija*, ICTY Trial Chamber, IT-95-17/1-t (10 December 1998) 38 ILM 317, § 144; *Cantoral Benavides case* (Peru), Series C No. 69, judgment of the Inter-American Court of Human Rights of 18 August 2000, § 96; *Doebbler v. Sudan*, African Commission, Communication No. 222/99, (15 Jul 2003) extracted from Interights database at <http://www.interights.org/searchdatabases.php?dir=databases> Relevant decisions of the European Court of Human Rights include *Tomasai v. France*, No. 12850/87, Eur. Ct. of Hum. Rts (17 August 1992), § 115; *Aksoy v. Turkey*, No. 21897/96, Eur. Ct. of Hum. Rts. (18 December 1996), § 62; *Chahal v. UK*, No. 22414/93, Eur. Ct. of Hum. Rts. (15 November 1996), § 79.

240 Concluding Observation on Colombia, CAT, A/59/44 (2003) 32 at § 67.

241 See, eg, *Tekin v. Turkey*, No. 22496/93, Eur. Ct. of Hum. Rts. (9 June 1998), decision of the European Court of Human Rights. Detention for four days in total darkness with blindfold, combined with beatings, breached Article 3, the European equivalent of Article 7.

*Third breach of Article 7: beatings at City Prison*

48. The repeated beatings suffered by the author in City Prison at the hands of the prison guards, Messrs P and Q, amount to a breach of Article 7 in the same way as the beatings endured at the hands of police officers at City Police Station. The evidence of these beatings is the formal complaint made by Mr. L to the prison authorities (see Annex 15), the medical report of Dr. H which indicates the existence of recent and fresh bruising (see Annex 6), and the author's consistent account of events at City Prison.

*Fourth breach of Article 7: Prison Conditions*

49. The author submits that the conditions of his incarceration at City Prison amounted to a breach of Article 7.

50. In *Vuolanne v. Finland* (265/87), the Human Rights Committee held that:

For punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.

As such, in order for detention to violate Article 7 of the ICCPR, it is not sufficient for a prisoner to only be deprived of their liberty; there must be an added element of 'humiliation or debasement' in the treatment of the individual. The author submits that the conditions of his detention went far beyond those inherent in the deprivation of liberty, and amounted to a breach of Article 7.

51. In the case of *Deidrick v. Jamaica* (619/95), the author of the Communication was locked in his cell for twenty-three hours a day, without a mattress, bedding, adequate sanitation, natural light, recreational facilities, decent food or adequate medical care, and this amounted to cruel and inhuman treatment. The conditions of detention in *Deidrick* are analogous to the conditions of detention suffered by the author in this case. The conditions are also similar to those described in *Mukong v. Cameroon* (458/91), *Edwards v. Jamaica* (529/93), and *Brown v. Jamaica* (775/97); the Human Rights Committee found that the relevant prison conditions breached Article 7 in all three of those cases.

52. The evidence of the conditions described is found in the complaints submitted (without satisfaction) on behalf of the author to the prison authorities (see Annex 15), and to the Chief Prosecutor (see Annexes 22 and 25). NGO's report also backs up the evidence of the author on this matter (see Annex 14)

*Fifth Breach of Article 7: Failure to investigate complaints*

53. The State party has failed in its duty under Article 7, in conjunction with the duty to provide a remedy under Article 2(3), to properly investigate the claims of ill-treatment of the author. At paragraph 14 of General Comment 20, the Human Rights Committee stated:

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 complaint and how they have been dealt with.

54. Most cases on this issue have arisen under the analogous provisions of the Convention Against Torture, Articles 12 and 13, rather than under the ICCPR. As noted above (paragraph 36), it is submitted that the Human Rights Committee should be influenced by the case law developed under the CAT.
55. The States failure in this regard is evident in a number of ways. First, the Chief Prosecutor failed to respond promptly to either of the submitted complaints. In both cases, no official reply was received by the author for approximately eight months (see Annexes 24 and 26). No justification has ever been given for the delay in interviewing the author; he was not interviewed until 14 months after the submission of his second complaint. Delays in an investigation also breached CAT in *Halimi-Nedzibi v. Austria* (CAT 8/91). Secondly, the investigation of those complaints by the Chief Prosecutor was plainly inadequate, in that he did not interview a number of relevant witnesses, as outlined in paragraph 25 above. The interview with the author was also unsatisfactory. For example, the author did not get a chance to respond to the contention that the ill-treatment could have been caused by other prisoners. The investigation was plainly not impartial as the Chief Investigator only personally interviewed witnesses who would favour the State. The failings of the Chief Prosecutor in the investigations resemble those that were found to breach the Articles 12 and 13 of the CAT in *Baraket v. Tunisia* (CAT 60/96) and *Blanco Abad v. Spain* (CAT 59/96). The Human Rights Committee also found a breach of Article 7 due to a State's failure to undertake a prompt and adequate investigation of torture allegations in *Herrera Rubio v. Colombia* (161/83). Thirdly, the Court of Appeal compounded the poor investigation, by failing to reinstate the investigation, and giving no reasons for its decision. Fourthly, the complaint about prison conditions to the prison authorities was not taken seriously. Indeed, it only resulted in reprisals against the author. The Human Rights Committee has condemned Brazil in Concluding Observations for failing to provide witnesses with protection against reprisals in respect of complaints of torture.<sup>242</sup> Finally, the failure of the City Prison doctor to

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242 (1996) CCPR/C/79/Add. 66, paragraph 12.

undertake a proper medical examination of the author (see above, paragraph 8) breaches Article 7. Any standard medical examination involves the removal of some clothing, and the doctor was plainly not interested in listening or responding to the author's allegations. The superficial and selective nature of the medical examination rendered it clearly inadequate. Its inadequacy was compounded by the refusal of the prison authorities to permit an independent medical examination (see annex 13), which thwarted the author's ability to obtain evidence of his ill-treatment.

56. The author's allegations regarding these breaches of Article 7 are supported by the documentation relating to the complaints, as well as the medical examinations conducted after the author's release.

*Breach of Article 10 of the ICCPR*

57. Article 7 is supplemented by Article 10, which details the rights of detainees to receive humane treatment in detention. If any of the above arguments are not accepted with regard to Article 7, it is submitted that the above impugned treatment breaches Article 10. In respect of the violation of Article 10, the author re-alleges his arguments above in paragraphs 39-44, 48, and 53-56 regarding the beatings and the failure to investigate complaints, without repeating them here. The author adds further arguments below of particular relevance to Article 10 regarding prison conditions and incommunicado detention.

*Prison Conditions*

58. Numerous statements by the Human Rights Committee indicate that the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated within Article 10.<sup>243</sup> The conditions at City Prison breach numerous provisions of the Standard Minimum Rules.
59. For example, Rule 9 states that each prisoner should, in general, have his or her own cell. Though exceptions are permitted, it is clearly inappropriate to have thirty people in one cell, sharing beds. The overcrowding in City Prison amounts to a breach of Article 10. In its Concluding Observation on Portugal, the Human Rights Committee expressed concern in regard to overpopulation of twenty-two percent.<sup>244</sup> In City Prison, at times, overpopulation amounted to over fifty percent (see above, paragraph 11). NGO's report supports the author's allegations in this respect (see Annex 14).
60. Contrary to Rules 10-21, adequate bedding, clothing, food and hygiene facilities were not supplied. Adequate medical care was not provided, contrary to Rules 22-26 (a copy of the Standard Minimum Rules for the Treatment of Prisoners is contained in Annex 45 for the convenience of the Committee members).

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243 See, eg, *Mukong v. Cameroon* (458/91), paragraph 9.3; Concluding Observations on the USA, CCPR/C/79/Add. 50, paragraph 34.

244 Concluding Observation on Portugal, A/58/40, Vol.1 (2003) 56 at § 83.

61. In its Concluding Observation on Uganda, the Human Rights Committee expressed concern about the overcrowded conditions, the lack of food, the poor sanitary conditions and inadequate material available to inmates.<sup>245</sup> Similar conditions prevailed in this case.

62. Finally, State X was in clear violation of Article 10(2)(a) as remand prisoners, such as the author, were not segregated from convicted prisoners.

*Incommunicado Detention*

63. In the event that incommunicado detention is not held to be a breach of Article 7 of the ICCPR, the author submits that his incommunicado detention is in breach of Article 10 of the ICCPR. In *Arutyunyan v. Uzbekistan* (917/00), two weeks' incommunicado detention was found to breach Article 10. It is submitted that even shorter periods of incommunicado detention breach Article 10, as incommunicado detention is simply an unacceptable and inhumane way of treating prisoners. There is no conceivable justification for denying the author access to the outside world for four days. Therefore, the four days of incommunicado detention in this case constitute a violation of Article 10.

**D. CONCLUSION**

64. In light of the above, the Author respectfully requests that the Committee:

- *Declare* that the State Party, X, has breached the following Articles of the International Covenant on Civil and Political Rights: 7, 10, and has breached Article 2(3) when read in conjunction with Articles 7 and 10.
- *Recommend* that X adopt all necessary action to:
  - a) Fully investigate the circumstances of the torture and ill-treatment of the Author and, based on the results of such investigation, take appropriate measures against those responsible for that treatment;
  - b) Adopt measures to ensure that the Author receives full and adequate compensation for the harm he has suffered.

Dated the day of 2006.

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Mr. L

Counsel for Victim

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<sup>245</sup> Concluding Observation on Uganda, (2004) CCPR/C/80/UGA.

## LIST OF ANNEXES

Annex No.	Document
1	Passport of Victim
2	Authorisation letter for Mr. L to act as Legal Counsel for Victim
3	Witness Statement of Mrs. A
4	Witness Statement of Mr. B
5	Witness Statement of Mrs. C
6	Medical Report of Dr. H, dated 13 January 2003.
7	Document ('confession') signed under duress by the author, dated 27 September 2002.
8	Copy of the <i>National Security and Public Order Act</i> 1998.
9	Copy of Charge Sheet, dated 27 September 2002
10	Copy of entry in City Prison's database relating to the author's arrest, dated 27 September 2002.
11	Copy of Prison Doctor's report, dated 27 September 2002.
12	Copy of request submitted to the prison authorities for an alternative medical examination, dated 28 September 2002.
13	Refusal of medical examination by prison authorities.
14	Report on City Prison by NGO.
15	Formal complaint by Mr. L to prison authorities, dated 5 November 2002.
16	Psychiatric Report of Dr. J, dated 15 January 2003.
17	Psychiatric Report of Dr. K, dated 17 March 2003.
18	Psychiatric Report of Dr. J, dated 23 July 2003.
19	Psychiatric Report of Dr. J, dated 15 August 2004.
20	Psychiatric Report of Dr. J, dated 15 January 2005.
21	Psychiatric Report of Dr. J, dated 14 August 2005.
22	Letter of complaint to the Chief Prosecutor by Mr. L, dated 1 October 2002.
23	Copy of the <i>Investigations (Human Rights) Act</i> 1990.
24	Letter of Reply from Chief Prosecutor, dated 5 June 2003.
25	Letter of complaint to the Chief Prosecutor by Mr. L, dated, 15 January 2003.
26	Letter of Reply from Chief Prosecutor, dated 17 September 2003.
27	Diary notes of Mr. L documenting his contact with the Office of the Chief Prosecutor.
28	Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 7 January 2003

- 29 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, and containing written medical and psychiatric reports of Dr H, Dr J, and Dr K, dated 18 March 2003.
- 30 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 17 April 2003.
- 31 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 20 June 2003.
- 32 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 30 August 2003.
- 33 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 21 September 2003.
- 34 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 27 December 2003.
- 35 Letter from the Office of the Chief Prosecutor to organise an interview with the author on 15 March 2004, dated 26 February 2004.
- 36 Letter from Mr. L to the Chief Prosecutor requesting a copy of a transcript of the interview between Mr. T and the author, dated 17 March 2004.
- 37 Letter of discontinuance from the Office of the Chief Prosecutor informing the author of the Chief Prosecutor's decision to drop the investigations, dated 17 April 2005.
- 38 Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 19 April 2005.
- 39 Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 23 June 2005.
- 40 Letter from the Office of the Chief Prosecutor stating its refusal to reopen the investigation, dated 1 August 2005.
- 41 Statement of claim in Court of Appeal
- 42 Transcript of Court of Appeal decision dismissing the author's case without reasons, dated 12 November 2005.
- 43 Statement of claim seeking leave to Supreme Court
- 44 Transcript of the refusal of the Supreme Court to grant leave to the author, dated 13 April 2006.
- 45 Standard Minimum Rules for the Treatment of Prisoners.

## 2.3 Other Procedures

### 2.3.1 Reporting Procedures under the ICCPR and the CAT

#### a) Overview of Reporting System

The only compulsory monitoring mechanism under the ICCPR and the CAT is the “reporting” system. A State party must submit an initial report within one year of the treaty coming into force for that State, and thereafter it must submit periodic reports at intervals dictated by the relevant Committee. Under the ICCPR, the HRC has tended to request reports every five years. Under the CAT, the CAT Committee has tended to request reports every four years.

In its report, a State party should outline how it implements the rights in the respective treaty. It should give details of relevant legislation, policies, and practices. It is not sufficient to simply outline legislation without commenting on how, or if, that legislation is enforced. It should also highlight areas where implementation is deficient or problematic.<sup>246</sup>

Each State party should also submit a “core document” which outlines basic information about that State, such as its geography, demography, its constitutional, political and legal structure, and other general information.<sup>247</sup> The same core document can suffice for reports to all UN human rights treaty bodies. The core document should be updated when necessary.

A State report is a public document, and is available via the Treaty Bodies Website at <http://www.unhchr.ch/tbs/doc.nsf>. This website also details the dates at which future reports are due.

Once a report is submitted, a dialogue between the State’s representatives and the relevant Committee regarding the contents of a report and other matters relating to its record regarding compliance with the relevant treaty will be scheduled. In conducting these dialogues, Committee members will often make use of alternative sources of information, including information from NGOs. During this dialogue, State party representatives will clarify aspects of the report, and its implementation of the relevant treaty, for the Committee.

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246 See UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee” at <http://www.ohchr.org/english/about/publications/sheets.htm>, pp. 10-12 for instructions on how a State should prepare a report.

247 UN Fact Sheet 15, Rev. 1, «Civil and Political Rights: The Human Rights Committee», at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 11.

At the conclusion of the session in which a report is examined, the Committee will adopt Concluding Observations on the relevant State party. These Concluding Observations are divided into various sections: Introduction, Positive Aspects, and Principal Subjects of Concern and Recommendations.

The Concluding Observations, particularly the Principal Subjects of Concern and Recommendations, are then “followed up” by the relevant Committee. That is, a Committee member will engage in ongoing dialogue with a State as to how or if it is implementing those recommendations, and addressing subjects of priority concern. Follow-up information is publicly available via the treaty bodies website. The follow-up process is discussed in Section 2.4.1(a).

The Concluding Observations also highlight areas that should be the focus of the next report. Periodic reports do not have to cover every treaty right in the same detail as the initial report, though significant developments between reports must be explained.<sup>248</sup>

The cycle of State reporting is as follows:

- State submits report to relevant Committee.
- A dialogue between the Committee and State representatives is scheduled.
- Committee members may also receive information on the State from other sources, such as NGOs.
- The Committee and representatives from the State party have a constructive dialogue over the contents of the report.
- The Committee adopts Concluding Observations on the report and the dialogue.
- The Concluding Observations, and particularly any priority areas of concern noted in those Observations, are “followed up” by the relevant Committee. The State party provides follow-up information on the Principal Subjects of Concern and Recommendations within one year of the issuance of the Concluding Observations.
- If necessary, there is ongoing follow-up dialogue between the Committee and the State party.
- State party submits its next report as requested by the Committee, and process begins again.

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248 UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 11.

In addition, a State should submit its core document either before or at least with its initial report, and should update that document when necessary.

Exceptionally, a Committee will request an emergency report, when it believes that a human rights crisis of some form is under way in a relevant State.<sup>249</sup> A Committee may also call for an earlier report as part of the process of “following up” the Concluding Observations.

### **b) Reform of Reporting System**

The reporting system has been the subject of much criticism due to its unwieldy nature. For example, even with the high number of late reports, there can still be a considerable time gap between the submission of a report and its examination. The Committees’ part time nature does not allow them sufficient time to address reports in a timely manner. Often States will be requested to submit updated information prior to the dialogue, due to the time gap between submission and dialogue.

The reporting process has been subjected to significant reform in recent years. For example, a Committee may now examine a State’s human rights record under the relevant treaty even in the absence of report, as a way of countering a State’s chronic failure to submit.<sup>250</sup> The reforms to the reporting system largely concern the internal workings of the various Committees, and are beyond the scope of this *Handbook*.<sup>251</sup>

### **c) Use of the Reporting Process by and on behalf of Torture Victims**

The Committees make use of alternative sources of information in conducting dialogues with States parties over their reports. It is of course crucial that the Committees do so in order to uphold the integrity and credibility of the reporting system. It would be highly unsatisfactory if the only source of information about a State’s human rights record was the State itself.

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249 See generally, S. Joseph, “New Procedures concerning the Human Rights Committee’s Examination of State Reports” (1995) 13 *Netherlands Quarterly on Human Rights*, p. 5, pp. 13-23.

250 General Comment 30, § 4(b).

251 See e.g., UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, pp. 10-15, particularly Box 111.2 ‘Where is the reporting process headed?’ p. 15.

Individuals and groups can make use of the reporting system to bring instances of torture and other ill-treatment in a State to the attention of the relevant Committee. There are a number of reasons why one might wish to use the reporting process rather than the individual complaints process for this purpose.

- The relevant State may not allow individual complaints against it under a particular treaty
- One cannot otherwise satisfy the admissibility criteria for an individual complaint

Perhaps most importantly, the individual complaints system is geared towards addressing abuses at an individual level and is less suitable for highlighting large scale human rights abuses. The reporting process offers a better outlet for the submission of information regarding large scale or systemic human rights abuses. For example, statistics that reveal a high suicide rate in prison for persons of a certain ethnic group will not of themselves prove that a particular individual member of that group has suffered human rights abuse. They do however provide evidence of a systemic problem regarding the treatment of members of that group in prisons.

In submitting information pursuant to the reporting process, it is recommended that organisations do the following:<sup>252</sup>

- Keep track of when reports are due
- Submit information in a timely fashion to ensure that Committee members have time to digest it. For example, do not submit a 100 page report on the day that the relevant dialogue is taking place.
- Be concise
- Give necessary contextual background information to supplement the State's core document if necessary
- Structure information around the provisions of the treaty
- Refer to the previous Concluding Observations of the Committee if relevant
- Refer to any previous individual complaints if relevant

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<sup>252</sup> Giffard, above note 109, pp. 72-75.

- Comment on the State report itself, and present additional important information if necessary. Do not respond to every point made by the State; focus only on important points.
- Use concrete examples and statistics
- Suggest questions that the Committee might ask of the State party representatives
- Make constructive suggestions for improvement within a State party

It is important not to inundate a Committee with information. The Committee members operate on a part time basis and may not have the time to absorb large amounts of information. Ideally, civil society organisations should cooperate with each other in submitting information to ensure against overlap and duplication. Indeed, NGOs are encouraged to submit a common “shadow report”, often in the same format as the State report. Such a submission streamlines the information for the Committee, and also benefits from greater credibility due to the participation of more than one group in its preparation.<sup>253</sup>

Information submitted to the Committees is presumed to be public, so one must inform the Committee if one would rather the information be kept confidential. Submissions by NGOs and other interested non-State parties are not treated as formal UN documents, and so they will not be translated by the UN.<sup>254</sup> Multiple hard copies, and an electronic copy, of the submission should be provided, as “the secretariat does not have the capacity to reproduce NGO materials.”<sup>255</sup>

It is possible to attend the meeting in which the relevant dialogue is taking place, as these dialogues take place in public session. One will need authorisation to get into the UN building (whether in Geneva or New York City), so one must contact the Secretariat in advance of one’s visit to arrange for such authorisation. During the dialogue, one is not entitled to intervene; the only speakers permitted are Committee members and the State party representa-

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253 UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 12. See also Office of the UN High Commissioner for Human Rights, ‘Working with the Office of the United Nations High Commissioner for Human Rights: A Handbook for NGOs’, (2006) HR/PUB/06/10, p. 68.

254 Office of the UN High Commissioner for Human Rights, ‘Working with the Office of the United Nations High Commissioner for Human Rights: A Handbook for NGOs’, (2006) HR/PUB/06/10, p. 69.

255 *Ibid*, p. 70.

tives. However, both Committees do provide for specific times during their sessions when NGOs may make oral submissions about particular State reports. These oral briefings normally take place in closed sessions.<sup>256</sup> Furthermore, there are opportunities, during breaks in Committee sessions, for informal briefings of Committee members.<sup>257</sup>

### **2.3.2 CAT inquiry procedure**

Article 20 of CAT acts as a monitoring mechanism which can be invoked when the CAT Committee (“the Committee” in this section) receives information suggesting that systematic acts of torture are occurring within a State. Persons wishing to utilise Article 20 should submit their evidence and information to the U.N. Secretary-General who will bring it before the Committee. Such information must meet certain criteria in order to be considered by the Committee. First, the State concerned must have recognised the competence of the Committee to respond to information submitted under Article 20. Under Article 28(1), States parties may deny such competence to the Committee at the time of ratification or accession of the treaty. A State which has so opted not to recognise competence may later recognise the competence of the Committee under Article 28(2). Second, the submitted information must be “reliable” and “well founded”, and must reflect the existence of a systematic practice of torture within the relevant State.

The type of treatment which falls under the scope of Article 20 is limited to torture, as described in Article 1 of the CAT. It does not extend to cruel, inhuman or degrading treatment as per Article 16.

#### **a) Gathering Information**

Article 20 inquiries should operate with the full consent of, and in co-operation with, the State under scrutiny. Once the Committee has established that the information meets the requisite criteria, the Committee will forward the information to the State in question and invite it to respond. The Committee may also decide that it requires further information in order make an informed assessment of evidence it has received. In such a case, it may request additional information from the State, NGOs, or other concerned parties. Once it

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<sup>256</sup> *Ibid*, pp. 71, 75, 79.

<sup>257</sup> *Ibid*, pp. 71, 75.

has gathered sufficient information the Committee will make a decision over whether an independent inquiry is required.

### **b) An Independent Inquiry**

Independent inquiries are conducted by one or more of the members of the CAT Committee. The State will be informed of this decision and will be invited to assist through the provision of further information. The Committee may also request permission for some of its members to visit the State for the purpose of making on-site investigations, such as meeting with prisoners, and visiting places of detention. A visit to the State's territory can only occur with the consent of the State involved. The Committee does not possess any prescribed powers to call witnesses or request documents which may assist in its inquiry. At the conclusion of the inquiry the Committee will review the evidence and make suggestions and comments as to how the State may improve the situation. The State is then invited to respond to the findings and to inform the Committee of how it intends to address the issues raised.

### **c) Confidentiality**

The inquiry itself and any findings made as a result are confidential in accordance with rule 72 and 73 of the Committee's Rules of Procedure. This rule of confidentiality extends to any relevant documents, meetings or proceedings. However, the Committee may choose to include a summary of the findings in its public annual report under Article 20(5).

### **d) Criticism of the Procedure**

The requirement of consent for visits to the territory and the confidential nature of the operation of Article 20 have been the subject of criticism from commentators, who argue that such rules may undermine the procedure's effectiveness. While such provisions operate to protect the sovereignty of the State concerned, they arguably do so at the cost of human rights protection and the eradication of torture.<sup>258</sup>

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258 For example Ahcene Boulesbaa states: "It is highly unlikely that States which practice torture will allow the Committee to inspect their places of detention and examine conditions of the prisoners who are alleged to have been tortured since they have the power of veto....the Committee is thereby denied access to the very evidence it needs to ascertain whether torture has or has not occurred": see A. Boulesbaa., *The U.N Convention on Torture and the Prospects for Enforcement*, M. Nijhoff Publishers, 1999, p. 265.

### **e) Submitting Information for an Article 20 Inquiry**

In submitting information designed to prompt an Article 20 inquiry, individuals or organisations must present credible information that signals the potential existence of systematic practices of torture in a State: the information should indicate that torture is “habitual, widespread and deliberate” and arises in “at least a considerable part of the territory in question”.<sup>259</sup> It is not sufficient to present information on isolated instances of torture, though it is important to include a large number of concrete examples of torture. Information should be organised so as to be easy to read and understand.<sup>260</sup>

Furthermore, an individual or organisation should submit important background information on a State, such as (if relevant) a history of ethnic conflict and discrimination, the inadequacies of existing legislation, and any inadequacies in governance such as within the court system.<sup>261</sup>

In advance of an inquiry, persons should submit suggestions to the Committee on places that the relevant members should visit, as well as people that they should contact, such as government officials, torture victims, detainees, lawyers, and NGOs.<sup>262</sup> If one is meeting with an inquiry team, one should tell one’s story succinctly and apolitically, and present copies of relevant documentation if possible. One should address important points first in case time runs out. A written submission should be prepared to ensure that all points have been conveyed, even if one does run out of time during a face to face meeting.<sup>263</sup>

### **f) Article 20 in Action**

In its 2004 Annual Report, the Committee gives a summary account of findings in relation to Serbia and Montenegro arising from an Article 20 inquiry. The inquiry was sparked by the submission of information in December 1997, from the Humanitarian Law Centre (HLC), an NGO based in Belgrade, alleging that systematic torture was being practised in Serbia and Montenegro, and requesting an Article 20 investigation by the Committee. After requesting further information from the HLC, the Committee launched an independent inquiry.

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259 Giffard, above note 109, p. 98.

260 Giffard, above note 109, p. 98.

261 Giffard, above note 109, p. 98.

262 Giffard, above note 109, pp. 74-75.

263 Giffard, above note 109, p. 75.

This inquiry began in November 2000 and included a visit, with government permission, to Serbia and Montenegro from the 8 to 19 July 2002. During the visit, Committee members met with many government officials, members of the judiciary, state representatives, representatives of the Organisation for Security and Cooperation in Europe, and NGOs. They also visited prisons and police stations to observe log books, medical records, and interrogation rooms, and to conduct interviews with detainees, pre-trial detainees and former detainees. The Committee members reported that “the ... authorities were supportive of the visit and very cooperative. The members visited prisons and places of detention without prior notice and talked in private with detainees”.<sup>264</sup>

In its summary account the Committee found that under the previous regime of President Slobodan Milosevic, torture had been widely practised and documented. In the post Milosevic era, “the incidence of torture appeared to have dropped considerably and torture was no longer systematic”.<sup>265</sup> Nevertheless, the Committee noted that acts of torture continued to occur and reminded the State of its “obligation to spare no effort to investigate all cases of torture [including acts under the Milosevic government], provide compensation for the loss or injury caused and prosecute the persons responsible”.<sup>266</sup> In conclusion, it provided a list of 20 recommendations which the State should adopt in order to meet its CAT obligations. The Committee then invited the State to report back regarding the course of action it intended to undertake in response. The State subsequently responded, informing the Committee of various measures it had taken, and was in the process of undertaking, to ensure its obligations were met. In 2003 and 2004, the Committee received further information from NGOs in the region. This information indicated that acts of torture were still occurring and that the State continued to shun its responsibility to investigate and persecute those responsible for earlier war crimes. The Committee noted this information with concern in its annual report for 2004.<sup>267</sup>

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264 Annual Report of the Committee against Torture, (2004) U.N. Doc. A/59/44, § 160.

265 *Ibid.*, § 212.

266 *Ibid.*, § 212.

267 *Ibid.*, §§ 236-239.

### 2.3.3 Optional Protocol to the CAT

The Optional Protocol (the Protocol) aims to prevent torture, cruel, inhuman or degrading treatment or punishment through the establishment of domestic and international mechanisms which will consistently monitor the treatment of individuals deprived of their liberty, primarily through visits to places of detention. Detainees are peculiarly vulnerable to acts of torture and other ill-treatment. The Protocol was adopted and opened for signature, ratification and accession on 18 December 2002. It came into force on 22 June 2006.

#### a) Objective of Protocol

Article 1 of the Protocol states the objective of the Protocol:

“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.”

The Protocol provides for the creation of a new international body, namely the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee), which will work together with domestic monitoring bodies, the National Prevention Mechanisms (NPMs), to prevent torture and other mistreatment by States parties. It is intended that both bodies will be able to conduct visits to detention centres. This emphasis on prevention through co-operation between an international mechanism and domestic bodies differentiates the Protocol from other existing anti-torture mechanisms.

#### b) The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Subcommittee will consist of ten members nominated and subsequently elected by the States Parties in a secret ballot to four year terms. As with the HRC and the CAT Committee, the Subcommittee members will operate in an independent expert capacity. A Subcommittee member should have experience in the area of justice administration, including criminal law, police or prison administration or in a field which relates to the treatment of individuals who are deprived of their liberty.<sup>268</sup> The fundamental principles which should

guide all members of the Subcommittee in their actions and approach are “confidentiality, impartiality, non-selectivity, universality and objectivity”.<sup>269</sup>

Under Article 11 of the OP, the Subcommittee has two main tasks. The first is to visit places of detention and communicate with the State Parties regarding what they observe. The second is to liaise with and assist in the operation of the National Preventive Mechanism.

*i. Visiting Places of Detention*

Under Article 11, the Subcommittee shall:

- (a) Visit the places referred to in Article 4 and make recommendations to State Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

“Places of detention” is defined in Article 4(1) as:

“...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 acquiesce.”

“Deprivation of liberty” is defined in Article 4(2):

“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.”

Thus the definition is broad, to ensure that the Subcommittee may visit:

“prisons and police stations, detention centres, psychiatric institutions (where persons have been hospitalized on involuntary basis), detention areas in military bases, detention centres for asylum seekers and immigration centres, centres for juveniles and places of administrative detention”.<sup>270</sup>

Furthermore, “the list is not closed”<sup>271</sup> so the definition can be applied flexibly to new contexts in which an individual is deprived of his or her liberty.

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268 Article 5.2.

269 Article 2(3), CAT OP.

270 Amnesty International, “Preventing Torture Worldwide- The Optional Protocol to the Convention Against Torture”, (June, 2003), AI Index: IOR 51/002/2003, <http://web.amnesty.org/library/index/ENGIOR510022003>.

Visits should occur regularly, however the Protocol does not specify a time frame for this criteria. The first round of visits to States parties shall be established by lot, after which they will fall into a regular program.<sup>272</sup> The procedure for arranging visits is found in Article 13(2):

“After consultations, the Subcommittee on Prevention shall notify the State Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.”

As noted below in Section 2.3.3(c), States parties are obliged to cooperate with the Subcommittee in giving it access to relevant places of detention. The visits themselves will be conducted by at least two members of the Subcommittee<sup>273</sup> and if necessary the members will be accompanied by an expert selected from a roster compiled on the basis of suggestions made by State Parties, the Office of the UN High Commission for Human Rights and the United Nations Centre for International Crime Prevention.<sup>274</sup> Such an expert must have “demonstrated professional experience and knowledge in the fields covered by the present Protocol.”<sup>275</sup> The State Party may object to the choice of expert for the visit in which case the Subcommittee will propose another expert.<sup>276</sup>

The Subcommittee may decide under Article 13(4) that a short follow up visit is required to ensure that the State Party has implemented or is working towards implementing its recommendations. No criteria for such visits are spelled out in Article 13(4), so the Subcommittee seems to have considerable discretion in this respect.

The recommendations and observations which the Subcommittee makes during its visit must be confidentially communicated to the State Party and if relevant also to the NPM.<sup>277</sup> If the State Party requests it to do so the Subcommittee must publish its report. This publication should include any comments of the State Party. If the State Party itself makes part of the report

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271 M. Evans, ‘Signing the Optional Protocol to the Torture Convention’, (October, 2004) *The New Zealand Law Journal* 383, p. 384.

272 Article 13 (1), CAT OP.

273 Article 13 (3), CAT OP.

274 Article 13 (3), CAT OP.

275 Article 13 (3), CAT OP.

276 Article 13 (3), CAT OP.

277 Article 16 (1), CAT OP.

public, the Subcommittee has the right to publish any part or even the whole of the report.<sup>278</sup>

An annual report given by the Subcommittee to the CAT Committee shall be publicly available.<sup>279</sup> It is as yet uncertain how that report will be structured, or how detailed it will be with regard to the Subcommittee's activities.

### **c) Obligations of the State Party**

The successful operation of the Protocol is dependent upon cooperation between the State Party and the Subcommittee. The central obligations and undertakings of the State Party are outlined in Article 12 and Article 14. The State Party must grant to the Subcommittee unrestricted access to all places of detention and their installations and facilities.<sup>280</sup> Further, the State Party must give the Subcommittee full access to the places it chooses to visit and the people it wishes to interview.<sup>281</sup> The State Party must also ensure that interviews with persons deprived of their liberty, or with anyone whom the Subcommittee feels may have relevant information, can be conducted privately without witnesses.<sup>282</sup>

The State Party must give unrestricted access to information concerning the number of persons deprived of their liberty and the treatment of persons in places of detention, including their conditions of detention and the location and number of such places.<sup>283</sup> Any other relevant information which the Subcommittee 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" must also be provided to the Subcommittee by the State Party.<sup>284</sup>

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278 Article 16 (2), CAT OP.

279 Article 16 (3), CAT OP.

280 Article 14 (c), CAT OP.

281 Article 14 (1)(e), CAT OP.

282 Article 14 (d), CAT OP.

283 Article 14 (1) (a), (b), CAT OP.

284 Article 12 (b), CAT OP.

The State Party may object to visits on certain narrow grounds as specified in Article 14(2):

“Objection 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 the State Party as a reason to object to a visit.”

Professor Malcolm Evans suggests that, “[t]here will be a heavy burden upon a State wishing to restrict the right of access on these grounds.”<sup>285</sup>

After the visit to the State, the Subcommittee must communicate its recommendations and observations to the State Party.<sup>286</sup> These communications are confidential, but the NPM may also be advised if the Subcommittee deems it relevant.<sup>287</sup> The State Party must then examine the recommendations of the Subcommittee and enter into a dialogue with it regarding possible implementation measures.<sup>288</sup>

The only sanction for non-compliance by a State party with its Protocol obligations arises under Article 16(4). The CAT Committee may decide by majority vote, at the request of the Subcommittee, to make a public statement on the non compliance of the State Party, or publish any relevant report of the Subcommittee. This threat of public exposure of torture or mistreatment of detainees will provide some incentive for cooperation and compliance with the Subcommittee’s recommendations.

#### **d) The National Preventive Mechanism**

The National Preventive Mechanism (NPM) is a body or group of bodies which work in conjunction with the Subcommittee towards preventing torture in a particular State. An NPM is established, designated and maintained by the State Party itself<sup>289</sup> and operates from within its territory. The type of this mechanism will vary between State Parties:

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285 M. Evans, ‘Signing the Optional Protocol to the Torture Convention’, (October, 2004) *The New Zealand Law Journal*, p. 383, p. 384.

286 Article 16(1), CAT OP.

287 Article 16(1), CAT OP.

288 Article 12(d), CAT OP.

289 Article 17, CAT OP.

“some may have a single Human Rights Commission or Ombudsman Office which already enjoys most or all of the visiting capacities required. Others will have an extensive patchwork of bodies operating in different sectors that, in combination, produce an appropriate overall coverage.”<sup>290</sup>

Therefore, the type of mechanism utilised by the State Party will largely depend upon the nature of pre-existing bodies, and the approach of authorities towards this aspect of implementation.

The domestic location of an NPM will enable it to closely monitor developments in the State; an NPM is “more likely [than the Subcommittee] to be able to identify problems and apply pressure over time”.<sup>291</sup> They will also provide a valuable source of up-to-date and reliable information for the Subcommittee. Their presence gives new strength to the operation of international law domestically, as they will facilitate ongoing reinforcement of the recommendations and standards of the Subcommittee. They will operate to generate a national culture of human rights which is shaped by international standards.<sup>292</sup>

The State Party has a crucial role in creating and maintaining NPMs. The State Party must ensure that experts of the NPMs have the “required capabilities and professional knowledge”.<sup>293</sup> Regarding the composition of an NPM, the State should “strive for a gender balance and the adequate representation of ethnic and minority groups in the country”.<sup>294</sup> To be effective it is also essential that the mechanisms operate independently of the State Party. To this end, the State Party must guarantee both the “functional independence” and “independence of their personnel”.<sup>295</sup> The State Party must also provide the NPMs with the “necessary resources” for their functioning.<sup>296</sup>

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290 M. Evans, “Signing the Optional Protocol to the Torture Convention”, (October, 2004), *The New Zealand Law Journal* 383, p. 385.

291 M. Evans, “International visitors in UK Cells”, (November, 2004), *The New Zealand Law Journal* 433, p. 434.

292 As noted by Malcolm Evans, “Those national mechanisms designated by the state become part of the international framework of torture prevention and the boundaries between the national and international suddenly become malleable and permeable”, in *ibid*, p. 434.

293 Article 18(2), CAT OP.

294 Article 18(2), CAT OP.

295 Article 18(1), CAT OP.

296 Article 18(3), CAT OP.

*i. Functions of the NPM*

An NPM will work with the Subcommittee and the State Party to establish practices which will prevent acts of torture, cruel, inhuman or degrading treatment or punishment from occurring within that State. They will have three central roles. First, NPMs will regularly monitor the treatment of detainees in that State; this role includes making visits to places of detention.<sup>297</sup> Second, they will make recommendations and submit proposals and observations to the State party relating to current or drafted legislation.<sup>298</sup> Third, the NPM will communicate with and exchange information with the Subcommittee.<sup>299</sup>

The NPMs' role in monitoring the treatment of detainees is very similar to that of the Subcommittee in visiting places of detention.<sup>300</sup> States parties must cooperate with NPMs in permitting and facilitating such visits. Furthermore, States must examine recommendations by NPMs, in regards to treatment of detainees and also with regard to State party laws and policies, and engage in a dialogue with the NPM on possible ways of implementing its recommendations.<sup>301</sup>

It is envisaged that NPMs will publish annual reports, which must be distributed by the relevant States parties.<sup>302</sup> The Protocol is not specific as to the requisite content of such reports.

The powers granted to the NPM in relation to monitoring detainees and making recommendations and proposals reflect the minimum powers which must be granted to the NPM under the Protocol;<sup>303</sup> a State Party may choose to authorise further powers to its NPM/s.

*ii. The Relationship between the Subcommittee and the NPMs*

A strong working relationship between the Subcommittee and the NPM is crucial for the optimal functioning of the Protocol. The State party should encourage and facilitate such contact and communication.<sup>304</sup> Such communication

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297 Article 19(a), CAT OP.

298 Article 19(b) and (c), CAT OP.

299 Article 20(f) and Article 11(b)(ii) and Article 16(1), CAT OP.

300 Article 20, CAT OP.

301 Article 22, CAT OP.

302 Article 23, CAT OP.

303 Article 19, CAT OP.

304 Article 12(c), CAT OP.

may, if necessary, be kept confidential.<sup>305</sup> The general role of the Subcommittee in relation to the NPMs is “one of general oversight, exercising something of a paternalistic interest in the operation and functioning of NPMs”.<sup>306</sup> For example, the Subcommittee may assist the State party to establish the NPM, and may offer training and technical assistance to an NPM.<sup>307</sup> The Subcommittee should also make recommendations and observations to State Parties in relation to strengthening the capacity and the mandate of an NPM.<sup>308</sup>

### **e) Protecting Those who Communicate or Provide Information**

In order for the Subcommittee and the NPMs to assess the true situation in relation to the practice of torture within a State they must be able to have uncensored and open communication with relevant individuals and groups. Therefore, such individuals and groups must be able to speak freely with the Subcommittee and NPMs, without fear of reprisal or punishment. Article 15 therefore states:

“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 21(1) ensures that the same degree of protection is offered in relation to NPMs. With both the Subcommittee and NPMs, no personal data will be published without the explicit consent of the individual or persons concerned.

### **f) Conclusion**

It is of course premature to assess the functioning of the Protocol, given that it has only very recently come into force. It is hoped that the approach envisioned under the Protocol of visiting countries combined with the complementary relationship between international and domestic mechanisms will “be the final stone in the edifice which the United Nations has built in their campaign against torture”.<sup>309</sup>

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305 Article 11(b)(ii), CAT OP.

306 M. Evans, “Signing the Optional Protocol to the Torture Convention”, (October, 2004) *The New Zealand Law Journal* 383, p. 385.

307 Article 11(b)(iii), CAT OP.

308 Article 11(b)(iv), CAT OP.

309 Report of the Special Rapporteur on Torture, (Mr. P.Kooijmans), (1998) UN doc. E/CN.4/1988/17, § 65.

### 2.3.4 The UN Special Rapporteur on Torture

The position of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (“Special Rapporteur on Torture”) was created by the United Nations Commission on Human Rights in 1985 in order to examine issues relating to torture and other ill-treatment. Each Rapporteur serves in his or her individual capacity, independent of government or other organisations. To date, there have been four Special Rapporteurs on Torture. The choice of Rapporteur is “crucial to the credibility of the mandate”<sup>310</sup>, so the position of Special Rapporteur requires “individuals of high standing and deep knowledge of human rights.”<sup>311</sup> The current Special Rapporteur is Professor Manfred Nowak who was appointed by the United Nations Commission on Human Rights on 1 December 2004.

The original mandate of the Special Rapporteur was described in Commission Resolution 1985/33, and has evolved in succeeding resolutions. The ultimate parameters of the work of the Special Rapporteur are outlined in the International Bill of Human Rights and other UN instruments which prohibit acts of torture or cruel, inhuman or degrading treatment or punishment.<sup>312</sup> The main function is to present the Commission (and now the Commission’s replacement, the Human Rights Council) with as accurate a report as possible on the practice of torture in the world.<sup>313</sup> The types of issues which the Special Rapporteur has addressed include anti-terrorism measures, the Convention Against Torture, corporal punishment, disappearances, effective investigation of torture, gender-specific forms of torture, torture equipment, impunity, incommunicado detention, the role of medical personnel, non-refoulement and the exclusionary rule.<sup>314</sup>

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310 UN Fact Sheet No. 27, “Seventeen Frequently Asked Questions about United Nations Special Rapporteurs”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 6.

311 UN Fact Sheet No. 27, “Seventeen Frequently Asked Questions about United Nations Special Rapporteurs”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 6.

312 Methods of Work of the Special Rapporteur on Torture, Annex to UN doc. E/CN.4/1997/7 (hereinafter referred to as “Methods of Work”), §1. These “methods of work” were approved by the Commission on Human Rights in Resolution 2001/62. (2001) UN doc. E/CN.4/RES/2001, § 30.

313 Giffard, above note 109, p. 92.

314 A list of “Issues in Focus” and related reports available at <http://www.ohchr.org/english/issues/torture/rapporteur/issues.htm>

The mandate of the Special Rapporteur allows him or her to uniquely respond in situations where other human rights bodies working against torture may not be able. For example, there is no requirement that the State in question be a party to CAT or any other treaty, so the Special Rapporteur may respond to allegations of torture against any State.

### **(a) Central Functions of the Special Rapporteur**

#### *i. Urgent Appeals*

This arm of the Special Rapporteur's mandate is intended to operate as a preventative mechanism in situations where the Special Rapporteur receives information indicating that an individual or group of individuals is at risk of torture or ill-treatment. In this situation, the Special Rapporteur will only take action upon determining that such information is credible. In making an assessment as to whether there are reasonable grounds to believe that a risk of torture or ill-treatment is present, the Special Rapporteur may consider:

- The previous reliability of the source of the information;
- The international consistency of the information;
- The consistency of the information with other information received by the Special Rapporteur relating to this particular country;
- The existence of authoritative reports of torture practices from national sources, such as official commissions of inquiry;
- The findings of other international bodies, such as those established in the framework of the UN human rights machinery;
- The existence of national legislation, such as that permitting prolonged incommunicado detention, that can facilitate torture;
- The threat of extradition or deportation, directly or indirectly to a State or territory where one or more of the above elements are present.<sup>315</sup>

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<sup>315</sup> Methods of Work, § 3.

The action taken by the Special Rapporteur generally takes the form of an urgent appeal through a letter to the relevant State's Minister of Foreign Affairs, requesting the investigation of the allegations, and the taking of steps to ensure the physical and mental integrity of the individual/individuals concerned.<sup>316</sup> This communication does not amount to an accusation, rather it seeks to enlist the cooperation and assistance of the government in ensuring that international human rights standards are upheld in the specific circumstance. An urgent appeal can be used to complement a request for interim measures by another human rights body, such as the HRC or the CAT Committee.<sup>317</sup> In 2005, the Special Rapporteur on Torture sent, both jointly with other mandates and individually, 190 urgent appeals to 55 countries.<sup>318</sup>

### *ii. Allegation Letters*

Upon receiving allegations of acts of torture and determining that they are credible, the Special Rapporteur will endeavour to open up a dialogue with the respective government by sending it an "allegation letter", which requires that the government respond to the allegations and provide details of any subsequent investigation. Upon receipt of such information, the Special Rapporteur will consider the details of the response and will communicate the information to the individuals or group who made the allegation (as appropriate). The Special Rapporteur will also consider whether to pursue further dialogue with the State party.<sup>319</sup> In 2005, the Special Rapporteur sent, both jointly with other mandates and individually, 93 allegation letters on torture to 47 countries.<sup>320</sup> The Special Rapporteur's conclusions regarding such communications are compiled in an annual report (see Section 2.3.4(b)).

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316 Methods of Work, § 4.

317 See Section 2.2.

318 "Special Procedures of the Commission on Human Rights – 2005 Communications" at <http://www.ohchr.org/english/bodies/chr/special/Facts%20and%20figures%20on%202005%20Special%20Procedures%20communications.pdf>, p. 3

319 Methods of Work, § 8.

320 "Special Procedures of the Commissioner on Human Rights – 2005 Communications" at <http://www.ohchr.org/english/bodies/chr/special/Facts%20and%20figures%20on%202005%20Special%20Procedures%20communications.pdf>, p. 3

### *iii. Fact-finding Visits*

An integral part of the Special Rapporteur's mandate is to undertake fact-finding visits to States. These visits are always carried out with the consent of the State involved and may be arranged in two ways. A State's government may invite the Special Rapporteur to visit, or the Special Rapporteur may seek to solicit an invitation from a government due to the "number, credibility and gravity of the allegations received, and the potential impact that the mission may have on the overall human rights situation".<sup>321</sup> NGOs may play an active role in lobbying the Special Rapporteur to visit a particular State.

Country visits provide the Special Rapporteur with the opportunity to gain a first-hand understanding and insight into the human rights situation in relation to practices of torture and ill-treatment, and in relation to the particular States visited. The type of investigation undertaken by the Special Rapporteur include visits to places of detention, and meetings with relevant individuals and groups, such as victims, their families, NGOs, journalists, lawyers, and government authorities.

In order to ensure that the visit of the Special Rapporteur will enable him or her to gain a true perspective of the situation and that the visit will not generate or aggravate situations of abuse, the Rapporteur asks for certain guarantees from the government of the State before the visit commences. These include:

- Freedom of movement throughout the country;
- Freedom of inquiry, especially regarding access to places of detention;
- Freedom of contact with government officials, members of NGOs, private institutions and the media;
- Full access to all relevant documentary material;
- Assurances that no persons who are in contact with the Special Rapporteur will suffer consequent retribution.<sup>322</sup>

For example, the Special Rapporteur cancelled a planned visit to the U.S.'s detention facility in Guantanamo Bay in late 2005 as the U.S. would not allow him free access to privately interview detainees in that facility.<sup>323</sup>

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321 See Office for the High Commissioner on Human Rights, "Special Rapporteur on Torture, Country Visits" at <http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm>

322 See Office for the High Commissioner on Human Rights, "Special Rapporteur on Torture, Country Visits" at <http://www.ohchr.org/english/issues/torture/rapporteur/appeals.htm>

323 See 'Human Rights experts issue joint report on situation in Guantanamo Bay', UN Press Release, 16 February 2006.

## **b) Reports**

The Special Rapporteur's findings are not legally binding. However, the public nature of his findings puts pressure on States to conform to his or her recommendations.<sup>324</sup> The Special Rapporteur compiles an annual report on his work throughout the year, including accounts of visits to States, communications received, and on salient issues related to torture and ill-treatment.<sup>325</sup> These reports identify the factors and practices which cause and sustain acts of torture or other ill-treatment, and recommend measures regarding the eradication of such practices. These recommendations are subject to limited follow-up by the Special Rapporteur who will:

“periodically remind Governments concerned of the observations and recommendations formulated in the respective reports, requesting information on the consideration given to them and the steps taken for their implementation, or the constraints which might have prevented their implementation.”<sup>326</sup>

The Special Rapporteur used to report annually to the Commission on Human Rights.<sup>327</sup> These reports will now be submitted to the UN Human Rights Council. The Special Rapporteur also submits an annual report to the UN General Assembly.<sup>328</sup>

## **c) Practical Information for submitting a communication to the Special Rapporteur**

When submitting a communication to the Special Rapporteur on Torture there is certain basic information which must be included in order for a submission to be considered;

- Full name of the victim;
- Date on which the incident(s) of torture occurred (at least as to the month and year);
- Place where the person was seized (city, province, etc.) and location at which the torture was carried out (if known);
- Indication of the forces carrying out the torture;

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324 Giffard, above note 109, p. 93.

325 To access these reports go to [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=103](http://ap.ohchr.org/documents/dpage_e.aspx?m=103)

326 Methods of Work, §13.

327 See e.g., UN doc. E/CN.4/ 2006/6, 23 December 2005.

328 See e.g., UN doc. A/60/316, 30 August 2005.

- Description of the form of torture used and any injury suffered as a result;
- Identity of the person or organization submitting the report (name and address, which will be kept confidential).<sup>329</sup>

A very useful tool to assist someone who is writing a submission to the Special Rapporteur is the model questionnaire available in English, French and Spanish at <http://www.ohchr.org/english/issues/torture/rapporteur/model.htm>. Although it is not compulsory to submit the communication in this style, the questionnaire is very helpful in identifying the information which should be included if possible. As much detail as possible should be given in any communication to the Special Rapporteur. However, if precise details are not known or unclear, this should not preclude a communication from being made (subject to the basic informational requirements outlined above). Other information which should be included are any copies of documents which support the allegations, such as police or medical reports.

The postal and email address for communications to the Special Rapporteur is:

Special Rapporteur on Torture  
c/o Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
CH-1211 Geneva 10  
Switzerland

Email: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

For further information on the work of the Special Rapporteur and procedures for submitting a complaint please refer to the United Nations website at <http://www.ohchr.org/english/issues/torture/rapporteur/index.htm>

and <http://www.ohchr.org/english/bodies/chr/special/complaints.htm>

### **2.3.5 The Working Group on Arbitrary Detention**

The Working Group on Arbitrary Detention seeks to investigate instances of and the phenomenon of arbitrary detention. Examples of such detention include where an individual has been imprisoned without an arrest warrant and without being charged or tried by an independent judicial authority, or without

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<sup>329</sup> See “Model questionnaire to be completed by persons alleging torture or their representatives”, available at <http://www.ohchr.org/english/issues/torture/rapporteur/model.htm>

access to a lawyer, or where he or she has been detained without the fundamental guarantee of a fair trial.<sup>330</sup> Arbitrary detention is prohibited under Article 9 ICCPR. It is often a prelude to acts of torture or other ill-treatment.

The Working Group was established in 1991 by the Commission on Human Rights.<sup>331</sup> The Working Group is made up of five independent experts who meet three times per year for a period of five to eight working days.

“Detention” is defined in Commission Resolution No. 1997/50 as any “deprivation of liberty”, and includes instances of arrest, apprehension, detention, incarceration, prison, reclusion, custody and remand. It extends to a “deprivation of freedom either before, during or after the trial...as well as deprivation of freedom in the absence of any kind of trial (administrative detention)”, as well as house arrest.<sup>332</sup>

The Working Group has adopted the following criteria in determining whether a detention is arbitrary:

1. “When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)”.
2. “When the deprivation of liberty results from the exercise of rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and insofar as States Parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26, and 27 of the International Covenant on Civil and Political Rights (ICCPR)”.
3. “When the total or partial non observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character”.<sup>333</sup>

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330 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>

331 Commission on Human Rights, Resolution 1991/42.

332 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

333 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

### **a) The Mandate of the Working Group on Arbitrary Detention**

The mandate of the Working Group, as determined by the Commission on Human Rights, involves three central areas of operation.<sup>334</sup> First, it investigates cases where an individual has been deprived of his or her liberty in circumstances which appear to be arbitrary. Second, the Working Group will seek and receive information regarding situations of arbitrary detention occurring throughout the world. Third, the Working Group compiles a public annual report on its activities, including recommendations and conclusions about the factors which lead to instances of arbitrary detention. The report includes the Working Group's opinions on individual communications submitted to it, and reports of field visits and relevant statistics for that period. The report is then considered by the Commission on Human Rights in its annual session. The Commission's replacement, the UN Human Rights Council, will take over that role.

### **b) Method of Operation**

#### *i. Individual Complaints*

The Working Group on Arbitrary Detention is the only non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints. It can therefore act on complaints regarding any State, regardless of the treaties it has ratified.<sup>335</sup>

The process of consideration of individual complaints is as follows. The Working Group receives the complaint from a concerned party, such as the victim or a representative. The Working Group will then determine if the claim appears to be sufficiently substantiated to proceed. If it does proceed, it forwards a copy of the communication to the State concerned, and requests a response within 90 days. The government's response is then forwarded to the complainant. Ultimately, the Working Group determines its opinion on the basis of all of the information received. It may decide that the detention is arbitrary (even if the person has since been released), and will then recommend an appropriate remedy. It may determine that the particular detention was not

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334 UN Fact Sheet, No. 26, "The Working Group on Arbitrary Detention", at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

335 UN Fact Sheet, No. 26, "The Working Group on Arbitrary Detention", at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

arbitrary. Finally, it may determine that more information is required, so the case is filed until the information is received. It will notify the government of its opinion and three weeks later will also notify the author.<sup>336</sup>

A very useful tool to assist someone who is writing a communication to the Working Group on Arbitrary Detention is the model questionnaire available at <http://www.ohchr.org/english/about/publications/docs/fs26.htm#A5> in Annex 5.

### *ii. Deliberations*

The Working Group also produces “deliberations”, which are designed to develop consistent precedents to assist States to identify practices which may lead to, or constitute, arbitrary detention.<sup>337</sup> Recent deliberations of the Working Group include Deliberation 8 on deprivation of liberty linked to/resulting from the use of the internet (2006)<sup>338</sup> and Deliberation 7 on issues related to psychiatric detention (2005).<sup>339</sup>

### *iii. Urgent Action*

Where the Working Group receives information indicating that a situation urgently requires its attention it may issue an urgent appeal. The Working Group will engage in this process where it receives sufficiently reliable allegations that a person is being arbitrarily detained, and that the detention constitutes a serious threat to the person’s life or health, or in other exceptional circumstances where the Working Group decides that such an appeal is warranted. In these situations, the Working Group will send the Minister for Foreign Affairs of the relevant State an urgent appeal requesting him or her to take all appropriate action to ensure that the physical and mental integrity of the individual/s concerned is protected. These appeals do not assume guilt on the part of the State, and have no effect on any subsequent decision by the Working Group regarding the relevant detention.<sup>340</sup>

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336 See Working Group on Arbitrary Detention, “Individual Complaints, Urgent Appeals, Deliberations” at [www.ohchr.org/english/issues/detention/complaints.htm](http://www.ohchr.org/english/issues/detention/complaints.htm), Part I.

337 See Working Group on Arbitrary Detention, “Individual Complaints, Urgent Appeals, Deliberations” at [www.ohchr.org/english/issues/detention/complaints.htm](http://www.ohchr.org/english/issues/detention/complaints.htm), Part III.

338 Working Group on Arbitrary Detention, Deliberation 8, (2006) UN doc. E/CN.4/2006/7.

339 Working Group on Arbitrary Detention, Deliberation 7, (2005) UN doc. E/CN.4/2005/6.

340 [www.ohchr.org/english/issues/detention/complaints.htm](http://www.ohchr.org/english/issues/detention/complaints.htm), Part II.

#### *iv. Field Missions*

The Working Group also conducts visits to the territory of States upon invitation of State governments. Through meeting with detainees, government officials, members of the judiciary and NGOs, the Working Group gains a first hand understanding of the political, cultural and social situation in that country and also an insight into the factors leading and contributing to instances of arbitrary detention.<sup>341</sup>

#### **c) Avoiding Duplication with other Human Rights Mechanisms**

To ensure that two bodies are not simultaneously dealing with the same case or set of circumstances a procedure has been set in place:

“as soon as a case is brought before the Group, the secretariat checks whether it does indeed fall under the Group’s mandate. If the principal violation suffered by the detained person falls under the practice of torture, summary execution or enforced disappearance, the case is forwarded to the appropriate special rapporteur or working group.”<sup>342</sup>

A case will otherwise be sent to the Working Group, unless it is possible that the communication is meant for the HRC, which of course has the power to make determinations regarding individual communications under Article 9 ICCPR if the complaint concerns a State party to the OP. In such a case the author will be contacted and he or she can choose which mechanism (HRC or Working Group) he or she wishes to utilise.<sup>343</sup>

#### **d) Practical Information**

For further information on the Working Group on Arbitrary Detention including reports, press releases, relevant international standards and guidelines for submission of a communication (model questionnaire) see their web site at: <http://www.ohchr.org/english/issues/detention/complaints.htm>

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341 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part V.D.

342 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part VII.

343 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part VII.

For an individual case or cases, the communication should be sent to:

Working Group on Arbitrary Detention  
c/o. Office of the UN High Commissioner for Human Rights  
United Nations Office at Geneva  
CH-1211, Geneva 10  
Switzerland

Communications requesting the Working Group to launch an urgent appeal on humanitarian grounds should also be sent to the above address or preferably, by facsimile to: +41 (0)22 917 9006.

## 2.4 Follow-up Procedure

Follow-up measures refer to the procedures of the HRC and the CAT Committee to “follow up” the responses and reactions of States parties to their Concluding Observations or their findings of violation in individual complaints.

Prior to the instigation of follow-up measures, the Committees had little knowledge about the actual impact of their findings upon the practice of States parties. States were left to develop their own ways of acting (or not acting) upon the findings of the Committee and implementing the recommendations that were made.<sup>344</sup> Without a monitoring mechanism in place there was occasionally little incentive for a State to put such recommendations into practice. The Committees aim to facilitate, encourage and supervise compliance through the implementation of follow-up measures.

“The issue of follow-up to concluding observations has been identified as of central importance for the effectiveness of the work of treaty bodies...without such efforts the likelihood of implementation of recommendations is greatly diminished”.<sup>345</sup>

The development of follow-up procedures means that States are subjected to continued scrutiny after they have been found in violation of the relevant

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344 M. Schmidt, “Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond”, in A.F. Bayefsky (ed), *UN Human Rights Treaty System in the 21 Century*, Kluwer Law International, 2000, p. 234.

345 M. O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies” (2006) 6 *Human Rights Law Review* 27, p. 47.

treaty, which should improve the overall record of compliance with the treaty bodies' decisions.

### **2.4.1 Follow-up by the Human Rights Committee**

There are two contexts in which the HRC will implement follow-up procedures. The first is after it releases its Concluding Observations on a particular State pursuant to the reporting process. The second is in relation to views issued in response to individual complaints under the OP.

#### **a) Follow-up on Concluding Observations**

Concluding Observations are issued at the conclusion of the reporting process. The HRC now routinely requests the relevant State party to give priority to particular “concerns and recommendations” in its Concluding Observations, which provides the starting point for the “follow-up” procedure in relation to those Concluding Observations. In 2002, the HRC appointed a Special Rapporteur on Follow-Up to Concluding Observations (referred to under this heading as Special Rapporteur) to oversee this procedure;<sup>346</sup> his or her role is to “establish, maintain or restore dialogue with the State party”.<sup>347</sup>

After the HRC has identified the priority issues, the relevant State is required to respond with regard to those issues within twelve months. In its response the State should provide the HRC with information indicating the measures taken to address and improve on its performance in the priority areas. The information provided by the State in its response is labeled as “follow-up information” and is made publicly available on the Treaty Bodies Database (at <http://www.unhchr.ch/tbs/doc.nsf>) and in the HRC’s Annual Reports.

The Special Rapporteur will then assess this follow-up information and any other credible information which is submitted by third parties, such as NGOs, and make recommendations to the HRC regarding any further steps which should be taken. The HRC will consider these recommendations and then decide on whether further action needs to be taken. Suggestions will vary depending on the particular situation and needs of the State in question. Examples of action which may be taken include face to face discussions

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346 Report of the Human Rights Committee, (1992) UN doc. A/57/40 (Vol. I), § 54 and Annex III A, §§ 3-5.

347 General Comment 30, § 5.

between the Special Rapporteur and State representatives, and bringing the due date of the next periodic report forward.<sup>348</sup>

Where a State fails to respond to the priority issues within ten months of receiving the Concluding Observations, the Secretariat will contact the State party informally. If the State party still fails to respond, the Special Rapporteur will then send a formal reminder in writing. If the State still fails to respond, the Special Rapporteur will try to arrange a meeting with a representative of that State to discuss the situation. In some circumstances a State may not respond at all; this fact is reported in the Annual Report of the HRC.<sup>349</sup>

In its Annual Report for 2005, the HRC stated that:

“it views this procedure as a constructive mechanism by which the dialogue initiated with the examination of a report can be continued, and which serves to simplify the process of the next periodic report on the part of the State party”.<sup>350</sup>

#### **b) Follow-Up on “Views” under the Optional Protocol**

The follow-up to views issued under Article 5(4) of the OP is overseen by the “Special Rapporteur on Follow-up on Views”<sup>351</sup> (referred to as the Special Rapporteur under this heading). The mandate of the Special Rapporteur is to:

“make such contacts and take such action as appropriate for the due performance of the follow-up mandate. The Special Rapporteur shall make such recommendations for further action by the Committee as may be necessary”.<sup>352</sup>

The scope of the mandate allows for flexibility in the implementation of the Special Rapporteur’s duties.

Where a violation is found to have occurred, the State is requested to provide the HRC with information regarding its course of action within 90 days of the finding being communicated to it. The Special Rapporteur will then commence a dialogue with the State party regarding the ways in which it may provide a

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348 UN Fact Sheet, No. 15 (Rev. 1), “Civil and Political Rights: The Human Rights Committee” at <http://www.ohchr.org/english/about/publications/sheets.htm>, p14.

349 M. O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies” (2006) 6 *Human Rights Law Review* 27, p. 47.

350 Report of the Human Rights Committee, (2005) UN doc. A/60/40 (Vol. 1), p. 139.

351 The Special Rapporteur on Follow-up on Views was appointed by the HRC in July 1990.

352 HRC Rules of Procedure, Rule 101 (2).

remedy to the author of the communication, and otherwise implement the HRC's findings. The response of the State party in this situation is labeled a "follow-up reply". Information regarding the compliance of the State with the recommendations is often received from sources other than the State party, including the author of the relevant complaint, his or her representative, and NGOs.

When a State fails to reply, the Special Rapporteur may attempt to establish communication or request a visit to the State territory. The lack of response and/or unwillingness of a State party to cooperate will be made public in the Annual Report of the HRC. Such bad publicity is a soft yet real sanction; all States wish to avoid such international embarrassment.

The Special Rapporteur also makes recommendations and presents regular follow-up progress reports to the HRC. These reports provide a "detailed overview of the state of implementation of the Committee's views".<sup>353</sup> The information on which these recommendations and reports are based includes information from the State party, NGOs, and any personal follow-up missions or consultations conducted by the Special Rapporteur.

## **2.4.2 Follow-up by the CAT Committee**

The CAT Committee also has processes to follow up its Concluding Observations pursuant to the reporting procedure, as well as individual complaints decided under Article 22.

### **a) Follow-up to Concluding Observations**

As part of its conclusions and recommendations issued pursuant to the reporting process under Article 19 of CAT, the CAT Committee may request that a State party take action within a set period of time to improve a situation where it is failing to meet its obligations under CAT. A Rapporteur is appointed by the CAT Committee to follow-up on State compliance with such recommendations.<sup>354</sup>

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353 M. Schmidt, "Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond", in A.F. Bayefsky (ed), *UN Human Rights Treaty System in the 21 Century*, Kluwer Law International, 2000, p. 236.

354 CAT Rules of Procedure, Rule 68(1).

In 2002, the CAT Committee appointed two of its members as Rapporteurs to oversee compliance with conclusions and recommendations. Another task for these Rapporteurs is to “maintain contacts with representatives of non-reporting States in order to encourage the preparation and submission of reports”.<sup>355</sup> The role of these Rapporteurs was further defined in the CAT Committee’s 2002 Annual Report:

“these Rapporteurs would seek information as to a State party’s implementation of and compliance with the Committee’s conclusions and recommendations upon the former’s initial, periodic or other reports and/or would urge the State party to take appropriate measures to that end. The Rapporteurs would report to the Committee on the activities they have undertaken pursuant to this mandate.”<sup>356</sup>

In general, the follow-up process under CAT is very similar to that under the ICCPR.

#### **b) Follow-up of Individual Communications submitted under Article 22 of CAT**

Under Article 114 of its Rules of Procedure, the CAT Committee may appoint one or more Rapporteurs to follow-up on the actions of a State in response to a finding of a violation under Article 22 of CAT. The Rapporteurs have a broad mandate, as outlined in Rule 114 (2):

“The Rapporteur(s) may make such contacts and take such action as appropriate for the due performance of the follow-up mandate and report accordingly to the Committee”.

The specific types of action which may be undertaken by the Rapporteur were outlined in the CAT Committee’s Annual Report in 2004.<sup>357</sup> They included:

- Requesting information from the State parties regarding action taken in response to the findings of the Committee.
- Advising the Committee on possible courses of action where States have failed to respond to inquiries from the Rapporteur or the Rapporteur receives

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355 “Overview of the working methods of the Committee Against Torture”, at <http://www.ohchr.org/english/bodies/cat/workingmethods.htm#n3> , Part V.

356 Report of the Committee Against Torture, (2002) UN doc. A/57/44, Annex X (Amended Rule of Procedure 68, § 15).

357 Report of the Committee Against Torture, (2004) UN doc. A/59/44, § 264.

information that indicates the State has not upheld the Committee's recommendations.

- Engaging with State representatives to encourage implementation and to provide advice or assistance from the Office of the High Commissioner for Human Rights, if the Rapporteur considers that it is necessary.
- Visiting the territory of the State in question, with the approval of the CAT Committee and the State.

The Rapporteur must regularly report to the Committee on his or her activities.<sup>358</sup> Information from these reports is then included in the CAT Committee's Annual Report.

In general, the functions of the Rapporteur on following up Article 22 Views is similar to that of the HRC's Rapporteur on Follow-up on (OP) Views.

### **2.4.3 Gauging Compliance with HRC and CAT Recommendations**

One of the purposes of the follow-up process is to gauge the level of compliance with decisions and recommendations by the relevant Committee. An overview of the chapter on Follow-up to OP Views in the 2005 HRC Annual Report by the current authors revealed that the HRC had received a totally satisfactory response in only about 20% of OP cases. However, this figure is skewed by the fact that follow-up in many of the early cases was undertaken many years after the original views were issued; it was probably difficult for some States to provide satisfactory follow-up information in such situations. Further, dialogue was "ongoing" in a number of cases, so it is perhaps premature to classify some of the recent such cases as "unsatisfactory". Finally, the figure is skewed by the many unsatisfactory responses of certain States, such as Jamaica, Uruguay and Trinidad and Tobago, which together account for a large percentage of adverse OP views. In any case, the ways in which States have responded to the HRC's views under the OP and the subsequent follow-up procedure is difficult to quantify. The HRC acknowledged in its 2005 Annual Report:

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358 CAT Rules of Procedure, Rule 114 (3).

“[a]ll attempts to categorise follow-up replies by State parties are inherently imprecise and subjective; it is therefore not possible to provide a neat statistical breakdown of follow-up replies.”<sup>359</sup>

The HRC in its 2005 Annual Report noted the variety of reasons given by State parties for non-implementation of OP views:

“[Some] replies cannot be considered satisfactory because they either do not address the Committee’s Views at all, or only relate to certain aspects of them. Certain replies simply note that the Victim has filed a claim for compensation outside statutory deadline and that no compensation can therefore be paid. Still other replies indicate that there is no legal obligation on the State party to provide a remedy, but that a remedy will be afforded to the complaint on an *ex gratia* basis. The remaining follow-up replies challenge the Committee’s Views and findings on factual or legal grounds, constitute much-belated submissions on the merits of the complaint, promise an investigation of the matter considered by the Committee or indicate that the State party will not, for one reason or another, give effect to the Committee’s Views”.<sup>360</sup>

A primary issue preventing implementation may relate to a lack of process and understanding, within a State, of how to implement the recommendations. For example, de Zayas suggests that:

“[t]he main obstacle to implementation is not the unwillingness of state parties to cooperate but the lack of a mechanism in domestic law to receive and implement decisions emanating from a foreign entity”.<sup>361</sup>

In such situations, the follow-up process is an invaluable means of not only rendering a State accountable, but also in helping a State to comply with the Committees’ findings.

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359 Report of the Human Rights Committee, (2005) UN doc. A/60/40 (Vol. 1), p. 120.

360 Report of the Human Rights Committee, (2005) UN doc. A/60/40 (Vol. 1), p. 120.

361 A. de Zayas, “Petitioning the United Nations” (2001) *Proceedings of the 95th Annual Meeting of the American Society of International Law* 82, p. 86.

## **2.4.4 Conclusion**

Both the HRC and the CAT Committee present a summary of all follow-up replies in their annual reports. Such information is also available via the Treaty Bodies Website at <http://www.unhchr.ch/tbs/doc.nsf>. Follow-up replies provide very useful information regarding a State's attitude to certain human rights issues. Furthermore, the recording of such information places subtle pressure on States to conform with the findings of relevant Committees, which can only help to improve the level of overall compliance.

## PART III

### JURISPRUDENCE OF THE HUMAN RIGHTS COMMITTEE



In this section, we analyse the jurisprudence from OP cases, General Comments, and Concluding Observations of the HRC, with regard to torture, cruel, inhuman or degrading treatment or punishment. The most relevant provision of the ICCPR is Article 7, discussed directly below. We also analyse the jurisprudence under Article 10, a related provision, which imposes duties upon States to ensure that detainees are treated humanely.

### 3.1 Article 7

Article 7 of the ICCPR states:

“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.”

This Article creates three types of prohibited behaviour against another person. Namely, a person may not be subjected to:

- Torture
- Treatment or punishment which is cruel and inhuman
- Treatment or punishment which is degrading.

#### 3.1.1 Absolute Nature of Article 7

The provisions of Article 7 are absolute.<sup>362</sup> No exceptions to the prohibition on torture and cruel, inhuman or degrading treatment and punishment are permitted. Article 7 is a non-derogable right under Article 4(2).<sup>363</sup> No crisis, such as a terrorist emergency or a time of war, justifies departure from the standards of Article 7.<sup>364</sup>

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362 See also General Comment 20, § 3.

363 Under Article 4, States may ‘derogate’ from, or suspend, their ICCPR duties in times of public emergency so long as such derogation is justified ‘by the exigencies of the situation’. Certain rights however may never be the subject of derogation, including Article 7.

364 For general discussion of the absolute nature of the prohibition under international law, see above Section 1.1.

### 3.1.2 The Scope of Article 7

The General Comments and case law of the HRC have clarified the scope of Article 7.<sup>365</sup> A detailed overview of the jurisprudence starts below from Section 3.2. A summary of general points begins here.

In General Comment 20, the HRC expands upon the meaning of Article 7. It confirmed the following regarding the scope of the provision:

- Article 7 aims to protect the dignity of individuals as well as their physical and mental integrity, thus the prohibition extends to acts causing mental suffering as well as physical pain.<sup>366</sup>
- The State must provide protection against all acts prohibited by Article 7, whether these acts are committed by individuals acting in their official capacity, outside their official capacity or in a private capacity.<sup>367</sup> States must take reasonable steps to prevent and punish acts of torture by private actors.<sup>368</sup> As noted below,<sup>369</sup> this may significantly extend the scope of the ICCPR in this regard beyond that of the CAT.
- Article 7 extends to both acts and omissions. That is, a State can breach Article 7 by its failure to act as well as its perpetration of acts. For example, it may fail to act by failing to punish a person for torturing another person, or by withholding food from a prisoner.<sup>370</sup>
- Article 7 can be breached by an act that unintentionally inflicts severe pain and suffering on a person. It is however likely that “intention” is necessary in order for a violation to be classified as “torture” as opposed to one of the other prohibited forms of bad treatment.<sup>371</sup> The HRC itself has said that the various treatments are distinguishable on the basis of the “purpose” of such treatment.<sup>372</sup> However, a violation of Article 7, seeing as it prohibits acts other than torture, can certainly be entailed in unintentional behaviour.

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365 See also Joseph, Schultz, and Castan, above note 31, §§ 9.03-9.40.

366 General Comment 20, §§ 2, 5.

367 General Comment 20, § 2.

368 See also Concluding Observations on the Russian Federation, (2003) UN doc. CCPR/CO/79/RUS, § 13.

369 See Section 4.1.2(e).

370 Joseph, Schultz, and Castan, above note 31, § 9.08.

371 See Section 4.1.2(b) for interpretation of this aspect of the CAT definition of torture.

372 General Comment 20, § 4.

In *Rojas Garcia v. Colombia* (687/96), a search party mistakenly stormed the home of the author at 2am, verbally abusing and terrifying the complainant and his family, including young children. A gunshot was fired during the search, and the complainant was forced to sign a statement without reading it. It turned out that the search party meant to search another house, and the search party had no particular intention to harm the complainant or his family. Nevertheless, a violation of Article 7 was found.

There are both subjective and objective components to the determination of whether a violation of Article 7 has taken place. In *Vuolanne v. Finland* (265/87), the HRC stated that whether an act falls under the scope of Article 7:

“depends on all the circumstances of the case...the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”.<sup>373</sup>

Therefore the personal characteristics of the victim are taken into account in determining whether the treatment in question constitutes inhuman or degrading treatment under Article 7. For example, treatment inflicted on a child may constitute a breach of Article 7 in a situation where the same treatment may not classify as a breach if inflicted upon an adult.<sup>374</sup>

### **3.1.3 Definitions of Torture and Cruel, Inhuman or Degrading Treatment**

The HRC has not issued specific definitions of these three types of prohibited behaviour under Article 7.<sup>375</sup> In most cases where a breach of Article 7 has been found, the HRC has not specified which part of Article 7 has been breached. In General Comment 20, the HRC remarked at paragraph 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 types of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied”.

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373 *Vuolanne v. Finland* (265/87), § 9.2.

374 See, e.g., section 3.2.11.

375 The European Court of Human Rights takes a different approach in discussing violations of its equivalent provision, Article 3 of the ECHR and generally indicates in its decisions which category of mistreatment has occurred.

The categorisation of the act is not without significance, particularly for the reprimanded State for whom a finding of torture will carry particular weight and stigma.<sup>376</sup> Article 1 of the CAT provides a more specific definition of torture. Although this definition is not binding upon the HRC in its application of Article 7, it “can be drawn upon as an interpretational aid.”<sup>377</sup>

### a) Findings of Torture

The HRC rarely differentiates between the types of prohibited behaviour in Article 7. In most cases where a breach of Article 7 has been found, the HRC will simply find that an act has violated Article 7 without specifying the actual part of Article 7 that has been violated. However, it has specified the relevant limb of Article 7 on a few occasions. For example, combinations of the following acts have been explicitly found by the HRC to constitute “torture”:

- “Systematic beatings, electric shocks to the fingers, eyelids, nose and genitals when tied naked to a metal bedframe or in coiling wire around fingers and genitals, burning with cigarettes, extended burns, extended hanging from hand and/or leg chains, often combined with electric shocks, repeated immersion in a mixture of blood, urine, vomit and excrement (“submarino”), standing naked and handcuffed for great lengths, threats, simulated executions and amputations”.<sup>378</sup>
- “beatings, electric shocks, mock executions, deprivation of food and water and thumb presses”.<sup>379</sup>
- Beatings to induce confession, as well as beatings of and ultimately the killing of the victim’s father on police premises.<sup>380</sup>

The HRC will also give due weight to acts which cause permanent damage to the health of the victim. This element may be a crucial factor in the HRC’s

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376 Nowak, above note 97, p. 160. See also *Aydin v. Turkey*, No. 23178/94, Eur. Ct. of Hum. Rts. (25 September 1997), § 82.

377 Nowak, above note 97, p. 161; see section 4.1 for the definition of Article 1 of CAT.

378 Nowak, above note 97, p. 162, drawing from the cases of *Grille Motta v. Uruguay* (11/1977), *Bleier v. Uruguay* (30/1978), *Lopez Burgos v. Uruguay* (52/1979), *Sendic v. Uruguay* (63/1979), *Angel Estrella v. Uruguay* (74/1980), *Arzuaga Gilboa v. Uruguay* (147/1983), *Caribon v. Uruguay* (159/1983), *Berterretche Acosta v. Uruguay* (162/1983), and *Rodriguez v. Uruguay* (322/1988).

379 Nowak, above note 97, p. 163, citing *Muteba v. Zaire* (124/82), *Miango Muiyo v. Zaire* (194/85) and *Kanana v. Zaire* (366/89).

380 *Khalilova v. Tajikistan* (973/01), § 7.2.

decision to elevate to “torture” a violation which would otherwise have been defined as cruel and inhuman treatment.<sup>381</sup>

### **b) Findings of Cruel and Inhuman Treatment**

Generally both “cruel” and “inhuman” treatment will be established concurrently: it seems the terms describe the same type of treatment and there is no meaningful distinction between the two. Furthermore, there appears to be a fine line between what constitutes “torture” and “cruel and inhuman treatment”.<sup>382</sup> Nowak suggests that these latter two terms:

“include all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements [as identified in the CAT definition in Article 1]...they also cover those practices imposing suffering that does not reach the necessary intensity”.<sup>383</sup>

The HRC has found the following to constitute “cruel and inhuman” treatment:

- The victim was beaten unconscious, subjected to a mock execution and denied appropriate medical care.<sup>384</sup>
- The victim was beaten repeatedly with clubs, iron pipes and batons and left without medical care for his injuries.<sup>385</sup>
- The victim was severely beaten by prison warders and also received death threats from them.<sup>386</sup>
- The victim was imprisoned in a cell for 23 hours per day, without mattress or bedding, integral sanitation, natural light, recreational facilities, decent food or adequate medical care.<sup>387</sup>

### **c) Findings of Degrading Treatment**

Degrading treatment arises where the victim has been subjected to particularly humiliating treatment. Of the Article 7 “limbs” of prohibited treatment,

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381 Nowak, above note 97, pp. 162-164, citing *Massera v. Uruguay* (5/77).

382 See, e.g., R. B. Schechter, “Intentional starvation as torture: exploring the gray area between ill-treatment and torture” (2003) 18 *American University International Law Review* 1233-1270.

383 Nowak, above note 97, p. 163.

384 *Linton v. Jamaica* (255/87).

385 *Bailey v. Jamaica* (334/1988).

386 *Hylton v. Jamaica* (407/90).

387 *Deidrick v. Jamaica* (619/95). See Model Complaint, *Textbox ii*, § 51.

degrading treatment seems to require the lowest threshold of suffering. The humiliation itself, or the affront to the victim's dignity, is the primary consideration, "regardless of whether this is in the eyes of others or those of the victim himself or herself"<sup>388</sup> and thus may have both an objective and subjective element. Treatment which may be seen as degrading in one set of circumstances may not be seen to be so where the circumstances are different. Nowak gives the following example:

"whereas...controlled use of rubber truncheons in connection with an arrest...may seem a necessary, restrained and therefore justified use of force, the Austrian Constitutional Court has deemed mere handcuffing, slapping or hair pulling to be degrading treatment when this contradicts the principle of proportionality in light of the specific circumstances of the case".<sup>389</sup>

The HRC has found the following acts to constitute "degrading treatment".

- The victim was "assaulted by soldiers and warders who beat him, pushed him with a bayonet, emptied a urine bucket over his head, threw his food and water on the floor and his mattress out of the cell."<sup>390</sup>
- The victim was beaten with rifle butts and denied medical attention for injuries sustained.<sup>391</sup>
- The victim was imprisoned in a very small cell, allowed few visitors, assaulted by prison warders, had his effects stolen and his bed repeatedly soaked.<sup>392</sup>
- The victim was placed into a cage and then displayed to the media.<sup>393</sup>
- The State failed to provide medical care and treatment for a prisoner on death row, whose mental health had severely deteriorated.<sup>394</sup>

Where a prisoner is subjected to treatment which is humiliating, but which may not be as harsh as those described above, a violation of other ICCPR provisions

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388 Nowak, above note 97, p165 drawing on the judgment of the European Court of Human Rights in *Tyler v. UK*, No. 5856/72, Eur. Ct. of Hum. Rts. (25 April 1978).

389 Nowak, above note 97, pp. 165-166; see also Joseph, Schultz, and Castan, above note 31, § 9.32. 390 *Francis v. Jamaica* (320/88).

391 *Thomas v. Jamaica* (321/1988).

392 *Young v. Jamaica* (615/95).

393 *Polay Campos v. Peru* (577/94).

394 *Williams v. Jamaica* (609/95).

may be found. For example, such treatment might violate Article 10 (see section 3.3), or breach one's right to privacy under Article 17.

### 3.1.4 Application of Article 7 to “Punishment”

“Punishment” is a specific type of “treatment”. It is therefore arguable that punishment would be covered by Article 7 even if not explicitly mentioned. Nevertheless, it is important that Article 7 specifically applies to punishments to ensure that it unambiguously applies to acts which are prescribed by a State's laws as penalties for criminal behaviour.<sup>395</sup>

Every punishment inflicted upon a person will in some way impact upon a person's liberty and dignity. It is therefore essential that punishments are closely and carefully monitored to ensure that they are appropriately applied. Furthermore, the emergence of a global human rights culture has influenced the way in which punishment is inflicted by a State. This phenomenon is particularly evident in relation to the growing rejection and re-evaluation of corporal punishment and the death penalty. The “recognition of human dignity as the principal value underlying human rights” has meant that “most traditional punishments have been re-evaluated and gradually restrained”.<sup>396</sup>

In *Vuolanne v. Finland* (265/87), the HRC examined the nature of degrading punishment in the context of deprivation of personal liberty. The HRC stated:

“[i]t must involve a certain degree of humiliation or debasement. Depriving an individual of their liberty could not be enough to constitute such punishment.”<sup>397</sup>

In this case, the complainant was held in military detention for a period of ten days for disciplinary reasons. During his detention he was in almost complete isolation and his movement was very restricted, he wrote small notes which were confiscated and read aloud by the guards. The HRC found that this form of military discipline did not violate Article 7.<sup>398</sup>

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395 Note for example that the prohibition on torture and other ill-treatment in Article 8 of the Arab Charter of Human Rights does not explicitly apply to ‘punishment’; see also Section 4.1.2(f).

396 Nowak, above note 97, p. 167.

397 *Vuolanne v. Finland* (265/87), § 9.2.

398 The detention was found to breach Article 9(4) of the ICCPR, as the complainant was not able to challenge his detention in a court.

## 3.2 Jurisprudence under Article 7

### 3.2.1 Police Brutality

In exercising their duties, police may be expected to occasionally use force, for example in arresting a person who is resisting arrest, or in dispersing a crowd at a riot. However, this does not mean that police are free to use any amount of force in such situations.

Cases on this issue have generally arisen under Article 6, regarding the right to life, rather than Article 7.<sup>399</sup> For example, in *Suárez de Guerrero v. Colombia* (45/79), Colombian police shot and killed seven persons suspected of kidnapping a former Ambassador. The evidence indicated that the victims, including one María Fanny Suárez de Guerrero, were shot in cold blood, rather than, as had initially been claimed by police, whilst resisting arrest. The case is a very clear example of a disproportionate use of force which blatantly breached Article 6. The HRC, in finding such a violation, stated:

“There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned.”<sup>400</sup>

Therefore, the death of Ms Suárez de Guerrero was found to be “disproportionate to the requirements of law enforcement in the circumstances of the case”.<sup>401</sup> Therefore, the case confirms that the principle of proportionality applies in the context of the use of force for the purpose of arrest. Clearly, the police should not kill someone in disproportionate circumstances, nor should they utilise a disproportionate and therefore excessive amount of force in effecting an arrest. Such a latter use of force would breach Article 9 ICCPR, which includes the right to “security of the person”. If the relevant use of force was extreme enough, it would amount to a breach of Article 7.

The issue of police brutality has been raised in numerous Concluding Observations. For example, regarding the use of force in controlling crowds, the HRC has stated with regard to Togo:

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399 See also Section 3.2.16.

400 *Suárez de Guerrero v. Colombia* (45/79), § 13.2.

401 *Suárez de Guerrero v. Colombia* (45/79), § 13.3; see also *Baboeram et al v. Suriname* (146, 148-154/83).

“The Committee expresses concern at the consistent information that law enforcement personnel make excessive use of force in student demonstrations and various gatherings organized by the opposition. ... The Committee regrets that the State party has made no mention of any inquiry having been opened following these allegations.”<sup>402</sup>

Regarding Belgium, the HRC expressed concern over allegations of the use of excessive force in effecting the deportation of aliens.<sup>403</sup> Other examples of inappropriate uses of force that might inflict harm contrary to Article 7, or even death contrary to Article 6, would include the inappropriate use of dogs,<sup>404</sup> chemical irritants, or plastic bullets.<sup>405</sup> The HRC delivered one of its most detailed statements in this regard to the U.S. in 2006:

“The Committee reiterates its concern about reports of police brutality and excessive use of force by law enforcement officials. The Committee is concerned in particular by the use of so called less lethal restraint devices, such as electro-muscular disruption devices (EMDs), in situations where lethal or other serious force would not otherwise have been used. It is concerned about information according to which police have used tasers against unruly schoolchildren; mentally disabled or intoxicated individuals involved in disturbed but non-life-threatening behaviour; elderly people; pregnant women; unarmed suspects fleeing minor crime scenes and people who argue with officers or simply fail to comply with police commands, without in most cases the responsible officers being found to have violated their departments’ policies.

The State party should increase significantly its efforts towards the elimination of police brutality and excessive use of force by law enforcement officials. The State party should ensure that EMDs and other restraint devices are only used in situations where greater or lethal force would otherwise have been justified, and in particular that they are never used against vulnerable persons. The State party should bring its policies into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”<sup>406</sup>

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402 Concluding Observations on Togo, (2003) UN doc. CCPR A/58/40, § 11. See also, eg, Concluding Observations on Belarus, (1998) UN doc. A/53/50, § 145; Concluding Observations on Kosovo (Republic of Serbia), (2006) UN doc. CCPR/C/UNK/CO/1, § 15.

403 Concluding Observations on Belgium, (2004) UN doc. CCPR/CO/81/BEL, § 14.

404 See e.g., Concluding Observations on Denmark, (1997) UN doc. CCPR/C/79/Add. 68, § 14; Concluding Observations on Thailand, (2005) UN doc. CCPR/CO/84/THA, § 24.

405 Such tactics would also breach Article 21 ICCPR, which protects freedom of assembly.

406 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 30.

As with the above example regarding the U.S., the HRC has commonly recommended to States that its law enforcement officers adhere to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>407</sup> While these Principles mainly focus on the restriction of lethal force, they have application to the use of all types of force. For example, Principle 5(a) requires law enforcement officials to exercise restraint in the use of force if it is unavoidable, “and act in proportion to the seriousness of the offence and the legitimate objective to be achieved”. Under Principle 5(b), damage and injury should be minimised, along with loss of life. If a person is injured whilst being arrested or restrained, law enforcement officers should ensure that they receive appropriate medical attention (Principle 5(c)), and that relatives or close friends of the injured person are informed as soon as is practicable (Principle 5(d)).

### 3.2.2 Ill-treatment in Custody

Most violations of Article 7 have arisen in the context of ill-treatment in places of detention, such as police cells or prisons. Such treatment often occurs in the context of interrogation, where the authorities may be trying to force a person to confess to an act, or to reveal other information. Alternatively, it may arise in the context of enforcing discipline in custody. A number of findings in this regard are listed above at Section 3.1.3. In this section, we list more examples of abuses in detention that were found to breach Article 7:

- a person was held for:
 

“10 months incommunicado including solitary confinement chained to a bed spring for three and a half months with minimal clothing and severe food rations, followed by a further month’s detention incommunicado in a tiny cell, followed by detention with another in a three by three metre cell without external access for eighteen months.”<sup>408</sup>

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407 The Basic Principles are reprinted in Appendix 10. See e.g., Concluding Observations on Israel, (1998) UN doc. CCPR/C/79/Add.93, § 15; Concluding Observations on the U.S., (1995) UN doc. CCPR A/50/40, § 297; Concluding Observations on Cyprus, (1995) UN doc. CCPR/C/79/Add. 39, § 6; Concluding Observations on Portugal, (2003) UN doc. CCPR/CO/78/PRT, § 9; Concluding Observations on Paraguay, (2006) UN doc. CCPR/C/PRY/CO/2, § 11. The CAT Committee has also commonly referred to these principles in its Concluding Observations.

408 *White v. Madagascar* (115/82), §§ 15.2, 17.

- salt water was rubbed into the victim's nasal passages and he was then left for a night handcuffed to a chair without food or water.<sup>409</sup>
- Brutal beatings by at least six soldiers; being tied up and beaten all over the body until loss of consciousness; being hung upside down; lacerated; the nail of his right forefinger pulled out with pincers; cigarette burns; both legs broken by blows to the knees and ankles with metal tubing; two fingers broken by blows with rifle butts; jaw broken. Despite the victim's condition, and in particular his loss of mobility, he was not allowed to see a doctor.<sup>410</sup>
- Victim was subjected to electric shocks and being hung with his arms tied behind him. He was also taken to the beach, where he was subjected to mock drownings.<sup>411</sup>
- Use of interrogation techniques such as prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20 hour interrogations, removal of clothing and of all comfort items including religious items, forced grooming, and exploitation of a detainee's personal phobias.<sup>412</sup>
- Victim was severely beaten on his head by prison officers (requiring several stitches).<sup>413</sup>
- Beatings were so severe as to cause the victim to be hospitalised<sup>414</sup>
- Withholding of food and water for five consecutive days<sup>415</sup>
- Soldiers blindfolded and dunked the author in a canal.<sup>416</sup>
- Severe beatings by prison guards, along with the burning of the complainant's personal belongings, including legal documents. The treatment was inflicted to punish all persons, including the complainant, who had been involved in an escape attempt. His beatings were so bad that he "could hardly walk".<sup>417</sup>

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409 *Cañon Garcia v. Ecuador* (319/1988), § 5.2.

410 *Mulezi v. Congo* (962/01).

411 *Vargas Más v. Peru* (1058/02).

412 Concluding Observations on the U.S., (2006) CCPR/C/USA/CO/3, § 13. It is not clear if each of these techniques individually breach Article 7 but the combination of a few of these techniques at the same time does.

413 *Henry v. Trinidad and Tobago* (752/97), § 2.1.

414 *Sirageva v. Uzbekistan* (907/00).

415 *Bee and Obiang v. Equatorial Guinea* (1152 and 1190/03), § 6.1.

416 *Vicente et al v. Colombia* (612/95), § 8.5.

417 *Howell v. Jamaica* (798/98), § 2.5.

In *Wilson v. Philippines* (868/99), the complainant was charged with rape and remanded in prison. His account of ill-treatment in prison was as follows:

“There he was beaten and ill-treated in a «concrete coffin». This sixteen by sixteen foot cell held 40 prisoners with a six inch air gap some 10 foot from the floor. One inmate was shot by a drunken guard, and the author had a gun placed to his head on several occasions by guards. The bottoms of his feet were struck by a guard’s baton, and other inmates struck him on the guards’ orders. He was ordered to strike other prisoners and was beaten when he refused to do so. He was also constantly subjected to extortion by other inmates with the acquiescence and in some instances on the direct instruction of the prison authorities, and beaten when he refused to pay or perform the directed act(s).”<sup>418</sup>

These acts were found to constitute a combination of violations of both Article 7 and Article 10(1).

As noted above, the HRC has commonly recommended the adherence by State authorities to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>419</sup> Principle 15 thereof states:

“Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened” (emphasis added).

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are reprinted in full in Appendix 10.

### 3.2.3 Conditions of Detention

The HRC has dealt with many cases in which people have complained about poor conditions in places of detention, particularly prisons. In most such cases, the HRC has dealt with the case under Article 10 rather than Article 7.<sup>420</sup> While

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418 *Wilson v. Philippines* (868/99), § 2.1.

419 The Basic Principles are reprinted in “UN Human Rights – A Compilation of International Instruments”, (1990) UN doc. A/CONF.144/28. See, e.g., Concluding Observations on Israel, (1998) UN doc. CCPR/C/79/Add.93, § 15; Concluding Observations on the U.S., (1995) UN doc. CCPR/C/79/Add.50, § 297; Concluding Observations on Cyprus, (1995) UN doc. CCPR/C/79/Add. 39, § 6; Concluding Observations on Portugal, (2003) UN doc. CCPR/CO/78/PRT, § 9. The CAT Committee has also commonly referred to these principles in its Concluding Observations.

420 See Section 3.3.2.

very poor prison conditions may generally breach Article 10, it seems that there must be an aggravating factor in order for the violation to be elevated to a breach of Article 7. Such aggravating factors include the perpetration of violence within places of detention, such as those described directly above in section 3.2.2, and situations where the relevant victim is singled out for especially bad treatment. However, it must be noted that there is no clear dividing line between Articles 7 and 10 on this issue: the HRC has not been consistent in this area.<sup>421</sup>

The following types of prison conditions have been found by the HRC to be so bad as to violate Article 7:

- Over a two year period, the victim was variously subjected to incommunicado detention, threats of torture and death, intimidation, food deprivation, being locked in a cell for days without any possibility of recreation.<sup>422</sup>
- Deprivation of food and drink for several days.<sup>423</sup>
- Victims subjected to electric shocks, hanging by his hands, immersion of his head in dirty water near to the point of asphyxia.<sup>424</sup>
- Detention in a cell for fifty hours:

“measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held, and where, owing to lack of space, some detainees had to sit on excrement. He received no food or water until the following day”.<sup>425</sup>

- Being locked up in a cell for 23 hours a day, with no mattress or other bedding, no adequate sanitation, ventilation or electric lighting, exercise, medical treatment, adequate nutrition or clean drinking water. Furthermore, the victim’s belongings (including medication) were destroyed by the warders, and he had been denied prompt assistance in the case of an asthma-attack.<sup>426</sup>
- Beatings resulting in injuries to the victim’s head, back, chest and legs, because he and others disobeyed an order by the warders to leave their cell.

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421 Joseph, Schultz, and Castan, above note 31, §§ 9.139-9.143.

422 *Mikong v. Cameroon* (458/91), § 9.4.

423 *Tshiesekedi v. Zaire* (242/1987), § 13b, and *Miha v. Equatorial Guinea* (414/1990), § 6.4.

424 *Weismann v. Uruguay* (8/77), § 9.

425 *Portorreal v. Dominican Republic* (188/84), § 9.2.

426 *Brown v. Jamaica* (775/97), § 6.13. It is not clear from the record of the case how long these conditions had lasted for.

Though force may be used to enforce discipline in prison, such force must be proportionate; the treatment here was not a proportionate response to the relevant disobedience.<sup>427</sup>

- Shackling of female detainees during childbirth.<sup>428</sup>

The length of time for which the detainee is held in sub-standard conditions may be a factor in determining whether a violation of Article 7 has occurred. In *Edwards v. Jamaica* (529/93), the HRC noted the “deplorable conditions of detention”<sup>429</sup> over a ten year period. The complainant was held in a cell “measuring 6 feet by 14 feet, let out only three and half hours a day, was provided with no recreational facilities and received no books.”<sup>430</sup>

### 3.2.4 Solitary Confinement

In General Comment 20, the HRC stated that “prolonged solitary confinement may amount to acts prohibited by Article 7.”<sup>431</sup> In *Polay Campos v. Peru* (577/94), the HRC found that solitary confinement for over three years violated Article 7.<sup>432</sup> However in *Kang v. Republic of Korea* (878/99), where the complainant was held for 13 years, the HRC did not find a breach of Article 7, but only a breach of Article 10 (1). The complainant in this case did not raise Article 7 so it is possible that this is why it was not addressed by the HRC.<sup>433</sup> It is nevertheless arguable that the HRC should have found a violation of Article 7 in this case.

### 3.2.5 Detention Incommunicado

If one is detained incommunicado, that means that one is unable to communicate with the outside world, and therefore cannot communicate with one’s family, friends and others, such as one’s lawyer. One year of detention incommunicado was held to constitute “inhuman treatment” in *Polay Campos v.*

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427 *Robinson v. Jamaica* (731/97), § 10.3.

428 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 33.

429 *Edwards v. Jamaica* (529/93), § 8.3.

430 *Edwards v. Jamaica* (529/93), § 8.3.

431 General Comment 20, § 6; see also § 11.

432 *Polay Campos v. Peru* (577/94), § 8.7. See also *Marais v. Madagascar* (49/79) and *El-Megreisi v. Libyan Arab Jamahiriya* (440/90).

433 Joseph, Schultz, and Castan, above note 31, § 9.97.

*Peru* (577/94).<sup>434</sup> In *Shaw v. Jamaica* (704/96), the author was held incommunicado for 8 months, in damp and overcrowded conditions; the HRC accordingly found that “inhuman or degrading treatment” had taken place.<sup>435</sup> Shorter periods of incommunicado detention have been found to violate Article 10, rather than Article 7.<sup>436</sup>

### 3.2.6 Disappearances

Disappearances are a particularly heinous form of incommunicado detention, as the victim’s family and friends have no idea of his or her whereabouts. “Enforced disappearance” is defined in Article 7(2)(i) of the Rome Statute of the International Criminal Court as:

“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.”

In *Laureano v. Peru* (540/1993) and *Tshishimbi v. Zaire* (542/1993), the HRC held that “the forced disappearance of victims” constituted “cruel and inhuman treatment” contrary to Article 7.<sup>437</sup> In *Bousroual v. Algeria* (992/01), the HRC stated:

“The Committee recognises the degree of suffering involved in being held indefinitely without contact with the outside world. ... In the circumstances, the Committee concludes that the [victim’s] disappearance ... and the prevention of contact with his family and with the outside world constitute a violation of Article 7.”<sup>438</sup>

In *Mojica v. Dominican Republic* (449/91), the HRC stated that “the disappearance of persons is inseparably linked to treatment that amounts to a violation of Article 7.”<sup>439</sup> That is, people who “disappear” are often tortured.<sup>440</sup> It is very

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434 *Polay Campos v. Peru* (577/94), § 8.6.

435 *Shaw v. Jamaica* (704/96), §7.1.

436 See Section 3.3.3.

437 *Laureano v. Peru* (540/1993) and *Tshishimbi v. Zaire* (542/1993), § 8.6.

438 *Bousroual v. Algeria* (992/01), § 9.8; see also, e.g., *Sarma v. Sri Lanka* (950/00), § 9.5.

439 *Mojica v. Dominican Republic* (449/91), §5.7.

440 Joseph, Schultz, and Castan, above note 31, § 9.106.

difficult to hold persons accountable for such acts of torture as it is difficult to discover or prove the facts surrounding acts perpetrated upon disappeared persons. Indeed, disappearances often result in breaches of the right to life, as disappearance is often a precursor to the extrajudicial killing of the victim. In General Comment 6 on the right to life, the HRC stated at paragraph 4:

“States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”

Disappearances that led to the murder of the disappeared person have arisen in a number of OP cases, including *Herrera Rubio v. Colombia* (161/83), *Sanjuán Arévalo v. Colombia* (181/84), *Miango Muiyo v. Zaire* (194/85), *Mojica v. Dominican Republic* (449/91), *Laureano v. Peru* (540/93),<sup>441</sup> and *Bousroual v. Algeria* (992/01). In a number of cases, the HRC has found that there are serious reasons to believe that a breach of Article 6 has occurred, but has been unable to make a final decision in that regard in the absence of confirmation of death.<sup>442</sup> Alternatively, the HRC may refrain from such a finding out of respect for the disappeared person’s family (if they have not requested such a finding), who may not have abandoned hope of finding their loved one alive: in such circumstances “it is not for [the HRC] to presume the death of [the disappeared person]”.<sup>443</sup>

The stress, anguish, and uncertainty caused to the relatives of disappeared persons also breaches Article 7. This type of Article 7 breach is discussed in the next section.

### 3.2.7 Mental Distress

Mental distress is clearly recognised by the HRC as an equally valid form of suffering for the purposes of findings under Article 7, as physical pain. For example, in *Quinteros v. Uruguay* (107/81), government security forces

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441 *Ibid.*, § 8.13.

442 See, e.g., *Bleier v. Uruguay* (30/78), § 14.

443 *Sarma v. Sri Lanka* (950/00), § 9.6

abducted the author's daughter. The mental anguish suffered by the mother, in not knowing the whereabouts of her daughter, was acknowledged by the HRC as constituting a violation of Article 7.<sup>444</sup> Similarly, in *Schedko v. Belarus* (886/99), the HRC found a violation in the case of a mother who was not informed of the date, time or location of her son's execution and was denied access to his body and gravesite. This "complete secrecy" had the "effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress" and "amounts to inhuman treatment of the author in violation of Article 7."<sup>445</sup> In *Sankara et al v. Burkina Faso* (1159/03), the mental anguish entailed in the State party's failure to properly investigate the assassination of the victim's husband, to inform the family of the circumstances of the death, to reveal the precise location of the remains of the deceased, or to change the death certificate which listed "natural causes" (a blatant lie) as the cause of death, all amounted to breaches of Article 7.<sup>446</sup>

Of course, mental harm must reach a certain threshold before constituting a violation of Article 7. Indeed, in some situations, such as that of incarceration in reasonable circumstances, mental suffering is perhaps inevitable but is justifiable. Regarding incarceration, the HRC has suggested that there must be some aggravating factor or incident, related to the incarceration, which causes the suffering in order to be admitted for consideration by the HRC. In *Jensen v. Australia* (762/97), the complainant claimed that his transfer to a prison far away from his family had caused a high degree of mental suffering. The HRC found that the claim was not admissible as the treatment accorded to the author did not depart "from the normal treatment accorded to a prisoner."<sup>447</sup>

However, there may be circumstances in which the mental anguish caused by incarceration will fall within the scope of Article 7, as in *C v. Australia* (900/99). The complainant sought asylum in Australia, and was detained as an illegal immigrant for two years while his asylum claim was considered. Over these two years his mental health deteriorated rapidly. The State was aware of the decline in his mental health from an early stage and was also aware of the growing medical consensus that "there was a conflict between the author's

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444 See also, eg, *Bousroual v. Algeria* (992/01), § 9.8; *Sarma v. Sri Lanka* (950/00), § 9.5.

445 *Schedko v. Belarus* (886/99), § 10.2; see also *Shukarova v. Tajikistan* (1044/02), § 8.7; *Bazarov v. Uzbekistan* (959/00), § 8.5.

446 *Sankara et al v. Burkina Faso* (1159/03), § 12.2.

447 *Jensen v. Australia* (762/97), §§ 3.4, 6.2.

continued detention and his sanity”.<sup>448</sup> It was only after two years that the relevant Minister exercised his power to release the complainant from detention on medical grounds. The HRC found that the delay in release constituted a violation of Article 7. It is important to note here that the actual detention itself was found to be arbitrary and unreasonable and therefore a violation of Article 9(1) ICCPR, unlike the case in *Jensen*. It seems unlikely that the HRC would require the release of the detainee, even if he or she was severely ill, if the fact of detention itself was reasonable, though it may require release to a more appropriate place of detention, such as a psychiatric unit.<sup>449</sup>

### 3.2.8 Unauthorised Medical Experimentation and Treatment

Subjecting an individual to medical or scientific experimentation, without his or her free consent, is expressly prohibited in Article 7. This provision presents an underlying difficulty “in finding a formulation that prohibits criminal experimentations while not ruling out at the same time legitimate scientific and medical practices”.<sup>450</sup> It seems that “only experiments that are by their very nature to be deemed torture or cruel, inhuman or degrading treatment”<sup>451</sup> are caught within this limb of Article 7. Other experiments which fall below this threshold are probably not included.<sup>452</sup>

In *Viana Acosta v. Uruguay* (110/1981), the HRC found that psychiatric experiments and tranquilizer injections against the will of the imprisoned victim constituted inhuman treatment in violation of Article 7.<sup>453</sup> Nowak also suggests that:

“medical experiments which lead to mutilation or other severe physical or mental suffering are definitely impermissible...this applies...to experiments with inseminated ova...that lead to the birth of children with disabilities who thus must ensure physical or mental suffering.”<sup>454</sup>

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448 *C v. Australia* (900/99), § 8.4.

449 S. Joseph, “Human Rights Committee: Recent Cases”, (2003) 3 *Human Rights Law Review* 91, p. 98. In *Madafferi v Australia* (1011/01), the complainant was placed in immigration detention, and suffered declining mental health. As he was placed in home detention soon after his mental illness was diagnosed, no breach of article 7 was found. His later return to immigration detention, against medical advice, was found to breach article 10(1): see 3.3.2.

450 Nowak, above note 97, p. 188.

451 Nowak, above note 97, p. 191.

452 Such experiments, if unauthorised by the subject, would probably breach other rights, such as the right to privacy in Article 17 ICCPR, or the right to security of the person in Article 9(1) ICCPR.

453 *Viana Acosta v. Uruguay* (110/1981), § 15.

454 Nowak, above note 97, p. 191.

Consent to medical experimentation must be free and informed, and not for example obtained under duress. However, the wording of Article 7 seems to allow for a person to genuinely consent to medical or scientific experimentation, even if it objectively could amount to torture, and for such experimentation to be carried out without violating the ICCPR. This interpretation is challenged by Professor Dinstein, who assumes that such an act would still violate the prohibition on torture.<sup>455</sup> However, “both the wording of the provision and the *travaux préparatoires* tend to indicate the contrary”.<sup>456</sup>

In General Comment 20, the HRC addressed the issue of “free consent”:

“[S]pecial 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.”<sup>457</sup>

This comment acknowledges the particularly vulnerable status of those who are detained, and the difficulty in assessing whether consent given by such individuals is “free”.

In Concluding Observations on the U.S., the HRC stated:

“The Committee notes that (a) waivers of consent in research regulated by the U.S Department of Health and Human Services and the Food and Drug Administration may be given in case of individual and national emergencies; (b) some research may be conducted on persons vulnerable to coercion or undue influence such as children, prisoners, pregnant women, mentally disabled persons, or economically disadvantaged persons; (c) non-therapeutic research may be conducted on mentally ill persons or persons with impaired decision-making capacity, including minors; and (d) although no waivers have been given so far, domestic law authorises the President to waive the prior informed-consent requirement for the administration of an investigational new drug to a member of the U.S. Armed Forces, if the President determines that obtaining consent is not feasible, is contrary to the best interests of the military members, or is not in the interests of U.S. national security. ...

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455 Y. Dinstein, “The Rights to Life, Physical Integrity and Liberty” in L. Henkin (ed), *The International Bill of Rights : the Covenant on Civil and Political Rights*, Columbia University Press, 1981, at p. 125.

456 Nowak, above note 97, p. 191. The *travaux préparatoires* refer to the preparatory work of the ICCPR. See M. J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, 1987.

457 General Comment 20, § 7.

The State party should ensure that it meets its obligation under Article 7 of the Covenant not to subject anyone without his/her free consent to medical or scientific experimentation. The Committee recalls in this regard the non derogable character of this obligation under Article 4 of the Covenant. When there is doubt as to the ability of a person or category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with Article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual.<sup>7458</sup>

Regarding the Netherlands, the HRC was concerned that the practice of balancing the risk of relevant research against the probable value of the research potentially meant that the high scientific value of particular research could be used to justify severe risks to the subjects of the research. The HRC also stated that certain vulnerable people, namely minors and others who are unable to give genuine consent, must not be subjected to any medical experiments that do not directly benefit them.<sup>459</sup>

The difference between “medical experimentation” and the broader category of “medical treatment” must be noted. Unexceptional medical treatment is not captured under the prohibition and a patient’s consent is not required under this Article.<sup>460</sup> Such “exempt” medical treatment probably includes compulsory vaccinations to fight the spread of contagious diseases, and mandatory diagnostic or therapeutic measures, such as pregnancy tests or compulsory treatment of the mentally ill, drug addicts or prisoners.<sup>461</sup> In *Brough v. Australia* (1184/03), the prescription of an anti-psychotic drug to the complainant without his consent was found not to breach Article 7; the drug was prescribed at the recommendation of professionals to stop the complainant’s self-destructive behaviour.<sup>462</sup> For medical treatment to fall within the scope of Article 7 it would “have to reach a certain level of severity”.<sup>463</sup> An example of the kind of “medical treatment” which would violate Article 7 would be the sterilization of women without consent.<sup>464</sup>

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458 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 31.

459 Concluding Observations on the Netherlands, (2001) UN doc. CCPR/CO/72/NET, § 7.

460 Unauthorised medical treatment may however give rise to other breaches of the ICCPR, such as the right to privacy in Article 17.

461 Nowak, above note 97, pp. 190-192.

462 *Brough v. Australia* (1184/03), § 9.5. No breach of the ICCPR at all was found in respect of this treatment.

463 Joseph, Schultz, and Castan, above note 31, § 9.101.

464 Concluding Observations on Japan, (1998) UN doc. CCPR/C/79/Add.102, § 31. See also *A.S. v. Hungary*, Comm. No. 4/2004, Comm. on the Elimination of Discrimination against Women (14 August 2006).

### 3.2.9 Corporal Punishment

The HRC has taken a very strict view of corporal punishment. In General Comment 20, the HRC stated that:

“the prohibition [in Article 7] 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.”<sup>465</sup>

In *Higginson v. Jamaica* (792/98), the HRC added:

“irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman or degrading treatment contrary to Article 7.”<sup>466</sup>

In *Higginson*, the HRC found that the imposition, rather than only the execution, of a sentence involving whipping with a tamarind switch, violated Article 7.<sup>467</sup>

The strict approach of the HRC regarding corporal punishment has also been highlighted in a number of its Concluding Observations.<sup>468</sup> In Concluding Observations on Iraq, the HRC confirmed that corporal punishments as (arguably) prescribed under Islamic *shariah* law were breaches of Article 7.<sup>469</sup>

In Concluding Observations on Sri Lanka, the HRC condemned the use of corporal punishment in prisons and in schools.<sup>470</sup>

### 3.2.10 Death Penalty

While the HRC has taken a strict view regarding the imposition of corporal punishments, its hands are somewhat tied with regard to the death penalty.

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465 General Comment 20, § 5.

466 *Higginson v. Jamaica* (792/98), § 6.

467 See also *Sooklal v. Trinidad and Tobago* (928/00).

468 See, e.g., Concluding Observations on Cyprus, (1998) UN doc. CCPR/C/79/Add.88, § 16 and Concluding Observations on Lesotho, (1999) UN doc. CCPR/C/79/Add. 106, § 20.

469 Concluding Observations on Iraq, (1997) UN doc. CCPR/C/79/Add. 84, § 12. Death by stoning and amputation were condemned in Concluding Observations on Yemen, (2005) UN doc. CCPR/CO/84/YEM, §§ 15-16.

470 Concluding Observations on Sri Lanka, (2003) UN doc. CCPR/CO/79/LKA, § 11.

The death penalty is specifically permitted in narrow circumstances under Article 6 of the ICCPR, the right to life. It is prohibited under the Second Optional Protocol to the ICCPR, but of course retentionist States have not ratified that treaty. Ironically, the death penalty can be compliant with the ICCPR whereas corporal punishment is not.<sup>471</sup>

Nevertheless, some aspects of the death penalty have been challenged under the ICCPR, as detailed directly below.

### **a) Method of Execution**

The HRC has stated that the imposition of the death penalty must be conducted “in such a way as to cause the least possible physical and mental suffering.”<sup>472</sup> In *Ng v. Canada* (469/91), the victim faced the possibility of being extradited to the U.S., where he faced execution by gas asphyxiation in California. The HRC found, on the basis of evidence submitted regarding the agony caused by cyanide gas asphyxiation, that such a method of execution did not constitute the “least possible physical pain and suffering” and would constitute cruel and inhuman treatment in violation of Article 7.<sup>473</sup> In *Cox v. Canada* (539/93), the HRC held that death by lethal injection would not breach Article 7.<sup>474</sup>

The act of performing an execution in public has been deplored by the HRC and constitutes inhuman or degrading treatment.<sup>475</sup>

### **b) Death Row Phenomenon**

The “death row phenomenon” is experienced by inmates who are detained on death row for an extended amount of time; the term describes the “ever increasing mental anxiety and mounting tension over one’s impending death”.<sup>476</sup> The European Court of Human Rights, in the case of *Soering v. UK*,<sup>477</sup> as well as the Judicial Committee of the Privy Council, have acknowledged the inhuman or degrading nature of the death row phenomenon. For

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471 Joseph, Schultz, and Castan, above note 31, § 9.90. See, regarding the death penalty and CAT, Section 4.5.

472 General Comment 20, § 6.

473 *Ng v. Canada* (469/91), § 16.4.

474 *Cox v. Canada* (539/93) § 17.3. See however Section 4.5.

475 Concluding Observations on the Islamic Republic of Iran, (1993) UN doc. CCPR/C/79/Add. 25, § 8.

476 Joseph, Schultz, and Castan, above note 31, § 9.53.

477 *Soering v. UK*, No. 14038/88, Eur. Ct. of Hum. Rts. (7 July 1989).

example, in *Pratt and Morgan v. Attorney General for Jamaica*,<sup>478</sup> the Judicial Committee of the Privy Council found that detention on death row should last for no longer than five years. Nevertheless, the HRC has thus far refused to recognise that this type of suffering breaches Article 7.

The HRC's most extensive discussion of the death row phenomenon, at the time of writing, arose in *Johnson v. Jamaica* (588/94), where the complainant had been on death row for "well over 11 years".<sup>479</sup> The HRC rejected the idea that the death row phenomenon of itself constitutes a breach of Article 7 for the following reasons:

- The ICCPR permits the death penalty in certain circumstances. Detention on death row is an inevitable consequence of the imposition of the death penalty.
- The HRC does not wish to set "deadlines" which encourage a State to carry out a death penalty within a certain time period.
- The HRC does not wish to encourage the expeditious carrying out of the death penalty.
- The HRC does not wish to discourage States from adopting policies which are positive, yet may have the effect of extending stays on death row, such as moratoriums on executions.

The HRC conceded that it was not acceptable to keep a condemned prisoner on death row for many years. However, "the cruelty of the death row phenomenon is first and foremost a function of the permissibility of the death penalty under the Covenant".<sup>480</sup> Therefore, for pragmatic reasons, the HRC decided that extended time on death row of itself does not breach the ICCPR.

However, there may be aggravating factors which render a person's detention on death row a breach of Article 7. For example, in *Clive Johnson v. Jamaica* (592/94), the complainant was a minor who was placed on death row in breach of Article 6(5) of the ICCPR.<sup>481</sup> The HRC also found a breach of Article 7 and stated that:

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478 *Pratt and Morgan v. Attorney-General for Jamaica* [1993] 2 AC 1.

479 *Johnson v. Jamaica* (588/94), § 8.1.

480 *Johnson v. Jamaica* (588/94), § 8.4.

481 Article 6(5) prohibits the imposition or application of the death penalty to persons under the age of 18.

“[t]his detention ... may certainly amount to cruel and inhuman punishment, especially when the detention lasts longer than is necessary for the domestic legal proceedings required to correct the error involved in imposing the death sentence”.<sup>482</sup>

Furthermore, the issuing of a death warrant, to a person who is mentally ill constitutes a breach of Article 7. The individual does not have to be mentally incompetent at the time of imposition of the death penalty for a violation to be found: he or she need only to be ill at the time that the warrant for actual execution is issued.<sup>483</sup>

In *Chisanga v. Zambia* (1132/02), the complainant was led to believe that his death sentence was commuted, and he was removed from death row for two years. After two years, he was returned to death row without explanation from the State. The HRC found that such treatment “had such a negative psychological impact and left him in such continuing uncertainty, anguish and mental distress as to amount to cruel and inhuman treatment” in breach of Article 7.<sup>484</sup>

Mental distress and strain increases when the warrant for execution is actually issued and the inmate is transferred to a special death cell whilst awaiting execution. In *Pennant v. Jamaica* (647/95), the HRC found that a two week detention in a death cell after the warrant of execution was read, pending application for a stay, violated Article 7 of the ICCPR. Therefore, detention in a death cell should not be unduly extended, and is distinguishable from extended detention on death row.

Where a stay is issued in the case of a pending execution the prisoner should be told as soon as possible. In *Pratt and Morgan v. Jamaica* (210/86, 225/87), a gap of 24 hours was held to constitute a violation of Article 7. In *Thompson v. St Vincent and the Grenadines* (806/98), the complainant was removed from the gallows only 15 minutes before the scheduled execution on the basis that a stay had been granted. As he was informed as soon as possible of the stay, no breach of Article 7 was found.

In *Persaud and Rampersaud v. Guyana* (812/98), a complainant who had spent 15 years on death row again tried to argue that the death row phenomenon was of itself a breach of Article 7. The HRC found that the mandatory imposition

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482 *Clive Johnson v. Jamaica* (592/94), concurring opinion of Mr Kretzmer.

483 *R.S v. Trinidad and Tobago* (684/96), § 7.2; see also Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 7.

484 *Chisanga v. Zambia* (1132/02), § 7.3.

of the death penalty in this case breached the right to life in Article 6. Having found a breach of Article 6, the HRC added:

“As regards the issues raised under Article 7 of the Covenant, the Committee would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of Article 7. However, having also found a violation of Article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of Article 7.”<sup>485</sup>

In this case, decided in early 2006, the HRC does not reject the Article 7 claim, and seems to open the door for a possible challenge to the *Johnson* precedent in a future case. Therefore, it is possible that the HRC might find the death row phenomenon to be in breach of Article 7 in the near future.<sup>486</sup>

### 3.2.11 Cruel Sentences

Outside of the context of corporal or capital punishments, it is still possible for a sentence to be so cruel as to breach Article 7. In regard to the U.S., the HRC recommended that no child offender ever be sentenced to a life sentence without parole, and that all such existing sentences be reviewed. Such sentences breach Article 7 in conjunction with Article 24, which recognises the right of special protection for children in light of their special vulnerability.<sup>487</sup>

### 3.2.12 Extradition, Expulsion and Refoulement

In General Comment 20, the HRC stated:

“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.”<sup>488</sup>

The ICCPR therefore casts a wider net than CAT in relation to mistreatment from which an individual must be protected, as Article 3 of CAT only prohibits return where there is danger of torture. Despite the broader apparent

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485 *Persaud and Rampersaud v. Guyana* (812/98), § 7.3.

486 See also Concluding Observations on Benin, (2004) UN doc. CCPR/CO/82/BEN, § 13.

487 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 34.

488 General Comment No. 20, § 9.

scope of the ICCPR, most cases on this issue have come before the CAT Committee.<sup>489</sup>

In *C v. Australia* (900/99), the complainant was granted refugee status in Australia and issued with a protection visa on the basis that he had a well-founded fear of persecution on the basis of his race and his religion if returned to Iran. The complainant then committed a number of serious crimes over a six month period for which he was convicted and sentenced to imprisonment. Upon his release, the relevant Minister ordered that he be deported from Australia to Iran. The complainant challenged the proposed deportation on the basis that he faced a substantial risk of torture, cruel or inhuman treatment if returned to Iran. The HRC agreed that the complainant's deportation would breach Article 7 in two ways. First, he faced persecution as an Assyrian Christian, and a real risk of torture. Second, the complainant was mentally ill, and it was doubtful that he could access the necessary medicine to control his illness in Iran.

Both findings were influenced by unique features of this case. First, with regard to the finding of likely persecution, the HRC emphasised that Australia had already accepted that the author faced persecution upon his return to Iran by originally granting him refugee status. Given that the State party had previously acknowledged the danger facing the author, the HRC was less inclined to "accept the State's arguments that conditions had changed so much as to supersede its own decision".<sup>490</sup> Regarding the finding on the availability of medicine, the HRC emphasized that the relevant illness was largely caused by the complainant's original incarceration in immigration detention, and therefore was caused by the actions of the State party itself.<sup>491</sup>

In Concluding Observations on Canada, the HRC expressed concern over "allegations that the State party may have cooperated with agencies known to resort to torture with the aim of extracting information from individuals detained in foreign countries".<sup>492</sup> Therefore, "rendition" is impermissible under Article 7 of the ICCPR.<sup>493</sup>

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489 See Section 4.3.

490 S. Joseph, "Human Rights Committee: Recent Cases", (2003) 3 *Human Rights Law Review* 91, p. 99.

491 See Section 3.2.7.

492 Concluding Observations on Canada, (2006) UN doc. CCPR/C/CAN/CO/5, § 15.

493 See, e.g., Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 15, and Section 4.3.8.

A State must ensure that its procedures for deciding whether to deport a person take Article 7 rights into account. If a deportation proceeding is procedurally inadequate, a breach of Article 7 may ensue even in the absence of a substantive finding by the HRC that there is a real risk of torture upon deportation.<sup>494</sup> In this respect, it may be noted that the mere receipt of diplomatic assurances from a recipient State that it will not torture a deportee is not sufficient:

“States should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and vigorously the fate of the affected individuals. [States] should further recognise that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be.”<sup>495</sup>

As noted in Section 3.2.9, the HRC has confirmed that corporal punishment breaches Article 7. Therefore, expulsion of a person to a State where he or she might face corporal punishment presumably breaches the ICCPR. In *G.T. v. Australia* (706/1996) and *A.R.J v. Australia* (692/1996), the HRC affirmed that where there was a foreseeable risk of corporal punishment, any such extradition would violate Article 7. However, the risk “must be real, i.e. be the necessary and foreseeable consequence of deportation”.<sup>496</sup> In both cases, the complainants failed to establish that the risk was sufficiently real and foreseeable, so the HRC found that the deportations, if carried out, would not breach Article 7.

A number of cases have come before the HRC from persons fighting extradition to States where they face a real risk of execution. These authors claimed that such extradition breached Article 6, the right to life, in exposing them to the death penalty, or Article 7, in exposing them to a cruel execution or the death row phenomenon. The HRC’s original position was that such extradition did not breach the ICCPR unless it was foreseeable that the death penalty would somehow be carried out in a way that breached the ICCPR.<sup>497</sup> However,

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494 See e.g., *Ahani v. Canada* (1051/02).

495 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 16. See also Section 4.3.9.

496 *A.R.J v. Australia* (692/96), § 6.14.

497 See *Kindler v. Canada* (470/91).

the HRC's position on this matter has changed. Such extradition will now often be found to breach Article 6, the right to life, even though Article 6(2) explicitly permits the imposition of the death penalty. In *Judge v. Canada* (829/98), the HRC found that the death penalty exception explicitly does not apply to States such as Canada that have abolished the death penalty. Therefore, such States may not apply the death penalty, nor may they expose a person to the death penalty by extraditing them. In *Judge*, the proposed extradition was to have been from Canada to the U.S. Ironically, the deportation may have entailed a breach of the ICCPR by Canada, but any ultimate execution by the U.S. may not have constituted a breach of the ICCPR by the U.S. This is because the U.S. is not a State that has abolished the death penalty, and therefore may "benefit" from Article 6(2). Canada, on the other hand, has abolished the death penalty, and therefore does not benefit from the death penalty exception in Article 6(2).

**a) Pain and Suffering Caused by Being Forced to Leave a State**

In *Canepa v. Canada* (558/93), the complainant was deported from Canada to Italy due to his criminal record. He was an Italian citizen who had lived in Canada for most of his life but had never taken up Canadian citizenship. The deportee argued that the anguish he would experience in being separated from his family, and displaced from a State that he considered to be his home, constituted cruel, inhuman or degrading treatment. The HRC found that the deportation would not breach Article 7. Therefore, it seems that the mental pain entailed in being forced to leave a State, and therefore one's life in that State behind, does not breach Article 7, at least so long as the reasons behind the deportation are reasonable.

### **3.2.13 Gender-Specific Violations of Article 7**

In General Comment 28, the HRC stated at paragraph 11:

"To assess compliance with Article 7 of the Covenant, ... the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization. In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it should be

provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.”

The HRC has consistently recognised that domestic violence can breach Article 7 in conjunction with Article 3 (which guarantees the equal rights under the ICCPR of men and women). States parties must take appropriate measures to combat such violence, such as investigation of allegations, and prosecution and punishment of perpetrators.<sup>498</sup> In addition, General Comment 28 indicates that the following treatment breaches Article 7:

- Rape
- Lack of access to abortion after a rape
- Forced abortion
- Forced sterilization
- Female genital mutilation<sup>499</sup>

In Concluding Observations on the Netherlands, the HRC stated that women should not be deported to countries where they may be subjected to practices of genital mutilation and other traditional practices which “infringe upon the physical integrity or health of women”.<sup>500</sup>

In Concluding Observations on Morocco, the HRC found that the criminalization of abortion, which effectively forces women to carry pregnancies to term, breached Article 7.<sup>501</sup>

Finally, on the U.S., the HRC suggested that the shackling of women during childbirth breaches article 7.<sup>502</sup>

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498 See e.g., Concluding Observations on Paraguay, (2006) UN doc. CCPR/C/PRY/CO/2, § 9; Concluding Observations on Italy, (2006) UN doc. CCPR/C/ITA/CO/5, § 9, and Concluding Observations on Norway, (2006) UN doc. CCPR/C/NOR/CO/5, § 10. Indeed, the HRC has flagged domestic violence as an Article 7 issue with regard to most States parties in recent Concluding Observations. See also Nowak, above note 97, p. 184.

499 The HRC has consistently condemned the practice of female genital mutilation in numerous Concluding Observations. See, for recent statements to this effect, e.g., Concluding Observations on Yemen, (2005) UN doc. CCPR/CO/84/YEM, § 11; Concluding Observations on Kenya, (2005) UN doc. CCPR/CO/83/KEN, § 12; Concluding Observations on Benin, (2004) UN doc. CCPR/CO/82/BEN, § 11; Concluding Observations on Gambia, (2004) UN doc. CCPR/CO/75/GMB, § 10.

500 Concluding Observations on the Netherlands, (2001) UN doc. CCPR/CO/72/NE, § 11.

501 Concluding Observations on Morocco, (2004) UN doc. CCPR/CO/82/MAR, § 29; see also Concluding Observations on Sri Lanka, (2003) UN doc. CCPR/CO/79/LKA, § 12.

502 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 33.

### 3.2.14 Non-Use of Statements obtained in Breach of Article 7

In General Comment 20, the HRC stated:

“It is important for the discouragement of violations under article 7 that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”<sup>503</sup>

This aspect of Article 7 complements Article 14(3)(g) of the ICCPR, which provides for a right against self incrimination.<sup>504</sup>

In *Singarasa v. Sri Lanka* (1033/01), the HRC confirmed that in domestic criminal proceedings, “the prosecution must prove that the confession was made without duress”.<sup>505</sup> A violation of Article 7 (as well as Article 14(3)(g)) was entailed in the fact that the burden of proof in this respect was placed in domestic proceedings on the complainant.<sup>506</sup>

In *Bazarov v. Uzbekistan* (959/00), the complainant’s co-defendants testified against him after being tortured. Their evidence was used to convict the complainant. A violation of the complainant’s rights under Article 14(1) ICCPR was found, which protects the right to a fair trial.<sup>507</sup> No violation of Article 7 could be found in this respect, as this aspect of the complaint did not concern torture perpetrated upon the complainant, and the tortured co-defendants were not parties to the OP complaint, so no violations of their rights could specifically be found.

### 3.2.15 Positive duties under Article 7

A “negative” duty entails a duty upon a State to refrain from certain actions, such as the perpetration of acts of torture. A positive duty entails a duty for a State to perform rather than refrain from certain acts. States parties have numerous positive duties under Article 7, which are designed to prevent the

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503 General Comment 20, § 12.

504 Joseph, Schultz, and Castan, above note 31, § 9.107. See e.g., Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 14.

505 *Singarasa v. Sri Lanka* (1033/01), § 7.4.

506 See also Concluding Observations on the Philippines, (2003) UN doc. CCPR/CO/79/PHL, § 12.

507 *Bazarov v. Uzbekistan* (959/00), § 8.3.

occurrence of violations, and to ensure that alleged violations are appropriately investigated. If a violation is established to have occurred, perpetrators should be punished and victims should be compensated. Similar duties arise under the CAT, and most cases on this issue have been addressed by the CAT Committee rather than the HRC.<sup>508</sup> Indeed, it is submitted that most if not all of the explicit positive duties outlined in CAT are implicitly contained in Article 7.<sup>509</sup>

### **a) Duty to enact and enforce Legislation**

In General Comment 20, the HRC stated:

“State 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.”<sup>510</sup>

For example, in 1995 the HRC noted its concern that Yemen had failed to pass laws which deal with domestic violence.<sup>511</sup> In 2002, the HRC returned to the issue noting that, although Yemen had adopted laws which addressed the issue, there continued to be a lack of proper enforcement.<sup>512</sup> A similar criticism was made in 2005.<sup>513</sup> Therefore, the enactment of relevant legislation is not sufficient; relevant legislation must be enforced by appropriate persons, such as police, prosecutors and the courts.

### **b) Duty to investigate Allegations of Torture**

States have an obligation to ensure that all complaints of torture are responded to effectively. Such an obligation is grounded in a combination of Article 7

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508 See section 4.6. One relevant case before the HRC was *Zheikov v. Russian Federation* (889/99), § 7.2.

509 It is perhaps unlikely that the duties regarding universal jurisdiction (see Section 4.8) exist under the ICCPR, but all other positive duties contained in the CAT seem to have been confirmed as existing under Article 7, as seen below in Sections 3.2.15 (a)-(f).

510 General Comment 20, § 13.

511 Concluding Observations on Yemen, (1995) UN doc. CCPR/C/79/Add.51, § 14.

512 Concluding Observations on Yemen, (2002) UN doc. CCPR/CO/75/YEM, § 6.

513 Concluding Observations on Yemen, (2005) UN doc. CCPR/CO/84/YEM, § 12.

and Article 2(3), which requires States to provide remedies to victims of ICCPR rights abuses. “Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.<sup>514</sup> Most cases on this issue have been dealt with under the CAT.<sup>515</sup>

*Rajapakse v. Sri Lanka* (1250/04) concerned a deficient investigation into allegations of torture. Despite compelling evidence of ill-treatment of the victim, a criminal investigation into the allegations of ill-treatment did not begin for three months. Since commencement, the investigation had stalled significantly, and little progress had been made by the time of the HRC’s decision, four years after the alleged incident.<sup>516</sup> For example, by the time of the HRC’s decision, only one of ten witnesses had actually given evidence. The HRC noted that “the large workload” of its courts “did not excuse it from complying with its obligations under the Covenant”.<sup>517</sup> Furthermore, the State had failed to “provide any timeframe for the consideration of the case”.<sup>518</sup> The HRC concluded:

“Under article 2, paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The general information provided by the State party on the workload of the domestic courts would appear to indicate that the High Court proceedings and, thus the author’s ... case will not be determined for some time. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when it is clear that the remedies relied upon by the State party have been prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated article 2, paragraph 3, in conjunction with 7 of the Covenant. ...”<sup>519</sup>

In Concluding Observations, the HRC has stressed that investigations must be impartial and should preferably be conducted by an external body. For example, regarding Hong Kong, the HRC noted the high number of complaints

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514 General Comment 20, § 14; see e.g., Concluding Observations on Italy, (2006) UN doc. CCPR/C/ITA/CO/5, § 10. See Model Complaint, *Textbox ii*, § 53.

515 See Section 4.6.2.

516 As the proceedings were so prolonged, the complaint was found to comply with the domestic remedies requirement: *Rajapakse v. Sri Lanka* (1250/04), § 9.2.

517 *Rajapakse v. Sri Lanka* (1250/04), § 9.4.

518 *Rajapakse v. Sri Lanka* (1250/04), § 9.4.

519 *Rajapakse v. Sri Lanka* (1250/04), § 9.5.

against police officers which were ultimately dismissed. The HRC stressed the importance of an investigation process which is, and which appears to be, “fair and independent” and thus strongly recommended that investigations be carried out by an independent mechanism rather than by the police themselves.<sup>520</sup>

Furthermore, “the right to lodge complaints against maltreatment prohibited by Article 7 must be recognised in the domestic law”.<sup>521</sup> Therefore, such complainants must be protected from reprisals or victimization, regardless of the success of their complaints.<sup>522</sup>

### **c) Duty to Punish Offenders and Compensate Victims**

States have an obligation to pass and enforce legislation which prohibits violations of Article 7. Therefore, States must investigate, appropriately punish perpetrators, and provide effective remedies to victims. Furthermore, any victim of Article 7 treatment is entitled to a remedy in respect of that treatment under Article 2(3) of the ICCPR. Appropriate remedies will vary according to the circumstances of a case, and might include monetary compensation for losses as well as for pain and suffering, and rehabilitation.

An “amnesty” law is a law which protects persons from prosecution for past offences, including, occasionally, human rights abuses. Such laws are often passed by States in transition from dictatorship to democracy. In General Comment 20, the HRC stated:

“Amnesties are generally incompatible with the duty of States to investigate such [breaches of article 7]; 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.”<sup>523</sup>

In *Rodriguez v. Uruguay* (322/88), the complainant claimed that he had been subjected to torture under the previous military regime in Uruguay and that

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520 Concluding Observations on Hong Kong, (1996) UN doc. CCPR/C/79/Add. 57, § 11; see also e.g., Concluding Observations on Brazil, (2005) UN doc. CCPR/C/BRA/CO/2, § 13; Concluding Observations on the Syrian Arab Republic, (2005) UN doc. CCPR/CO/84/SYR, §§ 8, 9; Concluding Observations on Slovenia, (2005) UN doc. CCPR/CO/84/SVN, § 9, Concluding Observations on Kenya, (2005) UN doc. CCPR/CO/83/KEN, § 18.

521 General Comment 20, § 14.

522 See Concluding Observations on Brazil, (1996) UN doc. CCPR/C/79/Add.66, § 327.

523 General Comment 20, § 15.

he had sought judicial investigation and appropriate redress for this violation. The new government declined to investigate the allegations and parliament enacted “Law no 15,848...which effectively provided for the immediate end of judicial investigation into such matters”.<sup>524</sup> The application of this rule by the judiciary prevented individuals from being able to seek any form of redress for their claims of torture and mistreatment. The State responded that such criminal investigation would be contrary to goals of “reconciliation, pacification and the strengthening of democratic institutions”<sup>525</sup> within Uruguay. It may also be noted that the amnesty law was endorsed by a referendum in Uruguay. The HRC found that the amnesty law breached the State party’s obligation to investigate and remedy breaches of Article 7. The HRC added its concern that the amnesty law may help to generate an “atmosphere of impunity” which might generate further human rights violations.<sup>526</sup> The HRC’s disapproval of such amnesty laws has also been exhibited in numerous Concluding Observations.<sup>527</sup>

The punishment given to those who violate Article 7 must also reflect the gravity of the offence. For example, the HRC has expressed its concern regarding the tendency for police officers in Spain to be given lenient sentences or to simply avoid punishment altogether.<sup>528</sup>

Unlike CAT, the ICCPR does not contain any explicit provisions which create a universal jurisdiction over alleged torturers,<sup>529</sup> nor has the HRC referred to such jurisdiction. It is therefore possible that the ICCPR does not confer such jurisdiction over alleged torturers.<sup>530</sup>

#### **d) Duty to Train Appropriate Personnel**

The HRC has specified certain categories and classes of people whose operational rules and ethical standards must be informed by the content of Article 7, and who should receive specific instruction and training in this regard. These people are:

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524 *Rodríguez v. Uruguay* (322/88), § 2.2.

525 *Rodríguez v. Uruguay* (322/88), § 8.5.

526 *Rodríguez v. Uruguay* (322/88) § 12.4.

527 See e.g., Concluding Observations on El Salvador, (1994) UN doc. CCPR/C/79/ADD.34, § 7; Concluding Observations on Bolivia, (1998) UN doc. CCPR/C/79/Add. 73, § 15; Concluding Observations on Lebanon, (1998) UN doc. CCPR/C/79/Add. 78, § 12.

528 Concluding Observations on Spain, (1996) UN doc. CCPR/C/79Add. 61.

529 See Section 4.8.

530 Joseph, Schultz, and Castan, above note 31, § 9.131.

“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.”<sup>531</sup>

States parties are required to inform the HRC in their reports of the instruction and training given in this regard. Such training is particularly important for States in transitional phases of their political development, where enforcement authorities, such as the police, have developed a culture of routinely using torture or ill-treatment to perform their functions. Training is necessary to eradicate such a culture and to ensure that people understand that such methods are simply unacceptable.

### **e) Procedural Safeguards**

States must ensure that there are adequate procedural safeguards in place to protect those who are particularly vulnerable to breaches of their rights under Article 7. Such persons include people in detention, such as prisoners (including suspects, remand prisoners, and convicted prisoners) or involuntary patients in psychiatric wards. The HRC recommends that “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” should all be systemically reviewed to minimize and prevent cases of torture or ill-treatment.<sup>532</sup>

The crucial importance of relevant and accurate record keeping has also been emphasized:

“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. 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.”<sup>533</sup>

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531 General Comment 20, § 10.

532 General Comment 20, § 11.

533 General Comment 20, § 11.

The HRC also specifies that places of detention must not contain equipment which can be used to torture or grossly mistreat an individual.<sup>534</sup> Furthermore, detainees must be given regular and prompt access to doctors, lawyers and family members (with supervision where required).

As noted above, incommunicado detention can of itself breach Article 7.<sup>535</sup> Instances of incommunicado detention, and particularly disappearances, increase the opportunity for the perpetration of Article 7 treatment without punishment or even detection. Therefore, “[p]rovisions should ... be made against incommunicado detention”.<sup>536</sup>

The types of safeguards described above reflect the important relationship between effective procedures and protection against substantive violations of Article 7.

### **3.2.16 Overlap between Article 7 and other ICCPR Provisions**

Article 7 breaches overlap considerably with breaches of Article 10 ICCPR (see Section 3.3). Breaches of Article 7 commonly arise with other ICCPR breaches too. For example, torture can often result in death, leading to breaches of both the right to freedom from torture and the right to life (Article 6 ICCPR). As noted above in Section 3.2.6, disappearances often result in both torture and death.

Breaches of Article 7 often also arise in conjunction with breaches of Article 9 ICCPR, concerning arbitrary detention and/or threats to the security of the person.<sup>537</sup> Incommunicado detention, for example, will breach Article 9 and, if lengthy enough, will also breach Article 7.<sup>538</sup> Torture and ill-treatment can be used to procure evidence ultimately used in a trial, which will lead to breaches of the right to a fair trial in Article 14 ICCPR. Finally, Article 7 breaches often arise in the context of discrimination, contrary to Article 26 ICCPR.

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534 General Comment 20, § 11. See Model Complaint, *Textbox ii*, § 41.

535 See Section 3.2.5; see also Section 3.3.3. See Model Complaint, *Textbox ii*, § § 45-47, 63.

536 General Comment 20, § 11.

537 See also Section 2.3.5.

538 Disappearances will commonly breach Articles 6, 7, 9, and 10; see *Bousroual v. Algeria* (992/01), § 9.2.

### 3.3 Jurisprudence under Article 10

Article 10 states:

- “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) 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;  
  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

Article 10 seeks to address the distinct vulnerability of those who are in detention and to ensure that the deprivation of liberty does not leave detainees exposed to human rights violations. Such protection is essential as “the situation of “special power relationships” within closed facilities often occasions massive violations of the most diverse human rights”.<sup>539</sup>

Article 10 is both narrower and broader than Article 7. It is narrower as it only applies to people in detention. It is broader as it proscribes a less severe form of treatment, or lack of treatment, than Article 7.<sup>540</sup> The less severe nature of Article 10 abuses is reflected by the fact that it is a derogable right under Article 4 of the ICCPR.<sup>541</sup>

#### 3.3.1 Application of Article 10

In General Comment 21, the HRC outlined the beneficiaries of Article 10 rights, that is the meaning of “persons deprived of their liberty”. Article 10 “applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention

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539 Nowak, above note 97, p. 242.

540 General Comment 21, § 3; see also *Griffin v. Spain* (493/92), § 6.3.

541 However, the HRC has stated that Article 10 is implicitly non-derogable in General Comment 29, § 13(a).

camps or correctional institutions or elsewhere”.<sup>542</sup> It is not relevant to the application of Article 10 whether the fact of the deprivation of liberty is unreasonable or unlawful.<sup>543</sup>

Article 10 applies to all institutions and establishments which are within the State’s jurisdiction.<sup>544</sup> Therefore, the State continues to be responsible for the well-being of detainees and for any violations of Article 10 in private detention centres. In *Cabal and Pasini Betran v. Australia* (1020/02), the HRC noted that:

“the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve the State party of its obligations under the Covenant”.<sup>545</sup>

It is clearly more difficult for a State to oversee conditions in a private detention facility than in one that it runs itself. Therefore, the HRC has a preference for the maintenance of State control and management over detention facilities.<sup>546</sup> At the least, States parties must regularly monitor such places of detention to ensure that the requirements of Article 10 are being upheld.

### 3.3.2 Conditions of Detention

Clearly, a case regarding appalling conditions of, or treatment in, detention potentially raises issues under both Articles 7 and 10. The HRC has tended to address most such cases under Article 10, unless there is an element of personal persecution of the victim, or unless violent treatment or punishment is involved.<sup>547</sup> Nowak suggests that Article 10(1) aims to address situations where there is a poor “general state or detention facility” while Article 7 is aimed at addressing “specific, usually violent attacks on personal integrity”.<sup>548</sup> However, the line between violations under Article 7 and violations under Article 10 is often difficult to discern.<sup>549</sup> Sometimes violations of both Articles are found.

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542 General Comment 21, § 2.

543 Article 9 ICCPR addresses the issue of whether the fact of detention itself breaches human rights.

544 General Comment 21, § 2.

545 *Cabal and Pasini Betran v. Australia* (1020/02), § 7.2.

546 Concluding Observations on New Zealand, (2002) UN doc. CCPR/CO/75/NZL, § 13.

547 Joseph, Schultz, and Castan, above note 31, §§ 9.139-9.143. See also Section 3.2.3.

548 Nowak, above note 97, p. 250.

549 Joseph, Schultz, and Castan, above note 31, § 9.144.

In *Madafferi v. Australia* (1011/01), the return of the complainant to immigration detention despite his mental illness, and against the advice of doctors and psychiatrists, was deemed to be a breach of Article 10(1). The facts of this case in this respect resemble *C v. Australia* (900/99), where a violation of Article 7 was found.<sup>550</sup> The HRC stated with regard to a simultaneous complaint regarding Article 7:

“In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.”

This recent comment indicates that the lines between violations of Article 7 and Article 10 are very fine indeed.

The application of Article 10 “cannot be dependent on the material resources available in the State party”.<sup>551</sup> This is an important principle, as the provision of adequate detention facilities to address issues such as overcrowding in prisons can cost considerable amounts of money.

As with Article 10, considerations of breach sometimes entail a subjective element. In *Brough v. Australia* (1184/03), the HRC stated:

“Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.”<sup>552</sup>

The following situations have been classified as breaches of Article 10(1). As can be seen, the provision covers a wide range of situations, some of which surely verge close to the line of violating Article 7, while others seem far away from that line:

- Detention for 42 months on remand in a small and overcrowded cell followed by 8 years on death row, including periods of solitary confinement in appalling conditions.<sup>553</sup>

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550 See Section 3.2.7.

551 General Comment 21, § 4.

552 *Brough v. Australia* (1184/03), § 9.2.

553 *Kennedy v. Trinidad and Tobago* (845/98), § 7.8.

- For sixteen months, the victim was unable to leave his cell even for a shower or a walk; detention in cell measuring 3 metres by 3, which he shared at first with 8 and, eventually, 15 other detainees; inadequate food. The victim was then held for 16 months in another prison with 20 others in a cockroach-ridden cell measuring roughly 5 metres by 3, with no sanitation, no windows and no mattresses. His food rations consisted of manioc leaves or stalks. Two showers a week were permitted and the soldiers guarding him occasionally put the complainant out in the yard as he could not move by himself (due to injuries sustained).<sup>554</sup>
- Five years in a solitary cell measuring 9 by 6 feet, containing an iron mattress, bench and table, with a plastic pail for a toilet. A small ventilation hole was the only opening. There was no natural light, only a fluorescent strip that was on 24 hours a day. After five years, the prisoner was moved to share a 9 by 6 feet cell with 12 other prisoners. The overcrowding caused violent confrontations to erupt amongst the prisoners. There were not enough beds, so the victim slept on the floor. The plastic pail toilet was only emptied once a day, and sometimes overflowed. The victim was locked in his cell for 23 hours with no educational opportunities, work or reading materials. The food supplied did not meet his nutritional needs.<sup>555</sup>
- Detention for over ten years with access to the prison yard for only three hours a day, with the rest of the time spent in a dark, wet cell, with no access to books or to means of communication.<sup>556</sup>
- A lack of medical attention for a seriously ill prisoner, whose illness was obvious, and who subsequently died.<sup>557</sup>
- Detention for eight months in a 500 year old prison infested with rats, lice, cockroaches and diseases; 30 persons per cell, among them old men, women, adolescents and a baby; no windows, but only steel bars which let in the cold; high incidence of suicide, self-mutilation, violence; human faeces all over the floor as the toilet, a hole in the ground, was overflowing; urine soaked mattresses to sleep on.<sup>558</sup>

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554 *Mulezi v. Congo* (962/01), §§ 2.4, 2.5, 5.3.

555 *Sextus v. Trinidad and Tobago* (818/1998) § 7.4.

556 *Vargas Más v. Peru* (1058/02), §§ 3.3, 6.3.

557 *Lantsova v. Russian Federation* (763/1997) §§ 9.1, 9.2. A violation of Article 6, the right to life, was also found in this case.

558 *Griffin v. Spain* (493/92), § 6.2.

- A beating during a prison riot which required five stitches<sup>559</sup>
- The use of cage-beds as a measure of restraint in social care homes and psychiatric units<sup>560</sup>
- Placement in a holding cell in which the two accused could not sit down at the same time, even though such detention was only for one hour.<sup>561</sup>
- A few days' detention in a wet and dirty cell without a bed, table or any sanitary facilities.<sup>562</sup>
- Being told that one would not be considered under the prerogative of mercy nor for early release due to submission of a human rights complaint to the HRC. That is, the prisoner was victimized for exercising his right to submit an individual complaint under the OP.<sup>563</sup>
- Unexplained denial of access to one's medical records.<sup>564</sup>
- While prisons may exercise a certain level of reasonable control and censorship over prisoners' correspondence, extreme levels of censorship will breach Article 10(1) in conjunction with Article 17, the right to privacy in the ICCPR.<sup>565</sup>

In General Comment 21, the HRC identified certain UN documents which outline relevant standards for detention facilities, and invited States parties to comment on their implementation of those standards. This comment indicates that non-adherence to such standards leads to a violation of Article 10. Those standards are:

“[T]he Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).”<sup>566</sup>

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559 *Walker and Richards v. Jamaica* (639/95), § 8.1.

560 Concluding Observations on Slovakia, (2003) UN doc. CCPR/CO/78/SVK, § 13.

561 *Cabal and Pasini Bertran v. Australia* (1020/02).

562 *Gorji-Dinka v. Cameroon* (1134/02), § 5.2.

563 *Pinto v. Trinidad and Tobago* (512/92), § 8.3.

564 *Zhedludkov v. Ukraine* (726/96), § 8.4.

565 *Angel Estrella v. Uruguay* (74/80), § 9.2.

566 General Comment 21, § 5.

In particular, it seems that the Standard Minimum Rules for the Treatment of Prisoners have been incorporated into Article 10.<sup>567</sup> The Standard Minimum Rules outline the minimum conditions which are acceptable for the detention of an individual. The rules address various aspects of detention and all rules must be applied without discrimination. Examples of rights and issues addressed by the rules are outlined below:

- Prisoners should generally have their own cells
- Lighting, heating and ventilation, as well as work and sleep arrangements should “meet the requirements of health”.
- Adequate bedding clothing, food, water and hygiene facilities must be supplied.
- Certain medical services must be available for prisoners.
- Prisoners must be permitted access to the outside world and be able to receive information concerning their rights
- Prisoners should have access to a prison library
- Prisoners should have a reasonable opportunity to practice their religion
- Any confiscated property must be returned to the prisoner upon release
- Prison wardens must inform a prisoner’s family or designated representative if that prisoner dies or is seriously injured.
- The prisoner must be allowed to inform his or her family or representative of his/her imprisonment and of any subsequent transfer to another institution.

The rules also address disciplinary measures in Rules 27-36. The Standard Minimum Rules are reprinted in full at Appendix 9.

### 3.3.3 Detention Incommunicado and Solitary Confinement

Incommunicado detention, in principle, violates Article 10(1). The shortest period of detention found by the HRC to constitute a breach of Article 10 was two weeks in *Arutyunyan v. Uzbekistan* (917/00).<sup>568</sup> Where the period

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567 Joseph, Schultz, and Castan, above note 31, §§ 9.148-9.149 and see e.g., *Mukong v. Cameroon* (458/91), § 9.3 and *Potter v. New Zealand* (632/95), § 6.3.

568 See also *Arzuaga Gilboa v. Uruguay* (147/83), where incommunicado detention for 15 days breached Article 10(1).

of detention incommunicado lasted for eight months, the HRC found the detention to be so serious as to violate Article 7.<sup>569</sup>

The HRC is also wary of solitary confinement. Regarding Denmark, it has stated that such confinement is:

“a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant.”<sup>570</sup>

### 3.3.4 Death Row Phenomenon

The discussion of death row phenomenon under Article 7 can also be applied to Article 10.<sup>571</sup> That is, current case law indicates that it is not a breach of Article 10(1).

### 3.3.5 Procedural Duties under Article 10

The positive procedural obligations which arise under Article 10 mirror those required under Article 7.<sup>572</sup> In General Comment 21, the HRC referred to the following positive obligations:<sup>573</sup>

- Reports should provide detailed information on national legislative and administrative provisions that have a bearing on rights under Article 10(1)
- Reports should detail concrete measures to monitor effective application of rules regarding treatment of detainees, including systems of impartial supervision.
- Reports should refer to the provisions in the training and instruction of individuals who exercise authority over detainees, including the level of adherence to such provisions.
- Reports should detail the means by which detainees have access to information about their rights and effective legal means of ensuring that they are upheld, as well as an avenue for complaint and the right to obtain adequate compensation if their rights are violated.

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569 *Shaw v. Jamaica* (704/96). See also Joseph, Schultz, and Castan, above note 31, § 9.151. See Section 3.2.5.

570 Concluding Observations on Denmark, (2000) UN doc. CCPR/CO/70/DNK, § 12.

571 Section 3.2.10(b).

572 Joseph, Schultz, and Castan, above note 31, § 9.158.

573 General Comment 21, §§ 6, 7.

The above duties are all written as providing guidance to States parties on how to prepare reports on their Article 10 obligations. However, this guidance implicitly points to underlying substantive duties. For example, a duty to report on training measures implies that training measures must be in place. A duty to report on complaints procedures again implies that complaints procedures must be in place.

Fulfilment of such duties helps to ensure that breaches of Article 10 do not take place. Furthermore, non-fulfilment of relevant procedural duties may mean that a State finds it difficult to defend itself against Article 10 claims.<sup>574</sup> For example, in *Hill and Hill v. Spain* (526/93), the complainants claimed that they had been denied food and drink for five days while in police custody. The State was unable to produce records to demonstrate that such food had been provided. On the basis of the detailed allegations made by the authors and in light of the State's inability to produce the relevant evidence to the contrary, a violation of Article 10 was found.<sup>575</sup>

#### **a) Detention of Pregnant Women**

In General Comment 28, the HRC confirms that States have particular duties to care for pregnant and post natal women who are in detention. States parties must report on facilities and medical and health care available for mothers and their babies. Pregnant women “should receive humane treatment and respect for their inherent dignity at all times surrounding the birth and while caring for their newly-born children”.<sup>576</sup>

In Concluding Observations on Norway, the HRC expressed concern about the removal of infants from their mothers while in custody. Indeed, it felt that the State party should consider “appropriate non-custodial measures” for breastfeeding mothers.<sup>577</sup>

#### **b) Segregation of Convicted Prisoners from Remand Prisoners**

Under Article 10(2)(a), accused persons should be segregated from convicted persons, “save in exceptional circumstances”, and should be treated in a

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<sup>574</sup> Joseph, Schultz, and Castan, above note 31, § 9.160.

<sup>575</sup> *Hill and Hill v. Spain* (526/93), §§ 10.4, 13.

<sup>576</sup> General Comment 28, § 15.

<sup>577</sup> Concluding Observations on Norway, (2006) UN doc. CCPR/C/NOR/CO/5, § 16.

manner which is appropriate to “their status as un-convicted persons”. Article 10(2)(a) reinforces Article 14(2) of the ICCPR, which dictates that all people are entitled to be presumed innocent until proven otherwise.<sup>578</sup>

The degree of separation required by Article 10(2)(a) was addressed in *Pinkney v. Canada* (27/78). In *Pinkney*, the complainant’s cell was in a separate part of the prison to the cells of convicted prisoners. The HRC affirmed that accused persons need only be accommodated in separate quarters, not necessarily in separate buildings. Though convicted prisoners worked in the remand area of the prison (as cleaners and food servers), the HRC found that this level of interaction was acceptable provided that “contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of those tasks”.<sup>579</sup>

The HRC has also specified that male and female prisoners must be kept in separate facilities.<sup>580</sup>

### **c) Protection for Juvenile Detainees**

Article 10(2)(b) requires the separation of accused juveniles from adult detainees, and that they be brought to trial as speedily as possible. Article 10(3) further requires that juvenile offenders be separated from adults, and that they “be accorded treatment appropriate to their age and legal status”. In this respect, Article 10 supplements Article 24 of the ICCPR, which requires special protection for children’s rights.

In General Comment 21, the HRC concedes that the definition of a “juvenile” may vary according to “relevant, social, cultural and other conditions”. Nevertheless, it stresses a strong preference for juveniles to be classified as persons under 18 for criminal justice purposes, including for Article 10 purposes.<sup>581</sup> In *Thomas v. Jamaica* (800/98), the HRC found a violation of Articles 10(2)(b) and (3) entailed in the detention of the complainant with adult prisoners from the ages of 15 to 17.<sup>582</sup>

The requirement that the individual be brought “as speedily as possible for adjudication” seeks to ensure that juveniles spend the minimum amount of

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578 General Comment 21, § 9.

579 *Pinkney v. Canada* (27/78), § 30.

580 General Comment 28, § 15.

581 General Comment 21, § 13.

582 See also Concluding Observations on Cyprus, (1994) UN doc. CCPR/C/79/Add. 39, § 13.

time possible in pre-trial detention. This obligation should be read in light of Article 9(3) and 14(3)(c) in the ICCPR, which also seek to ensure that accused individuals are brought to trial “within a reasonable time” and “without undue delay.” The inclusion of this additional requirement suggests a heightened level of obligation for States in relation to juvenile detention, which goes beyond the requirements of Article 9(3) and 14(3)(c). Nowak adds that any adjudication of alleged youth crimes need not be before a court but may be before “special, non-judicial organs empowered to deal with crimes by juveniles”.<sup>583</sup>

Article 10(3) requires that juveniles be treated in a way which is “appropriate to their age and legal status”. The HRC has suggested that such treatment should entail initiatives such as shorter working hours and more contact with relatives.<sup>584</sup> The treatment of juveniles should reflect the aim of “furthering their reformation and rehabilitation”.<sup>585</sup>

In *Brough v. Australia* (1184/03), the complainant was a young Australian Aboriginal boy of 16 years who suffered from a mild intellectual disability, who participated in a riot at a Juvenile Detention Centre. He was subsequently transferred to an adult prison. The HRC found that his:

“extended confinement to an isolated cell without any possibility of communication - combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket - was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal<sup>586</sup>...the hardship of the imprisonment was manifestly incompatible with this condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt”.<sup>587</sup>

In *Brough*, violations of both Articles 10(1) and 10(3) were found. It seems likely that the treatment would have breached Article 10(1) even if the complainant had not been a youth, but the fact of his youth exacerbated the violation.

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583 Nowak, above note 97, p. 252.

584 General Comment 21, § 13.

585 General Comment 21, § 13.

586 Australian Aborigines are known to be vulnerable detainees, as evidenced by a disproportionate percentage of deaths in custody compared to non-Aboriginal detainees.

587 *Brough v. Australia* (1184/2003), § 9.4.

### 3.3.6 Rehabilitation Duty

Article 10(3) dictates that the essential aim of the penitentiary system should be the reformation and social rehabilitation of prisoners. In General Comment 21, the HRC affirms that “[n]o penitentiary system should be only retributory”.<sup>588</sup> The HRC requests that States provide information on the assistance given to prisoners after their release, and on the success of such programmes as well as:

“the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside”.<sup>589</sup>

It also requests information on specific aspects of detention which may compromise this goal if they are not addressed and managed appropriately. These aspects include:

“how convicted persons are dealt with individually and how they are categorised, the disciplinary system, solitary confinement and high security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, and non-governmental organisations)”.<sup>590</sup>

The HRC has addressed this “rehabilitation” duty in a number of Concluding Observations. For example, regarding Belgium, the HRC suggested that “[a]lternative sentencing, including community service, should be encouraged in view of its rehabilitative function...”<sup>591</sup> It further emphasised the importance of ongoing support for a released individual, urging the adoption of “rehabilitation programmes both for the time during imprisonment and for the period after release, when ex offenders must be re-integrated...if they are not to become recidivists”.<sup>592</sup> States should also “adhere to standards postulated in generally accepted theories of criminal sociology”.<sup>593</sup> The HRC has also expressed concern in this regard over the removal of the right to vote from

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588 General Comment 21, § 10.

589 General Comment 21, § 11.

590 General Comment 21, § 12.

591 Concluding Observations on Belgium, (1998) UN doc. CCPR/C/79/Add.99. § 16.

592 Concluding Observations on Belgium, (1998) UN doc. CCPR/C/79/Add.99. § 19.

593 Nowak, above note 97, p. 253.

prisoners.<sup>594</sup> However, it is generally perceived that states have broad discretion in how they approach the Article 10(3) obligation.<sup>595</sup>

Article 10(3) has arisen in very few individual complaints, which may be due to the difficulty in establishing that a particular person is a victim of a State's failure to adopt policies aimed at rehabilitating prisoners.<sup>596</sup> *Kang v. Republic of Korea* (878/99) is a rare case where a violation of Article 10(3) was found. The victim was held in solitary confinement for 13 years and the HRC found that this treatment violated Article 10(1) and Article 10(3).<sup>597</sup>

This "rehabilitation" aspect of Article 10(3) is perhaps controversial in the present day, where an increasing number of governments appear to be adopting policies which are designed to be "tough on crime".<sup>598</sup> Rehabilitation as opposed to other policies which might underline penal policy, such as retribution and deterrence, seems to be out of vogue at the beginning of the twenty-first century, as opposed to the 1960s when the ICCPR was adopted by the UN. In the face of such trends, it is hoped that the HRC will vigorously uphold the standards of Article 10(3).

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594 Concluding Observations on the UK, (2001) UN doc. CCPR/CO/73/UK, § 10; see also Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 35, where the concern seemed to be of the continued removal after parole or release, rather than removal of the right to vote per se.

595 Nowak, above note 97, p. 254.

596 See e.g., *Lewis v. Jamaica* (708/96).

597 *Kang v. Republic of Korea* (878/99), § 7.3.

598 For example, such a debate was dominating political debate in the UK in June 2006, with tough new criminal law measures being proposed by Prime Minister Tony Blair.



## PART IV

### JURISPRUDENCE OF THE CAT COMMITTEE



In this part, we analyse the jurisprudence developed by the CAT Committee under the CAT. It is likely that the CAT Committee will be influenced by the precedents of the HRC in areas where it has not yet itself commented on a relevant issue. Likewise, the HRC can be expected to be influenced by the decisions of the CAT Committee.

## 4.1 Definition of Torture

Article 1 of CAT states:

“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 or incidental to lawful sanctions.”

The CAT Committee has found the following acts to constitute torture in Article 22 cases:

- Victim was handcuffed to a radiator then kicked and punched by several police officers, who also racially insulted him. He was also struck with a big metal bar. He was later unfastened from the radiator and handcuffed to a bicycle, after which the punching and beatings continued with nightsticks and the metal bar. The beatings were so bad they caused the victim to bleed from his ears. The detention and beatings lasted for 5 and a half hours.<sup>599</sup>
- Victim repeatedly beaten with a baseball bat and steel cable, and kicked and punched all over his body. He lost consciousness on several occasions. The ill-treatment lasted, with only a few breaks, for 13 hours, leaving him with numerous injuries on his buttocks and left shoulder. As a result, he spent the next ten days being nursed in bed.<sup>600</sup>

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<sup>599</sup> *Dragan Dimitrijevic v. Serbia and Montenegro* (CAT 207/02), §§ 2.1, 5.3.

<sup>600</sup> *Dimitrov v. Serbia and Montenegro* (CAT 171/00), §§ 2.1, 7.1.

- Victim was stripped to his underwear, and handcuffed to a metal bar, whilst being beaten with a police club for approximately one hour, and spending the next three days in the same room, being denied food, water, medical treatment, and access to the lavatory.<sup>601</sup>

The CAT Committee has also specified in Concluding Observations that the following treatment constitutes torture:

- A combination of the following: restraining in painful positions, hooding, sounding of loud music for prolonged periods, prolonged sleep deprivation, threats including death threats, using cold air to chill, and violent shaking.<sup>602</sup>
- Beating by fists and wooden or metallic clubs, mainly on the head, the kidney area and on the soles of the feet, resulting in mutilations and even death in some cases.<sup>603</sup>

In Concluding Observations, the CAT Committee has indicated a number of breaches of the CAT without specifying whether the treatment is torture or other ill-treatment. It is submitted that the following treatment might be so severe as to contravene Article 1:

- Uninformed and involuntary sterilization of Roma women.<sup>604</sup>
- Interrogation techniques, using a combination of sexual humiliation, “water boarding”,<sup>605</sup> “short shackling”,<sup>606</sup> and the use of dogs to induce fear.<sup>607</sup>

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601 *Danilo Dimitrijevic v. Serbia and Montenegro* (CAT172/00), §§ 2.1, 2.2, and 7.1

602 Concluding Observations on Israel, (1997) UN doc. A/52/44, § 257.

603 Concluding Observations on Yugoslavia, (1999) UN doc. A/54/44, § 47.

604 Concluding Observations on the Czech Republic, (2004) UN doc. CAT/C/CR/32/2, § 5. *A.S. v. Hungary*, Comm. No. 4/2004, Comm. on the Elimination of Discrimination against Women (14 August 2006).

605 Waterboarding “involves strapping detainees to boards and immersing them in water to make them think they are drowning”: Jon M. Van Dyke, “Promoting Accountability for Human Rights Abuses” (2005) 8 *Chapman Law Review* 153, at p. 175.

606 ‘Short shackling’ is “an uncomfortable position where the detainee’s hands and feet are tied together for long periods of time”: B. Gasper, ‘Examining the Use of Evidence obtained under Torture: the case of British detainees may test the resolve of the European Convention in an era of Terrorism’ (2005) 21 *American University International Law Review* 277, at p. 297, n84.

607 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 24.

### 4.1.1 Absolute Prohibition of Torture<sup>608</sup>

Article 2(2) of CAT affirms the absolute nature of this provision:

“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.”

Therefore, torture is not allowed in any situation. In recent Concluding Observations on the U.S., the CAT Committee confirmed that the CAT “applies at all times, whether in peace, war or armed conflict ... without prejudice to any other international instrument”.<sup>609</sup>

Under Article 2(3), no one may invoke an order from a superior officer or a public authority as a justification for resort to torture.

The absolute nature of the prohibition on torture was confirmed in Concluding Observations on Israel in 1997. Israel had attempted to defend its use of certain interrogation techniques as a necessary means of combating terrorism, claiming that such methods had “thwarted ninety planned terrorist attacks saving countless lives”.<sup>610</sup> The CAT Committee nevertheless found that the interrogation methods were inhuman or degrading, and in combination amounted to torture. Though the CAT Committee:

“acknowledge[d] the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, [Israel] is precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1.”<sup>611</sup>

### 4.1.2 Aspects to Definition of Torture in Article 1

As with Article 7 of the ICCPR, the CAT prohibits torture, as well as cruel, inhuman or degrading treatment or punishment in Article 16. Nevertheless, the

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608 See Section 1.1 for general overview of the absolute nature of the prohibition.

609 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 14. The U.S. had tried to argue that the CAT did not apply in times of armed conflict, as that situation was exclusively covered by international humanitarian law.

610 See Israel’s Second Periodic Report under the Convention Against Torture, (1996) UN doc. CAT/C/33/Add.2/Rev. 1, especially at §§ 2-3, and 24.

611 Concluding Observations on Israel, (1997) UN doc. CAT/C/18/CRP1/Add. 4, § 134. See also Concluding Observations on Israel, (2002) UN doc. A/57/44 (2002) § 53.

definition of torture is significant, as greater legal consequences follow from an act of torture under CAT than follow from the perpetration of other forms of ill-treatment.<sup>612</sup> Therefore, it is important to go through the constituent elements of the Article 1 definition.

### a) Pain and Suffering

The pain or suffering must be severe and may be physical or mental in nature.<sup>613</sup>

### b) Intention

The perpetrator must intend to cause the high level of pain and suffering in order for it to be classified as “torture”. It may be sufficient if one is reckless as to whether one is causing extreme pain and suffering. It will not suffice for one to be negligent over whether one is causing extreme pain and suffering. Therefore, an act will not ordinarily constitute torture if that same act is unlikely to cause great suffering to an ordinary person, as the perpetrator is unlikely to have the requisite intention to cause extreme pain. If however the perpetrator is aware of the particular sensitivities of the victim, then the relevant act may constitute torture.<sup>614</sup>

### c) Purpose

Article 1 requires that there be a “purpose” for the act of torture, and provides a non-exhaustive list of relevant purposes. The “purpose” requirement is distinguishable from the requirement, discussed above, of “intention”. The “intention” requirement relates to an intention to inflict pain and suffering, whereas the requirement of a “purpose” relates to the motivation or the reason behind the infliction of that pain and suffering.<sup>615</sup> In order to maximise the protection offered by Article 1, it is submitted that any malicious purpose should fulfil this requirement.<sup>616</sup> However, Nowak suggests that the CAT may not

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612 These legal consequences are noted below. For example, universal jurisdiction only attaches to torture (see Section 4.8).

613 See e.g., Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 29.

614 Joseph, Schultz, and Castan, above note 31, § 9.07.

615 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, pp. 124-5.

616 Joseph, Schultz, and Castan, above note 31, §§ 9.09-9.10.

provide this degree of coverage: “if one person intentionally mistreats another person severely without thereby pursuing some purpose (e.g. purely sadistically), such acts are not torture but are rather cruel treatment”.<sup>617</sup> The CAT Committee has not confirmed whether it adopts such a strict view of the “purpose” criterion.

#### **d) Acts and Omissions**

It seems likely that the definition extends to both acts and omissions.<sup>618</sup> For example, the long term deliberate withholding of food should satisfy the definition.

#### **e) Public Officials or Persons Acting in an Official Capacity**

Article 1 requires that torture be “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”. This requirement is intended to protect States from being held accountable for acts over which they have no control. However, this provision should not be used to absolve States from their responsibility in cases where they have abjectly failed to take reasonable steps to respond or prevent acts of torture. The definition contains four levels of involvement which may render an official implicit in the act of torture. Those levels, in order of level of involvement (from highest to lowest), are:

- infliction
- instigation
- consent
- acquiescence

Interpretation of these levels of involvement, particularly the lowest level of “acquiescence”, are crucial when the actual torture is perpetrated by a non-State actor. The meaning of “acquiescence” arose in *Dzemajl et al v. Yugoslavia* (CAT 161/00). The case concerned inhuman or degrading

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617 Nowak, above note 97, p. 161.

618 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, p. 120; A. Boulesbaa, *The UN Convention against Torture and the Prospects for Enforcement*, Martinus Nijhoff, 1999, p. 15; Joseph, Schultz, and Castan, above note 31, § 9.08.

treatment under Article 16 rather than torture under Article 1; the “public official involvement” requirements for Article 16 are identical to those in Article 1 (see Section 4.2). In *Dzemajl*, the victims were Romani residents of a Roma settlement. Two Roma minors had confessed (under alleged duress) to raping a local Montenegrin girl. This incident sparked extreme racial violence against the victims. The residents of the settlement were warned by police to leave their homes, as their safety could not be ensured. Several hours later, at least three hundred non-Roma residents assembled in the settlement shouting that they were going to raze the settlement. The crowd soon began destroying everything in the settlement with arson (including the use of Molotov cocktails) and stones. The local police were clearly aware of the risk to the Roma residents and were present as the settlement was destroyed. The police failed to protect the Roma residents, or to stop the violence and destruction of their settlement. Ultimately, the settlement and all of the possessions of the Roma residents were completely destroyed. The CAT Committee found that the complainants had suffered cruel, inhuman or degrading treatment.<sup>619</sup> The police, as public officials, knew of the immediate risk and watched the events unfold. Their failure to take any appropriate steps to protect the complainants and their property was found to constitute “acquiescence” in the perpetration of the ill-treatment.

In *Agiza v. Sweden* (CAT 233/2003), the complainant suffered a breach of his Article 16 rights entailed in his treatment during an enforced deportation from Sweden to Egypt by U.S. agents.<sup>620</sup> The complaint, however, was against Sweden rather than the U.S.<sup>621</sup> The CAT Committee found that the Swedish authorities had willingly handed the complainant, a terrorist suspect, over to U.S. authorities, and had acquiesced in the ill-treatment of the complainant at a Swedish airport, and on the subsequent flight to Egypt.<sup>622</sup>

If there is no government involvement in an act of torture or ill-treatment, then there is no violation of CAT. In *G.R.B v. Sweden* (CAT 83/97), the complainant claimed that if she was deported to Peru she would face the risk of torture from a Peruvian rebel group. Therefore, she argued that her deportation would breach Article 3 of the Convention. The Committee found that

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619 *Dzemajl v. Yugoslavia* (161/00), §§ 3.6-3.8, 8.8-8.13, 9.2.

620 See Section 4.3.8.

621 The U.S. has not made a declaration under Article 22 CAT, so it was not possible for the complainant to make an individual complaint against the U.S. under the CAT.

622 *Agiza v. Sweden* (CAT 233/2003), § 13.4.

Article 3, which prohibits deportation to a State where one might face torture,<sup>623</sup> was not activated by this claim as torture by Peruvian non-government rebel groups did not constitute torture in accordance with Article 1. The Peruvian government could not be said to “acquiesce” in the acts, or future acts, of a terrorist group that it was actively fighting against.<sup>624</sup>

There has been much debate in recent decades over the classification of domestic violence as torture and ill-treatment. It is now generally accepted that domestic violence often entails extreme physical and psychological suffering.<sup>625</sup> However, the issue of “state involvement” is regarded as the biggest challenge in re-conceptualising domestic violence as torture; domestic violence has tended “to be viewed as a private matter between spouses rather than a state problem”.<sup>626</sup> However there is a duty upon law enforcement officials to prevent harm being inflicted upon women, including harm which occurs in a domestic context.<sup>627</sup> This approach to domestic violence has been accepted by the CAT Committee which has condemned “the prevalence of violence against women and girls, including domestic violence” in Concluding Observations.<sup>628</sup>

It may be noted, regarding the rights of women under CAT, that the CAT Committee has consistently expressed concern over the absence of legislation

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623 Article 3 is considered in greater detail below at Section 4.3.

624 See also *S.V. v. Canada* (CAT 49/96) (fear of abuse from Tamil groups upon return to Sri Lanka); *Rocha Chorlango v. Sweden* (CAT 218/02) (fear of rebel groups in Ecuador). In *Elmi v. Australia* (CAT 120/98), a prospective deportee argued that his deportation to Somalia would expose him to a real risk of torture by Somalian militia groups. The Committee found that the group in question was exercising “certain prerogatives that are comparable to those normally exercised by legitimate governments” (§ 6.5) and thus fell within the definition of “public official or persons acting in official capacity” required by Article 1. The situation in *Elmi* was unique in that Somalia had no recognized government at the time of the consideration of the complaint. In more recent cases, the CAT Committee has found that the situation in Somalia has changed to the extent that a central government is now identifiable, so local clan militias no longer classify as ‘public officials’ for the purposes of Article 1. Therefore, the risk of torture by such clan militias will no longer activate protection under CAT unless the government is somehow involved in such acts of torture (see *H.M.H.I. v. Australia* (CAT 177/01)).

625 See also Section 3.2.13; see also CEDAW General Recommendation No. 19, particularly § 23.

626 D. Miller, “Holding States to their Convention Obligations”, (2003) 17 *Georgetown Immigration Law Journal* 299, p. 318.

627 A. Montavon-McKillip, “CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law”, (2002) 44 *Arizona Law Review* 247, p. 254.

628 See e.g., Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, § 5 (see also § 4). See also Concluding Observations on Ecuador, (2006) UN doc. CAT/C/ECU/CO/3, § 17; See also Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, § 6; Concluding Observations on Bahrain, (2005) UN doc. CAT/C/CR/34/BHR, §§ 6-7; Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 27.

banning female genital mutilation ('FGM') in a number of States parties. These comments indicate that such an absence of legislation, or an absence of the enforcement of such legislation, amounts to "acquiescence" of FGM by State agents.<sup>629</sup> Furthermore, the permissibility of perverse defences to acts of torture or ill-treatment, such as exemption from punishment for a rapist if he marries the victim,<sup>630</sup> may also constitute "acquiescence". Finally, official involvement in or toleration of the trafficking and exploitation (including sexual exploitation) of trafficked women breaches CAT.<sup>631</sup>

In regard to private acts of torture, the CAT is possibly narrower than the ICCPR due to the explicit requirement of some minimum level of involvement by a public official. Under Article 7, States parties are required to take reasonable measures to prevent and punish acts of torture and other ill-treatment by persons acting in a private capacity.<sup>632</sup> It is possible, though uncertain, that the level of government involvement required under Article 7 is less than the standard of "acquiescence", the minimum threshold required under CAT.

#### **f) Pain or Suffering Inherent in or Incidental to Lawful Sanctions**

Pain or suffering that occurs as a result of a "lawful sanction" is expressly excluded from the definition of torture in Article 1. This raises the question of whether a sanction which is lawful under the domestic law of a State, which gives rise to pain or suffering which would otherwise amount to torture, is excluded from Article 1. For example, it is assumed that burning at the stake, or crucifixion, amount to torture. Would such punishments be excused from being classified as torture simply because they were prescribed as legitimate punishments in a State's law? A preferable interpretation of this exclusion is that the meaning of "lawful" in this context denotes compliance with international law standards. Sanctions which fail to conform to international standards should fall outside of this exclusion so that they can be classified as torture under Article 1.<sup>633</sup> Such an interpretation would prevent States from avoiding liability for acts of torture by prescribing them as lawful under their domestic

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629 See e.g., Concluding Observations on Cameroon, (2004) UN doc. CAT/C/CR/31/6, § 7.

630 Concluding Observations on Cameroon, (2004) UN doc. CAT/C/CR/31/6, § 9.

631 Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 32; see also Concluding Observations on Austria, (2005) UN doc. CAT/C/AUT/CO/3, § 4; Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, § 4.

632 Section 3.1.2.

633 Joseph, Schultz, and Castan, above note 31, § 9.18.

legislation. The importance of the interpretation of this exception is highlighted in the case of some Islamic countries which have sought to prescribe certain punishments arising under Islamic *shariah* law, including corporal punishments, in their domestic legislation.<sup>634</sup> It may be that “the role of the “lawful sanctions” exclusion is very restricted; its role may be solely to clarify that “torture” does not include mental anguish resulting from the very fact of incarceration.”<sup>635</sup> However the issue is not resolved, and it may be that this exception exempts even the cruellest treatment from classification as “torture” if such treatment is authorised by domestic law.<sup>636</sup>

This exception regarding “lawful sanctions” does not apply beyond torture to cruel, inhuman or degrading treatment or punishment under Article 16. In Concluding Observations, the CAT Committee has commonly classified *shariah* punishments as breaches of the Convention, but it has failed to specify whether the breaches were of Article 1 or 16.<sup>637</sup>

## 4.2 Cruel, Inhuman Or Degrading Treatment Under CAT

Article 16 of CAT states:

“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.”

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634 C. Ingelse, *The UN Committee against Torture: An Assessment*, Martinus Nijhoff, 2001, pp.213-214.

635 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, p. 119.

636 J. van der Vyer, “Torture as a crime under International Law” (2003) 67 *Albany Law Review* 427, p. 432.

637 See, e.g., Concluding Observations on Saudi Arabia, (2002) UN doc. CAT/C/CR/28/5, § 100; Concluding Observations on Yemen, (2004) UN doc. CAT/C/CR/31/4, § 6; Concluding Observations on Egypt, (2002) UN doc. CAT/C/CR/29/4 A/58/44, § 39.

The types of treatment that constitutes cruel, inhuman or degrading treatment are not defined under Article 16. The requirement that the acts be committed with a degree of involvement by a public official or person acting in an official capacity is expressed in a similar manner to the analogous requirement under Article 1. The other Article 1 requirements regarding severity, intention and purpose are presumably applied more leniently, if at all, in determining whether a breach has occurred.<sup>638</sup> For example, negligent acts may constitute breaches of Article 16 but not acts of torture under Article 1.

A breach of Article 16 does not attract the same consequences under CAT as a breach of Article 1. For example, many of the subsidiary obligations, such as the obligation to impose criminal sanctions for torture under Article 4, do not explicitly apply to Article 16. Only the ancillary obligations in Articles 10 to 13 expressly apply to ill-treatment which falls short of torture.<sup>639</sup> However, the CAT Committee may extend obligations outside Articles 10-13 to Article 16 treatment by implication.<sup>640</sup>

In *Dzemajl et al v. Yugoslavia* (CAT 161/00), the CAT Committee found that the burning and destruction of the complainants' houses and possessions constituted acts of cruel, inhuman or degrading treatment.<sup>641</sup> Aggravating factors in the circumstances were that some of the complainants were still hidden in the Roma settlement when the destruction began, and the high degree of racial motivation driving the attacks.

In *Agiza v. Sweden* (CAT 233/2003), the CAT Committee found that the complainant had suffered breaches of his Article 16 rights on his enforced flight from Sweden to Egypt accompanied by U.S. agents. For the flight, he had been hooded, strip-searched, his hands and feet bound, and strapped to a mattress.

In Concluding Observations, the CAT Committee has indicated a number of breaches of the CAT without specifying whether the treatment is torture or other ill-treatment. It is submitted that the following are examples of breaches of Article 16 rather than of Article 1:

- the detention of child offenders as young as the age of seven in specialized hospitals and protection units.<sup>642</sup>

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638 Joseph, Schultz, and Castan, above note 31, § 9.23.

639 These obligations are all addressed below.

640 See, e.g., Section 4.6.3.

641 See also Concluding Observations on Israel, (2002) UN doc. A/57/44, § 50.

642 Concluding Observations on Yemen, (2004) UN doc. CAT/C/CR/31/4, § 6.

- the long term detention of asylum seekers while their asylum claims are considered.<sup>643</sup>
- Detention in a cell for 22 hours a day without meaningful activities to occupy the prisoner's time.<sup>644</sup>
- Non-segregation of juvenile and adult prisoners, and non-segregation of male and female prisoners.<sup>645</sup>
- Incidents of bullying which causes self harm and suicide in the armed forces.<sup>646</sup>
- Inappropriate use of chemical, irritant, incapacitating and mechanical weapons by law enforcement authorities in the context of crowd control.<sup>647</sup>
- Reprisals, intimidation and threats against persons reporting acts of torture or ill-treatment.<sup>648</sup>
- Prisoners having to pay for a portion of the expenses related to their imprisonment.<sup>649</sup>
- The wearing of hoods or masks by officers effecting a forced deportation.<sup>650</sup>
- The use of electro-shock stun belts and restraint chairs as methods of constraint.<sup>651</sup>
- Incommunicado detention of up to five days<sup>652</sup> or longer.<sup>653</sup>
- Prolonged solitary confinement as a measure of retribution in prisons.<sup>654</sup>

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643 Concluding Observations on Latvia, (2004) UN doc. CAT/C/CR/31/3, § 6; Concluding Observations on Croatia, (2004) UN doc. CAT/C/CR/32/3, § 9.

644 Concluding Observations on Croatia, (2004) UN doc. CAT/C/CR/32/3, § 8; see also Concluding Observations on Spain, (2002) UN doc. CAT/C/CR/29/329, § 56.

645 Concluding Observations on Bosnia and Herzegovina, (2005) UN doc. CAT/C/BIH/CO/1, § 14.

646 Concluding Observations on UK – Dependent Territories, (2004) UN doc. CAT/C/CR/33/3, § 4; Concluding Observations on the Russian Federation, (2002) UN doc. CAT/C/CR/28/4, § 95; Concluding Observations on Armenia, (2001) UN doc A/56/44, § 37; Concluding Observations on Ukraine, (2001) UN doc. CAT/C/XXVII/Concl.2, § 136.

647 Concluding Observations on Canada, (2005) UN doc. CAT/C/CR/34/CAN, § 4; see also Concluding Observations on Indonesia, (2002) UN doc. CAT/C/GC/2002/1, § 42; Concluding Observations on the UK, (1996) UN doc. A/51/44, § 63.

648 Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, § 6; Concluding Observations on Tunisia, (1999), UN doc. A/54/44, §§ 97, 102 (c).

649 Concluding Observations on the Czech Republic, (2004) UN doc. CAT/C/CR/32/2, § 5.

650 Concluding Observations on Switzerland, (2005) UN doc. CAT/C/CR/34/CHE, § 4.

651 Concluding Observations on the U.S. (2000) UN doc. A/55/44, § 160; see also Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 35.

652 Concluding Observations on Spain, (1997), UN doc. A/58/44, § 61.

653 See e.g., Concluding Observations on Russian Federation, (1997) UN doc. A/52/44, § 42.

654 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 36.

### 4.3 Non-Refoulement

Article 3 of CAT states:

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.”

The large majority of individual complaints under CAT have concerned alleged violations of Article 3.

Article 3 applies only to deportations which might expose a person to a real risk of torture under Article 1, rather than breaches of a person’s rights under Article 16.<sup>655</sup> In this respect, it seems that the protection for prospective deportees is broader under Article 7 of the ICCPR.<sup>656</sup>

It is not necessary for a State to offer asylum or permanent residency to a person who cannot be deported under Article 3. It is simply prohibited from returning a person to a State where he or she might be tortured. It would be possible for example for the person to be deported to a third State, so long as he or she did not face torture, or subsequent deportation to a State where he/she faces torture, in that third State.<sup>657</sup>

If the expulsion of a person (who claims a breach of article 3) follows proceedings which are procedurally irregular, then a breach of Article 3 may be found regardless of the substantive risk of torture in the receiving State. For example, in *Brada v. France* (CAT 195/02), the complainant, who had challenged his deportation to Algeria for fear of torture, was deported prior to his exhaustion of domestic remedies in France. Indeed, a French appeal court ultimately found that the deportation breached French law. Therefore, the CAT Committee found a breach of Article 3.<sup>658</sup>

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655 General Comment 1 (CAT), § 1.

656 See Section 3.2.12. For comparative analysis of the *non-refoulement* rule under international and regional instruments, see Joint Third Party intervention in *Ramzy v. The Netherlands*, reprinted in Appendix 11.

657 See e.g., *Aemei v. Switzerland* (CAT 34/95), § 11.

658 See also *Arkauz Arana v. France* (CAT 63/97) and *Agiza v. Sweden* (CAT 233/03). See also Concluding Observations on Finland, (2005) UN doc. CAT/C/CR/34/FIN, § 4.

### 4.3.1 Substantiating a Claim under Article 3

The type of information which may assist the CAT Committee in determining whether a violation of Article 3 exists is described in General Comment 1 (CAT), which is reproduced above in Section 2.1.2(e).

### 4.3.2 Burden of Proof

The burden of proof for establishing a breach of Article 3 is initially on the complainant.<sup>659</sup> The risk of torture in a receiving State must “go beyond mere theory or suspicion”, but one need not establish that torture would be “highly probable”.<sup>660</sup> It must also be established that the “danger of being tortured” is “personal and present”.<sup>661</sup> For example, in *A.D. v. Netherlands* (CAT 96/97), the prospective deportee submitted information regarding prior harassment and torture by a previous Sri Lankan government. His claim did not concern the behaviour of the current government so his Article 3 claim failed.<sup>662</sup> Long time lapses may also mean that a threat of torture is not “current”.<sup>663</sup> In *S.S.S. v. Canada* (CAT 245/04), the complainant failed to establish that he faced torture upon return to India: even if he faced a real danger of torture in the Punjab area (which the CAT Committee doubted), “the Committee [did] not consider that he would be unable to lead a life free of torture in other parts of India”.<sup>664</sup>

Where a complainant provides a certain level of detail and information the burden of proof may then shift to the State party. In *A.S. v. Sweden* (CAT 149/99), the prospective deportee feared being stoned to death for adultery upon her forced return to Iran. She had:

“submitted sufficient details regarding her sighne or muttah marriage [into which she had allegedly been forced] and alleged arrest, such as names of persons, their positions, date, addresses, name of police station etc. that could have, and to a certain extent have been, certified by the Swedish immigration authorities, to shift the burden of proof.”<sup>665</sup>

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659 General Comment 1 (CAT), §§ 4-5.

660 General Comment 1 (CAT), § 6.

661 General Comment 1 (CAT), § 7.

662 See also *S.S. v. Netherlands* (CAT 191/01); *S.A. v. Sweden* (CAT 243/04); *M.A.M. v. Sweden* (CAT 196/02).

663 See *H.A.D. v. Switzerland* (CAT 216/99); *A.I v. Switzerland* (CAT 182/01).

664 *S.S.S. v. Canada* (CAT 245/04), § 8.5.

665 *A.S v. Sweden* (CAT 149/99), § 8.6.

She had also submitted evidence of the bad human rights situation for women in her position in Iran. The CAT Committee found that it was the failure of the State party to make sufficient inquiries and to follow up the evidence provided by the complainant that led the State party to find the claim to be unsubstantiated, rather than a lack of evidence provided by the complainant. Therefore, the CAT Committee found that the complainant had indeed established that her prospective deportation to Iran would breach Article 3.

### 4.3.3 Circumstances of the Receiving Country

As explicitly noted in Article 3(2), the CAT Committee, in considering Article 3 cases, will take account of “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”. In determining the human rights situation of the country the Committee will examine the reports of international and domestic human rights bodies and NGOs. For example in *A.S. v. Sweden* (CAT 149/99), the prospective deportee feared return to Iran where she argued that she faced death by stoning. The Committee noted UN and NGO reports, which confirmed that stoning was commonly inflicted as a penalty for adultery in Iran. In this case, the evidence on the general circumstances of Iran, combined with the complainant’s testimony of her personal risk, lead the CAT Committee to find that her deportation to Iran would violate Article 3.

### 4.3.4 Personal Risk

It is not enough to establish that a receiving State has a very bad human rights record. One must also establish that one is at personal risk of torture upon return to such a State. Where the complainant does not produce any evidence of personal mistreatment or torture and relies solely upon information relating to the general situation in a State, the CAT Committee is very unlikely to find a breach of Article 3. This is so, for example, even if the relevant individual is a member of an ethnic group which faces routine persecution in that country. The individual must show that he or she personally, as a member of that group, is at risk.<sup>666</sup>

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666 *Z.Z. v. Canada* (CAT 123/98), § 8.4.

This requirement of “personal risk” also works in reverse. That is, Article 3 should protect someone from being returned to a State where, although there is no pervasive abuse of human rights in that State, he or she will be personally at risk.<sup>667</sup>

To establish a situation of “personal risk”, the complainant’s account of his or her previous personal history of torture/mistreatment by the receiving State will be examined. The CAT Committee has acknowledged that sometimes these accounts will contain inconsistencies or be inaccurate in some way: “complete accuracy is seldom to be expected by victims of torture”.<sup>668</sup> The CAT Committee will also consider and may attach importance to the explanations for inconsistencies given by the complainant.<sup>669</sup> However, while the CAT Committee recognises the impact that torture may have on the accuracy of victim testimony, it does require that past allegations of torture be substantiated in some way. Complaints will not be upheld if the alleged victim’s story is simply not credible. For example, in *H.K.H. v. Sweden* (CAT 204/02), the alleged victim provided inconsistent information to the State party and later alleged that this was caused by the effects of torture. He did not connect the inconsistencies in his testimony to torture until he faced the Aliens Appeal Board; he also failed to provide any details of the alleged torture in domestic proceedings or in his submission to the CAT Committee. Furthermore, the CAT Committee noted that the claims contained many other inconsistencies which remained unexplained and which cast doubt over the alleged victim’s credibility. The CAT Committee duly found that the Article 3 claim was not substantiated.<sup>670</sup>

Each claimant is entitled to individual consideration of his or her circumstances. States cannot automatically deny the claims of certain “categories” of people. For example, States cannot create lists of supposedly “safe” countries of origin. Both the CAT Committee<sup>671</sup> and the HRC<sup>672</sup> have found that this process does not accommodate, respectively, Article 3 CAT or Article 7 ICCPR. Therefore, a generalized process (i.e. a non-individualized determination) which affects an individual’s rights to be considered and granted protection from torture, is not acceptable.

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667 *A.S. v. Sweden* (CAT149/99), § 8.3.

668 *Tala v. Sweden* (CAT 43/1996), § 10.3.

669 *Ahmed Karoui v. Sweden* (CAT 185/01), § 10.

670 See also, e.g., *S.U.A. v. Sweden* (CAT 223/02); *A.K. v. Australia* (CAT 148/99); *Zare v. Sweden* (256/04).

671 CAT Concluding Observations on Finland, (1997) UN doc. A/51/44, § 62.

672 Concluding Observations on Estonia, (2003) UN doc. CCPR/C/77/EST, § 13.

### 4.3.5 The Decisions of Domestic Courts

Nearly all Article 3 cases have been appealed at the domestic level. In many cases, domestic courts will have found on the facts that the prospective deportee does not face a relevant danger of torture in the receiving State.<sup>673</sup> In such circumstances, the CAT Committee is reluctant to “overrule” those findings.<sup>674</sup> Indeed, “[c]onsiderable weight will be given, in exercising the Committee’s jurisdiction pursuant to Article 3 of the Convention, to findings of fact that are made by organs of the State party concerned”.<sup>675</sup> However, “[t]he Committee is not bound by such findings and instead has the power, provided by Article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case”.<sup>676</sup> It may be, therefore, that the CAT Committee is more prepared than the HRC to “overrule municipal findings of fact in the absence of procedural deficiencies in the relevant municipal proceedings”,<sup>677</sup> at least in Article 3 cases. Given the fact that there are numerous Article 3 cases before CAT, and relatively few like cases before the HRC, it is currently difficult to empirically determine whether CAT is indeed more lenient in this respect.<sup>678</sup>

### 4.3.6 Risk of further deportation if Returned to the “Receiving State”

In assessing whether it is safe for an individual to be deported to the receiving State, the CAT Committee will consider whether there is a risk of subsequent deportation to a country where the complainant may be subjected to torture.<sup>679</sup> In *Korban v. Sweden* (CAT 88/97), the complainant faced deportation to Jordan. He feared that once deported to Jordan he would be subsequently deported to Iraq, where he risked being tortured. In assessing the risk of subsequent deportation, the CAT Committee examined reports from a variety of

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673 Sometimes Article 3 obligations have not been addressed by courts, which may for example have focused purely on whether the person is a refugee under the Refugee Convention (see also Section 4.3.7).

674 Joseph, Schultz, and Castan, above note 31, §9.71.

675 General Comment 1 (CAT), § 9(a).

676 General Comment 1 (CAT), § 9(b).

677 Joseph, Schultz, and Castan, above note 31, § 9.8.

678 For an example of CAT overruling a domestic court’s assessment, see *Dadar v. Canada* (CAT 258/04).

679 General Comment 1 (CAT), § 2.

sources. These reports provided evidence that “some Iraqis have been sent by the Jordanian authorities to Iraq against their will”.<sup>680</sup> On this basis, the CAT Committee found that the risk of subsequent deportation could not be excluded, so the proposed deportation to Jordan would be in breach of Article 3. The CAT Committee further noted that Jordan did not allow individual complaints under Article 22, so, if threatened with deportation to Iraq from Jordan, the complainant would not have the possibility of submitting another communication under CAT.

### 4.3.7 Article 3 and the Refugee Convention

Claims under Article 3 are often lodged by individuals who are seeking asylum or claiming refugee status. Clearly, issues under both Article 3 and the Convention Relating to the Status of Refugees 1951 (the Refugee Convention), may overlap. However, Article 3 decisions are conceptually separate from those made under the Refugee Convention.<sup>681</sup> Complainants under Article 3 should construct their arguments around the risk of torture, rather than attempt to establish a right of asylum under the terms of the Refugee Convention.<sup>682</sup>

The Refugee Convention is both broader and narrower than Article 3 of CAT. It is broader as a “refugee”, a person with a right to non-refoulement under Article 33 of that Convention, is a person who faces a “well founded fear of persecution” on particular grounds (e.g. race, religion) in a receiving State. “Persecution” may fall short of “torture”, so the Refugee Convention applies in circumstances where one fears a lesser form of ill-treatment in a receiving State. On the other hand, the reasons why one might face torture are irrelevant to an Article 3 assessment, whereas the reasons why one might face persecution are relevant under the Refugee Convention.<sup>683</sup> Furthermore, Article 3 rights are absolute. Refugee rights under the Refugee Convention are denied

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680 *Korban v. Sweden* (CAT 88/97), § 6.5.

681 Joseph, Schultz, and Castan, above note 31, § 9.83.

682 See, e.g., *X v. Spain* (CAT 23/95), *Mohamed v. Greece* (CAT 40/96). See, for a comparison of Article 3 obligations and those under the Refugee Convention, S. Taylor, “Australia’s implementation of its Non-Refoulement Obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights”, (1994) 17(2) *University of New South Wales Law Journal* 432.

683 One must be persecuted for a “Convention reason” per Article 1 of the Refugee Convention; one must have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

under Article 1F for certain categories of people, such as people who have committed war crimes, crimes against humanity, and crimes against peace. In contrast, such people have absolute rights not to be deported in situations where they face a risk of torture under Article 3.<sup>684</sup>

#### 4.3.8 Rendition and the War on Terror

There have been numerous media allegations during the “war on terror” that “renditions” have taken place in respect of suspected terrorists. That is, terrorist suspects have apparently been taken to States where they will be tortured in order to extract information of use in the “war on terror”. Renditions are clear breaches of Article 3.

The issue of rendition arose implicitly in *Agiza v. Sweden* (CAT 233/03). The complainant was suspected of terrorist activities. His claim for asylum in Sweden failed, and he was immediately deported to Egypt, so he was not afforded an opportunity for appeal. His swift deportation was due to his classification as a national security risk by Swedish authorities. The State party tried to defend its actions by reference to the fact that it had gained a diplomatic assurance from Egypt that the complainant would not be subjected to ill-treatment upon his return. Staff at the Swedish embassy in Egypt were allowed to meet with and monitor the complainant upon his return.

The CAT Committee found a number of breaches of Article 3 in this case. A procedural breach of Article 3 arose with regard to the swiftness of the deportation, which did not allow for an appeal against the deportation decision. It also found that the complainant faced a substantial risk of torture upon his return to Egypt, which was foreseeable at the time of his deportation. The risk was heightened due to his high national security rating. The assurance obtained from Egypt did not absolve Sweden of this breach; the monitoring mechanism was found to be inadequate. For example, the Swedish authorities in Egypt were not able to interview the complainant alone without the presence of Egyptian authorities.

The removal of the complainant from Sweden to Egypt had been undertaken by U.S. agents, facilitated in Sweden by Swedish authorities. The CAT

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684 See e.g., *Paez v. Sweden* (CAT 39/96); see also Concluding Observations on Canada, (2005) UN doc. CAT/C/CR/34/CAN, § 3. The same absolute protection applies under Article 7 ICCPR; see Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 17.

Committee does not explicitly acknowledge that this was an apparent case of so-called “rendition” of a terrorist suspect to a State that would be likely to torture him.<sup>685</sup> The CAT Committee decision nevertheless makes clear that rendition is not tolerated under CAT. Article 1 and 3 remain absolute rights, regardless of any arguments regarding the supposed exigencies of the “war on terror”.<sup>686</sup>

### 4.3.9 Diplomatic Assurances

Diplomatic assurances, also known as diplomatic guarantees, diplomatic contacts, and memoranda of understanding, refer to arrangements between the governments of two States that the rights of a particular individual will be upheld when they are returned from one State to the other. They typically arise in the context of the refoulement and expulsion of an individual from one country to another.

These assurances will often contain provisions such as “assurances for the respect for the deported person’s due process safeguards upon arrival to the returned country, refraining from torture and ill-treatment, adequate conditions of detention, and regular monitoring visits”.<sup>687</sup> They aim to ensure that the human rights of the individual are respected and that the receiving State upholds its obligations under international law.

However, diplomatic assurances are not an effective mechanism for protecting individuals from torture and ill-treatment. A government will seek a diplomatic assurance when it believes, in light of what it knows about the practices of the receiving State, that there is in fact a risk of torture or ill-treatment if the individual is returned to that State. Thus the returning State is aware that torture and ill-treatment is systemically practiced in the receiving State, but seeks to return the individual regardless. Regarding this situation, Alvaro

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685 The case has attracted considerable media and NGO attention and is commonly cited as an example of rendition: see, e.g., <http://web.amnesty.org/library/Index/ENGEUR420012004> (accessed 28 July 2006).

686 S. Joseph, “Rendering Terrorists and the Convention against Torture”, (2005) 5, *Human Rights Law Review*, p. 339, p. 346; see also Concluding Observations on Albania, (2005) UN doc. CAT/C/CR/34/ALB, § 7.

687 Statement By The Special Rapporteur Of The Commission On Human Rights On Torture (Wednesday, 26 October 2005) at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/005D29A66C57D5E5C12570AB002AA156?opendocument>

Gil-Robles, the Council of Europe Commissioner for Human Rights, noted in 1994:

“The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains”.<sup>688</sup>

The UN High Commissioner for Human Rights notes that many of the States who give such assurances are States that routinely breach their international human rights obligations.<sup>689</sup> Therefore, she notes:

“...if a government does not comply with binding law, it is difficult to see why it would respect legally non-binding agreements.”<sup>690</sup>

There is no international legal structure which regulates the use and enforcement of diplomatic assurances, so minimal legal weight may attach to an arrangement on which the well-being and life of an individual may depend. For example, there is no international definition of a diplomatic assurance, which outlines its parameters and operation.<sup>691</sup> Once a diplomatic assurance is established there is nothing which gives it legal weight or authority. In concluding his 2005 report to the General Assembly, the Special Rapporteur on Torture clearly rejected the use of diplomatic assurances, emphasising the lack of legal process and effect attached to diplomatic assurances as a central reason for his position:

“diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached and the person who the assurances aim to protect has no recourse if the assurances are violated.”<sup>692</sup>

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688 Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004)13, § 19.

689 See also UN Press Release “Diplomatic Assurances Not An Adequate Safeguard For Deportees, UN Special Rapporteur Against Torture Warns” (23 August 2005) available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9A54333D23E8CB81C1257065007323C7?opendocument>

690 Report of the High Commissioner for Human Rights, “Protection of human rights and fundamental freedoms while countering terrorism”, (2006) UN doc. E/CN.4/2006/94 A, § 26.

691 Report of the High Commissioner for Human Rights, “Protection of human rights and fundamental freedoms while countering terrorism”, (2006) UN doc. E/CN.4/2006/94 A, § 23.

692 Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (2005) UN doc. A/60/316, § 51.

Acts of torture or ill-treatment are illegal acts which are often shrouded in secrecy, so it is almost impossible to effectively monitor the outcome of a diplomatic assurance upon the return of the individual to the State. The Special Rapporteur has stated that:

“Post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”<sup>693</sup>

The ineffective operation of diplomatic assurances is evidenced in a report by Human Rights Watch which contains numerous examples of cases where diplomatic assurance failed to protect a returnee from torture and/or ill-treatment upon return.<sup>694</sup> Such reports only refer to the cases which have actually come to light. Many instances of torture are not reported, so we can assume that diplomatic assurances have failed in even more cases.

Diplomatic assurances aim to protect a particular individual in a context where torture and ill-treatment is known or strongly suspected to occur. It appears to promote “convenience” and “quick fixes” in difficult individual cases, without any attempt to initiate or sustain systemic change within the receiving State.<sup>695</sup>

The use of diplomatic assurances is not compatible with the absolute prohibition on torture and their operation undermines the efforts of the global community to ensure that the prohibition is upheld.

### a) Case law on Diplomatic Assurances

In *Mamatkulov and Askarov v. Turkey*,<sup>696</sup> the European Court of Human Rights recently found that the extradition of two people from Turkey to Uzbekistan did not breach the ECHR prohibition on torture, as Turkey had obtained an assurance from Uzbekistan that ill-treatment would not take place.<sup>697</sup> The CAT

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693 *Ibid.*, § 46.

694 Human Rights Watch, “Still at risk: diplomatic assurances no safeguard against torture”, (2005), available at <http://hrw.org/reports/2005>.

695 Statement By The Special Rapporteur Of The Commission On Human Rights On Torture (Wednesday, 26 October 2005) available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/005D29A66C57D5E5C12570AB002AA156?opendocument>; see also Report of the High Commissioner for Human Rights, “Protection of human rights and fundamental freedoms while countering terrorism”, (2006) UN doc. E/CN.4/2006/94 A, § 24.

696 *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99, 46951/99, Eur. Ct. of Hum. Rts. (Grand Chamber) (4 February 2005), §§ 76-77.

697 Cf *Chahal v. The United Kingdom*, No. 22414/93, Eur. Ct. of Hum. Rts. (15 November 1996), §§ 92 and 105.

Committee’s approach to such assurances is more sceptical, as exhibited in *Agiza v. Sweden* (CAT 233/03). This case, along with the CAT Committee’s view of the relevant assurance, is discussed above at Section 4.3.8. The CAT Committee’s scepticism was also manifested in Concluding Observations on the U.S.:

“the State should only rely on ‘diplomatic assurances’ in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements. The State party should also provide detailed information to the Committee on all cases since 11 September 2001 where assurances have been provided.”<sup>698</sup>

#### 4.4 Claims Of National Security Regarding State Party Information on Torture

While national security considerations cannot justify departure from freedoms from torture, they might be relevant to a State party’s duty to cooperate with the CAT Committee (or the HRC) during the consideration of an individual complaint. For example, does a State party have to share sensitive information with these Committees if that information is relevant to a complaint?

This issue arose in *Agiza v. Sweden* (233/03), the facts of which are discussed in Section 4.3.8. The State party withheld information from the CAT Committee regarding its knowledge in early 2002 of a complaint of ill-treatment by the complainant upon his return to Egypt. This information was withheld for two years, and eventually was submitted by counsel for the complainant. Sweden was thus caught “red-handed” in misleading the CAT Committee.<sup>699</sup> The State party attempted to justify its actions by stating that revelation of the information in early 2002 could have jeopardized the safety of the complainant. The CAT Committee did not accept these arguments, and found that “the deliberate and misleading withholding of information in *Agiza* constituted a ... breach of Article 22”.<sup>700</sup>

698 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 21.

699 It is perhaps naïve to believe that such misleading has never taken place before. Here however, Sweden was ‘caught’ doing so: see S. Joseph, “Rendering Terrorists and the Convention Against Torture”, (2005) 5 *Human Rights Law Review* 339, p. 346.

700 *Ibid*, p. 345.

The CAT Committee recognised that cases might arise where a State party has a legitimate wish to keep information from it, due to national security considerations. However, the correct approach in such a case was not to simply withhold the information and effectively mislead the CAT Committee. Rather, it was to seek some sort of permission from the CAT Committee to withhold the information. The CAT Committee claimed that its procedures were “sufficiently flexible”<sup>701</sup> to take account of such circumstances. If so, it is advisable for the CAT Committee to amend its rules of procedure, which make no reference to such situations, which are perhaps more likely to arise during the “war on terror”.<sup>702</sup>

## 4.5 Death Penalty

It may be noted that the CAT, unlike the ICCPR, does not explicitly allow the death penalty, so it is possible that the CAT is significantly broader than the ICCPR on this issue. In Concluding Observations on Armenia, the CAT Committee seemed to suggest that the imposition of the death penalty, as well as the death row phenomenon, breached Article 16.<sup>703</sup> On the other hand, in (earlier) Concluding Observations on China, the CAT Committee indicated that only “some methods of capital punishment” breached Article 16.<sup>704</sup> Furthermore, in 2006 Concluding Observations on the U.S., the Committee indicated that capital punishment is not of itself a CAT breach, by stating that the U.S. “should carefully review its execution methods”.<sup>705</sup> Clearly, this statement anticipates the continued occurrence of execution. However, the CAT Committee went on to say that the method of lethal injection should be reviewed due to its potential to cause severe pain and suffering.<sup>706</sup> Given that

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701 *Agiza v. Sweden* (CAT 233/03), § 13.10.

702 S. Joseph, “Rendering Terrorists and the Convention Against Torture”, (2005) 5 *Human Rights Law Review* 339, p.346. It may be noted that the State party did share sensitive information with the CAT Committee over its reasons for believing that the complainant posed a national security risk to Sweden. The CAT Committee acknowledged receipt of the information, but did not publish that information in its final views. See *Agiza v. Sweden* (CAT 233/03), § 4.11.

703 Concluding Observations on Armenia, (2001) UN doc. A/56/44, § 39; see also Concluding Observations on Jordan, (1995) UN doc. A/50/44, § 169; Concluding Observations on Namibia, (1997) UN doc. A/52/44 § 250; Concluding Observations on Libyan Arab Jamahiriya, UN doc. A/54/44 (1999), § 189.

704 Concluding Observations on China, (1996) UN doc. A/51/44, § 144.

705 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 31.

706 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 31.

lethal injection is often thought to be the most humane method of execution,<sup>707</sup> the potential outlawing of such a method could severely restrict a State's ability to carry out a death penalty without breaching the CAT.

#### 4.6 Positive Duties Under CAT

As under Articles 7 and 10 of the ICCPR, States parties to the CAT have extensive positive and procedural duties to take measures that prevent or minimize breaches of the CAT. For example, under Article 10(1), States parties must:

“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.”

Furthermore, under Article 10(2), “[e]ach State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons”.

Under 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.”

In Concluding Observations, the CAT Committee has given the following clues regarding appropriate positive measures by States:

- All detainees, wherever held, must be registered. Registration should contain the detainee's identity, as well as the date, time and place of detention, the identity of the detaining authority, the grounds for detention, state of health of detainee at time of being taken into custody and any changes thereto, time and place of interrogations, and dates and times of any transfer or release.<sup>708</sup>

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<sup>707</sup> See, e.g., J. Gibeaut “A painful way to die? Once called humane, lethal injection is now claimed to be cruel and unusual”, (April 2006) 92 *ABA Journal* 20.

<sup>708</sup> Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 16.

- Medical staff in prisons should be independent doctors, rather than members of the prison service.<sup>709</sup>
- Medical examinations should routinely take place before all forced removals by air.<sup>710</sup> Independent human rights observers should be present during such removals.<sup>711</sup>
- Doctors should be trained to identify signs of torture.<sup>712</sup>
- Social care institutions should employ trained personnel, such as social workers, psychologists, and pedagogues.<sup>713</sup>
- Introduction of audio and video taping facilities for interrogations.<sup>714</sup>
- Allow visits by independent human rights monitors to places of detention without notice.<sup>715</sup>
- Body cavity searches in prisons are conducted by medical staff in non-emergency situations.<sup>716</sup>
- Police officers should wear a form of personal identification so that they are identifiable to any person who alleges ill-treatment.<sup>717</sup>
- The introduction in law of “observance of the principle of proportionality in exercising measures of coercion”, as well as “the involvement of relevant non-governmental organizations during the deportation process”.<sup>718</sup>

#### 4.6.1 Duty to Enact and Enforce Legislation

Under Article 2(1), States parties must “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.

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709 Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, § 6.

710 Concluding Observations on Germany, (2004) UN doc. CAT/C/CR/32/7, § 5.

711 Concluding Observations on Switzerland, (2005) UN doc. CAT/C/CR/34/CHE, § 4.

712 Concluding Observations on Uzbekistan, (2002) UN doc. A/57/44, § 115.

713 Concluding Observations on Croatia, (2004) UN doc. CAT/C/CR/32/3, § 9.

714 Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, § 6; see also Concluding Observations on the UK, (1996) UN doc. A/51/44, § 63.

715 Concluding Observations on Uganda, (2005) UN doc. CAT/C/CR/34/UGA, § 10; see also Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 23.

716 Concluding Observations on Canada, (2005) UN doc. CAT/C/CR/34/CAN, § 4

717 Concluding Observations on Germany, (1998) UN doc. A/53/44, § 196.

718 Concluding Observations on Austria, (2005) UN doc. CAT/C/AUT/CO/3, § 4.

Under Article 4, States parties to the CAT are required to make “torture” a criminal offence, as well as “complicity or participation” in torture. Such offences must “be punishable by appropriate penalties which take into account their grave nature”. Article 4 is limited in its application to torture, rather than other ill-treatment. Therefore, the ICCPR probably provides broader protection in this regard than CAT.<sup>719</sup>

The State is not required to incorporate the exact text of the Article 1 definition of CAT into its domestic legislation. However the CAT Committee has become increasingly strict in its approach to this issue and has stated that States must create a separate offence of “torture” within their domestic legislation which is at least as broad in scope as that defined under Article 1 of CAT.<sup>720</sup>

In *Urra Guridi v. Spain* (CAT 212/02), the CAT Committee found that the light penalties and pardons conferred on civil guards who had tortured the complainant, along with an absence of disciplinary proceedings against those guards, constituted breaches of Articles 2(1) and 4(2) of the Convention. It has been suggested that a sentence of at least six years is needed to account for the gravity of the crime of torture.<sup>721</sup>

In Concluding Observations on Colombia, the CAT Committee expressed concern over the possibility of light “suspended sentences” for persons who had committed torture and war crimes, if they were members of armed rebel groups “who voluntarily laid down their arms”.<sup>722</sup> Therefore, peace deals do not justify amnesties for grave crimes such as torture.<sup>723</sup>

## 4.6.2 Duty to Investigate Allegations

Article 12 of CAT requires States parties to 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.”

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719 See Section 3.2.15(a).

720 C. Ingelse, *The UN Committee against Torture: An Assessment*, Martinus Nijhoff, 2001, pp. 218-220, 338-341. See e.g., Concluding Observations on Cambodia, (2005) UN doc. CAT/C/CR/31/7, § 6; Concluding Observations on Azerbaijan, (2003) UN doc. CAT/C/CR/30/1 and Corr.1, § 88; Concluding Observations on Israel, (1994) UN doc. A/49/44, § 170; Concluding Observations on the Russian Federation, (1997) UN doc. A/52/44, § 43.

721 C. Ingelse, *The UN Committee against Torture: An Assessment*, Martinus Nijhoff, p. 342.

722 Concluding Observations on Colombia, (2004) UN doc. CAT/C/CR/31/1, § 7.

723 See also Concluding Observations on Peru, (2000) UN doc. A/55/44 (2000), § 61.

Article 13 of CAT requires that States parties:

“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 ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

Both Articles apply in the context of allegations of cruel, inhuman or degrading treatment under Article 16.<sup>724</sup>

Article 13 protects the right to complain about torture without fear of retribution, and to have one’s claims dealt with fairly. Article 12 imposes an independent duty on the State to commence a prompt and impartial investigation if there is any reason to believe torture has taken place, even in the absence of a complaint.

In *Halimi-Nedzibi v. Austria* (CAT8/91), the State’s failure to investigate an allegation of torture for 15 months was a breach of Article 12, as the delay was unreasonable and contrary to the requirement of “prompt” investigations. The obligation to investigate is completely separate from the duty to not torture. Here, a violation of Article 12 was found even though the CAT Committee found that the allegation of torture itself was not sustained.<sup>725</sup>

In *Blanco Abad v. Spain* (CAT 59/96), the CAT Committee explained why a prompt investigation of any complaint of torture is essential. First, there is a need to ensure that such acts cease immediately. Secondly, the physical effects of torture or ill-treatment can quickly disappear, leaving the victim without the physical evidence he or she might need to support the claim.<sup>726</sup>

In *Blanco Abad*, the victim was allegedly held incommunicado and tortured from 29 January to 3 February 1992. Upon her release, the CAT Committee felt there was ample evidence, including medical reports, to prompt an official investigation. The delay of 14 days before a judge took up the matter, and 18 days before the investigation commenced, constituted a breach of Article 12.

In *Blanco Abad*, the CAT Committee addressed the issue of when the State’s duty to investigate an Article 13 complaint arises. The CAT Committee stated;

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<sup>724</sup> See *Dzemajl et al v. Yugoslavia* (CAT 161/00).

<sup>725</sup> *Halimi-Nedzibi v. Austria* (CAT 8/91), § 13.5.

<sup>726</sup> *Blanco Abad v. Spain* (CAT 59/96), § 8.2.

“...article 13 does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence...it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim’s wish that the facts should be promptly and impartially investigated...”

When the investigation in *Blanco Abad* did actually proceed, progress was slow and incompetent. The investigating court did not request access to essential evidence, such as medical reports, for months. Crucial witnesses, such as police officers at the station where the victim had been detained, were never called to give evidence. On numerous occasions during the proceedings, the complainant requested that further evidence, other than the medical reports, be admitted to support her claim; the court did not act on these requests. The CAT Committee found no justification for this approach by the court as “such evidence was entirely pertinent since...forensic reports...are often insufficient and have to be compared with and supplemented by other information.” The catalogue of delay, incompetence, and omissions (i.e. failures to act) constituted a failure to conduct an impartial investigation in violation of Article 13.<sup>727</sup>

In Concluding Observations on Bolivia, the CAT Committee recommended that personnel accused of torture or ill-treatment be suspended from their duties while the investigation is ongoing.<sup>728</sup>

### 4.6.3 Duty to Compensate Victims

Article 14 of CAT requires States to ensure that victims of torture are able to obtain redress and fair and adequate compensation, including the means for as full rehabilitation as possible. If the victim should die, his or her heirs have a right to compensation.

In *Urrea Guridi v. Spain* (CAT 212/02), the CAT Committee found that the light penalties and pardons conferred on civil guards, who had tortured the complainant, along with an absence of disciplinary proceedings against those

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<sup>727</sup> See also *Baraket v. Tunisia* (CAT 60/96); *Nikoli and Nikoli v. Serbia and Montenegro* (CAT 174/00). See also Model Complaint, *Textbox ii*, § 55.

<sup>728</sup> Concluding Observations on Bolivia, (2001) UN doc. A/56/44, § 97(d).

guards, constituted breaches of Article 14. The victim had in fact received monetary compensation for the relevant acts of torture, but the CAT Committee found that the lack of punishment for the perpetrators was incompatible with the State's duty to guarantee "the non-repetition of the violations".<sup>729</sup> Thus, Article 14 rights provide not only for civil remedies for torture victims, but, according to this case, a right to "restitution, compensation, and rehabilitation of the victim", as well as a guarantee of non-repetition of the relevant violations, and punishment of perpetrators found guilty.

In Concluding Observations on Turkey, the CAT Committee stated that relevant types of compensation for the purposes of Article 14 should include financial indemnification, rehabilitation and medical and psychological treatment.<sup>730</sup> States should also consider establishing a compensation fund.<sup>731</sup>

In a number of cases against Serbia and Montenegro, Article 14 violations have been entailed in the State party's refusal to conduct a proper criminal investigation into allegations of torture, thus effectively depriving the victim of a realistic chance of launching successful civil proceedings.<sup>732</sup>

Article 14 rights do not explicitly extend to victims of violations of Article 16. However, in *Dzemajl et al v. Yugoslavia* (CAT 161/00), the CAT Committee found that:

"the positive obligations that flow from the first sentence of article 16 of the convention include an obligation to grant redress and compensate the victims of an act in breach of that provision".<sup>733</sup>

Thus a failure by the State to provide "fair and adequate" compensation, where a person has suffered cruel, inhuman or degrading treatment or punishment, is in violation of its obligations under Article 16.

In Concluding Observations on the U.S., the CAT Committee was concerned that civil actions against federal prison authorities were only available if there is "a prior showing of physical injury". It recommended that legislation be amended to remove any limitation on the right to bring such civil actions.<sup>734</sup>

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729 *Urra Guridi v. Spain* (CAT 212/02), § 6.8.

730 Concluding Observations on Turkey, (2003) UN doc. CAT/C/CR/30/5, § 123.

731 Concluding Observations on Cuba, (1998) UN doc. A/53/44, § 118; see also Concluding Observations on Ecuador, (2006) UN doc. CAT/C/ECU/CO/3, § 26.

732 See, e.g., *Dimitrijevic v. Serbia and Montenegro* (CAT 172/00).

733 *Dzemajl et al v. Yugoslavia* (CAT 161/00), § 9.6.

734 Concluding Observations on the US, (2006) UN doc. CAT/C/USA/CO/2, § 29.

In Concluding Observations on Nepal, the CAT Committee confirmed that there should be no statute of limitations for the registering of complaints regarding torture, and that civil actions for compensation should be able to be brought within two years of the publication of the conclusions of relevant inquiries.<sup>735</sup>

#### 4.7 Non-Use of Statements Obtained from a breach of CAT

The non-use of statements obtained through torture or other prohibited treatment in judicial proceedings is guaranteed by Article 15 of CAT. This duty is absolute, and there are no exceptions. This issue has become topical during the “war on terror”, with the question arising as to the extent, if at all, such evidence can be used to prosecute terrorist suspects. Regardless of the dangers posed by terrorism, such statements can never be used.<sup>736</sup>

Article 15 applies to statements made by a tortured person about him or herself, as well as statements made about third parties. In *P.E v. France* (CAT193/01), the complainant argued that her proposed extradition from France to Spain was based on statements that had been extracted from a third party under torture. The CAT Committee confirmed that each State party must “ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.”<sup>737</sup> Ultimately however, the claim was found to be unsubstantiated so no violation was found.

In Concluding Observations on the UK, the CAT Committee expressed concern over a lower test of admittance of confessions in terrorism cases in Northern Ireland, as well as the permissibility of the admittance of derivative evidence.<sup>738</sup>

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735 Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 28; see also Concluding Observations on Chile, (2004) UN doc. CAT/C/CR/32/5, § 4; Concluding Observations on Turkey, (2003) UN doc. CAT/C/CR/30/5, § 123.

736 B. Zagaris, ‘UN Special Rapporteur Raises Torture Violations in Counter-Terrorism War’, (2005) 21 *International Enforcement Law Reporter*, p. 17.

737 *P.E v. France* (CAT193/01), § 6.3.

738 Concluding Observations on the UK, (1999) UN doc. A/54/44, § 76; See also, regarding Article 15 rights, Concluding Observations on Cameroon, (2004) UN doc. CAT/C/CR/31/6, § 8; Concluding Observations on UK, (2004) UN doc. CAT/C/CR/33/3, § 5. Direct use of compelled evidence arises when that evidence is itself used to incriminate a person in legal proceedings. ‘Derivative’ use arises when the compelled evidence is indirectly used to uncover further evidence, and that latter evidence is used to incriminate a person.

In Concluding Observations on Chile, the CAT Committee expressed concern that life saving medical care for women suffering complications from illegal abortions was apparently withheld until they revealed information about those performing the abortions; such confessions were allegedly used in later legal proceedings against the women and third parties.<sup>739</sup>

## 4.8 Universal Jurisdiction under CAT

“Universal jurisdiction” arises when a State has criminal jurisdiction<sup>740</sup> over an act regardless of the territory in which the act was perpetrated, and regardless of the nationality of the perpetrator or the victim. Universal jurisdiction is recognised as existing for only the rarest and most heinous of crimes. Torture is such a crime.<sup>741</sup>

Articles 4 to 9 of CAT, and especially Articles 5 and 7, establish a matrix of duties which have the following result: States parties may and indeed on occasion must exercise universal criminal jurisdiction over the crime of torture (as defined in Article 1).<sup>742</sup> That is, a State may punish a torturer even if the relevant torture did not take place within its territory, and neither the torturer nor the victim are nationals of the State. Indeed, a State must either prosecute (and punish if it convicts) an alleged torturer or extradite that person to a State that will so prosecute. A State does not have to do so if there is insufficient evidence of the guilt of the alleged torturer.<sup>743</sup>

In *Guengueng et al v. Senegal* (CAT 181/01), the complainants alleged breaches of Article 5(2) and 7 by the State party. The complainants credibly claimed that they had been tortured in Chad between 1982 and 1990 by agents of Chad’s then president, Hissène Habré. In 1990, Habré took refuge in Senegal, where he remained at the time of the CAT Committee’s decision in May 2006. In 2000, the complainants brought proceedings against Habré in

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739 Concluding Observations on Chile, (2004) UN doc. CAT/C/CR/32/5, §§ 4 and 7.

740 A State exercises criminal jurisdiction when it prosecutes a person for a crime, or, in those States where private prosecutions are permissible, it allows a person to prosecute another.

741 Other such crimes include the crime of genocide, piracy, or the perpetration of slavery.

742 See Joseph, Schultz, and Castan, above note 31, § 9.129.

743 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, pp. 132-133.

Senegal. These proceedings were dismissed on the basis that Senegalese courts had no jurisdiction under Senegalese law with regard to alleged torture in Chad. This ruling was confirmed on appeal.

The CAT Committee found that the State party had breached its duty under Article 5(2) to:

“take such measures as may be necessary to establish its jurisdiction over [the offence of torture] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”

As Senegal had ratified the CAT in August 1986, “the reasonable time frame within which the State party should have complied with this obligation has been considerably exceeded”.<sup>744</sup> Therefore, the CAT Committee seemed to concede that a State does not have to pass legislation to facilitate the exercise of universal jurisdiction immediately upon the entry into force of CAT for that State; it however must do so within “a reasonable time”. Senegal had manifestly failed to do so.

The CAT Committee also found a breach of Article 7, paragraph 1 of which states:

“The State Party in the territory under whose jurisdiction a person alleged to have committed [an act of torture], 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 State party had tried to argue that the Article 7(1) obligation did not come into play until a State had received an extradition request. The CAT Committee disagreed:

“the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition”.<sup>745</sup>

Therefore, a State party must prosecute an alleged torturer in the absence of an extradition request unless there is insufficient evidence to sustain a prosecution.

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<sup>744</sup> *Guengueng et al v. Senegal* (CAT 181/01), § 9.5.

<sup>745</sup> *Guengueng et al v. Senegal* (CAT 181/01), § 9.7.

In any case, by the time the case was decided in 2006, Belgium had requested the extradition of Hissène Habré (in 19 September 2005). As Senegal had neither prosecuted nor complied with the request to extradite Habré, the CAT Committee found two separate breaches of Article 7.<sup>746</sup>

#### 4.8.1 Immunity of Certain State Officials

In *Congo v. Belgium*,<sup>747</sup> the International Court of Justice considered the international legality of the attempted prosecution by Belgian authorities of sitting government officials in the Congo for torture in the Congo. The ICJ decided that the sitting senior government officials of one State, such as the “head of state, head of government, or minister of foreign affairs, and perhaps certain other diplomatic agents”, cannot be arrested or prosecuted in another State for any crime, including torture under CAT, while they remain in office.<sup>748</sup> This immunity does not extend to State officials outside of these categories,<sup>749</sup> and ceases once the person no longer holds “the position that qualified them for the immunity”.<sup>750</sup>

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<sup>746</sup> *Rosenmann v. Spain* (CAT 176/00) concerned the saga of the proposed extradition of General Pinochet from the UK to Spain (from 1998-2000) to face allegations of torture perpetrated upon Spanish citizens in Chile. The complainant was a Spanish citizen who alleged he had been tortured in Chile under Pinochet’s orders. He complained that Spanish executive authorities had obstructed the extradition process, initiated by the Spanish judiciary, and had not acted in an impartial manner. The key question in *Rosenmann* was whether there is any obligation on a State party to demand the extradition of an alleged torturer. The CAT Committee concluded that there was no such obligation in the CAT. See also S. Joseph, ‘Committee against Torture: Recent Jurisprudence’, (2006) 6 *Human Rights Law Review*, forthcoming.”

<sup>747</sup> *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Merits, February 14, 2002, General List No.121 (‘*Congo v. Belgium*’).

<sup>748</sup> N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, p. 136.

<sup>749</sup> *Ibid*, p. 136.

<sup>750</sup> *Ibid*, p. 135. See *Congo v. Belgium*, § 61.

## **PART V**

### **INDIVIDUAL COMPLAINTS UNDER THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**



## 5.1 Introduction

As its name suggests, the Convention on the Elimination of All Forms of Discrimination Against Women<sup>751</sup> (the “CEDAW Convention”) is primarily concerned with achieving equality between women and men through the elimination of discriminatory policies and practices. To this end, the CEDAW Convention sets out a series of obligations on States parties with the objective of ensuring both *de facto* and *de jure* equality for women in the enjoyment of their fundamental rights and freedoms. However, the CEDAW Convention does not set out any substantive obligations in respect of the prohibition of torture and ill-treatment. Therefore, this *Handbook*’s discussion of the Optional Protocol to the CEDAW Convention with a focus on such violations, requires a word of explanation.

Women are protected under Art. 7 of the ICCPR and by the CAT to the same extent as men, and the HRC and CAT Committee constitute the obvious fora for women in the context of violations relating to the prohibition of torture and ill-treatment. To be sure, a complaint alleging only substantive violations of the prohibition of torture or ill-treatment (without any element of discrimination) would not be admissible before the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the treaty body established by the CEDAW Convention to secure implementation at the national level. Nevertheless, the CEDAW Convention may offer an alternative avenue for redress in specific contexts where discrimination constitutes an important aspect of the underlying violation. Existing patterns of discrimination against women affect their ability to enjoy their rights, not least their right to be free from torture and other forms of ill-treatment, and discriminatory laws and policies may affect women’s abilities to seek redress before national courts for such violations. Complaints arising in both of these contexts are potentially admissible before the CEDAW Committee. Moreover, the CEDAW Committee has specifically provided, in General Recommendation 19 on the issue of violence against women, that the responsibility of States parties is engaged also by the conduct of *private actors* if the State fails to act with due diligence to “prevent

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751 Convention on the Elimination of All Forms of Discrimination against Women 1979, reprinted in full at Appendix 6.

752 Optional Protocol to the CEDAW Convention (in Part V of this book, referred to as “Optional Protocol”).

violations of rights or to investigate and punish acts of violence”.<sup>753</sup> Therefore, if the violations complained of occurred at the hands of private actors, there may be greater scope for a complaint under CEDAW than under CAT for instance, which limits “torture” to acts committed or authorised by agents of the State.

The purpose of this chapter is therefore to describe the individual complaints procedures established by the Optional Protocol to the CEDAW Convention, and in particular to analyse how such complaints procedures can be used by women in the context of violations of the prohibition of torture and ill-treatment.

This chapter will first highlight some of the essential elements of the CEDAW Convention. It presents the background to and content of the CEDAW Convention and the Optional Protocol. It describes the role of the CEDAW Committee. Finally, this chapter focuses on how to use the Optional Protocol; which procedures to follow and legal issues to address in order for the individual complaint to be successful and effective in its aims.

As the Optional Protocol to the CEDAW Convention is a relatively new instrument, only entering into force on 22 December 2000, the CEDAW Committee has not yet had the chance to develop extensive jurisprudence. Therefore, this chapter also draws on the approaches of existing human rights monitoring bodies with similar procedures, as the Optional Protocol is part of the comprehensive United Nations framework of mechanisms. Like the other treaty bodies, the CEDAW Committee seeks to ensure the implementation of human rights at the national level, and cannot be conceived as a stand-alone solution to address the human rights of women.

## **5.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention)**

### **5.2.1 Background of the CEDAW Convention**

The adoption of the CEDAW Convention on 18 December 1979 by the United Nations General Assembly signified an important step towards the recognition of women’s human rights as such. The CEDAW Convention was based on the acknowledgement that existing international human rights instruments did not effectively and comprehensively address the specific disadvantages and harms

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<sup>753</sup> General Recommendation 19, § 9.

faced by women despite the fact that their provisions apply equally to men and to women.<sup>754</sup> It has been argued by many women's rights activists that the human rights discipline generally reflects a male perspective, which renders invisible the violations of women's human dignity and thus prevents this discipline from effectively promoting and protecting the human rights of women.<sup>755</sup> In 1999, the World Organisation Against Torture (OMCT) published a study revealing that the treaty bodies were progressing at different rates in integrating a gender perspective in their work, some of them hardly showing any progress in this respect.<sup>756</sup> As a consequence, violations of women's human rights often go unrecognised, and when recognised, often go unpunished and unremedied.<sup>757</sup>

The scope of the CEDAW Convention was larger and its language far more "radical" than international human rights treaties in existence when it was adopted. It provides for focused promotion and protection of the human rights of women and identifies areas of women's human rights which were either not guaranteed or well developed in existing instruments, or which were not

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754 The Preamble to the 1945 Charter of the United Nations, the founding document of the UN, affirms the "equal rights of men and women", the "dignity and worth of the human person" and the "faith in fundamental human rights" as core United Nations principles and objectives. Article 1 (3) of the Charter proclaims that one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" [emphasis added]. Article 55 (c) commits the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion" [emphasis added]. The International Bill of Human Rights reinforces and develops the principle of equal rights of men and women. The Universal Declaration of Human Rights of 1948, the founding document of human rights law, proclaims the entitlement of everyone to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of any kind and proceeds to include sex among the grounds of such impermissible distinction. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted in 1966, clearly prohibit discrimination on the basis of sex. Article 2 of both Covenants contains a general clause specifying that rights should be guaranteed for all without discrimination, and article 3 elaborates on this general principle, emphasizing that equality of rights between men and women should be made reality in law and practice.

755 Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994; Kelly D. Askin and Doreen M. Koenig (eds.) *Women and International Human Rights Law*, New York, Transnational Publishers, 1999; Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in Julie Peters and Andrea Wolper, (eds.), *Women's Human Rights, Human Rights: International Feminist Perspectives*, Routledge, 1995; Hillary Charlesworth, Christine Chinkin and Shelly Wright, *Feminist Approaches to International Law* (1991) 85 *American Journal of International Law* 632.

756 Carin Benninger-Budel and Anne-Laurence Lacroix, *Violence against Women: A Report*, OMCT, 1999.

757 See Rebecca Cook, *State Accountability under the Convention on the Elimination of All Forms of Discrimination against Women*, in Rebecca Cook (ed.) *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994, p. 228.

properly implemented. For example, the Convention addresses the protection of women's human rights in both the public and private spheres, equality within the family, the equal rights and responsibilities of both parents in supporting their families, the right of women to undertake financial and other transactions in their own name and the rights of women to education, work, and political participation. It also imposes specific obligations on governments to ensure that private citizens and enterprises do not abuse women's rights, that the special needs of rural women are protected, and that steps are taken to transform social and cultural patterns in order to combat discrimination against women.

In order to monitor compliance with the obligations set forth in the Convention, it established in 1982, under article 17 of the CEDAW Convention, the CEDAW Committee, composed of 23 experts on women's issues from around the world. The Committee usually meets twice a year for two weeks.<sup>758</sup> States parties nominate the experts, and every two years an election takes place during a meeting of the States parties. Re-election of an expert is possible. The experts of the Committee sit as individuals and not as government representatives. So far, only three men have been nominated and elected.<sup>759</sup>

States parties that have ratified the CEDAW Convention are legally bound by its terms.<sup>760</sup> There are several procedures by which the CEDAW Committee monitors States parties' compliance with the Convention, the most recent of which are the individual complaints and the inquiry procedures under the Optional Protocol. Prior to the adoption of the Optional Protocol, the CEDAW Convention provided two monitoring procedures: the reporting procedure and the interstate complaints procedure. As outlined in article 18 of the CEDAW Convention, States parties are required to submit to the CEDAW Committee an initial report within the first year of ratifying the CEDAW Convention and periodic reports every four years thereafter. The purpose of this reporting mechanism is to examine progress the government has made, in law and practice, in giving effect to the Convention and to identify problem areas where compliance needs to be improved. During the review of the State party's

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758 Following the World Conference on Women in Beijing in 1995, the General Assembly adopted an amendment to Article 20 allowing the CEDAW Committee to meet in two sessions each year. General Assembly resolution 50/202, 23 February 1996.

759 Mr Cornelis Flinterman, Mr Göran Melander and Mr Johan Nordenfelt.

760 The Vienna Convention on the Law of Treaties sets forth the rule of *pacta sunt servanda*, which makes treaties binding and requires parties to a treaty to perform in good faith.

report, the State and the Committee discuss obstacles in achieving improvements in the human rights situation of women, the potential for progress and further action that needs to be taken. The Committee issues Concluding Comments but does not have the authority to issue sanctions or to act as an arbitrator regarding interpretational disputes. In this connection, it is important to note that NGOs play a critical role in ensuring that the Committee receives information that supplements, and often challenges, the information provided for by the governments. Due to the proximity of NGOs to the “front lines”, they are well positioned to gather information that that would not otherwise be available to Committee members and that is normally absent from the reports of the States parties, thus assisting the Committees in achieving a more balanced assessment of the State party’s record of compliance.

The second enforcement mechanism is the interstate complaints procedure outlined in article 29. This provision provides that all conflicts dealing with the interpretation of the CEDAW Convention must be arbitrated. If the conflict cannot be resolved during arbitration it is sent to the International Court of Justice (ICJ). All ICJ decisions are binding on States parties. However, there is little incentive for a State party to bring a claim against another State party, as respect for sovereignty of nations and fear of retaliation act as strong deterrents.<sup>761</sup> Another drawback to this mechanism is that States parties may use a reservation to avoid having to respond to interstate claims. The impact of this mechanism remains to be seen as it has yet to be invoked.

Pursuant to article 21 of the CEDAW Convention, the Committee delivers General Recommendations interpreting and stressing the importance of certain rights under the Convention. Although these interpretations are not legally binding in and of themselves, they are legally authoritative comments that illustrate and provide detail on the content and scope of the provisions of the Convention. As such, States parties have an obligation to comply with them in good faith. As of 1 November 2006, the Committee has issued 25 General Recommendations.

Today, the CEDAW Convention is the principal international convention dealing with women’s human rights. As of 19 September 2006, 184 countries (over ninety percent of the members of the United Nations) are parties to the Convention.<sup>762</sup>

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761 Laboni Hoq, “The Women’s Convention and its Optional Protocol: Empowering Women to Claim their Internationally Protected Rights” (2001) 32 *Colum. Human Rights L. Rev.* 699, p. 684.

762 At <http://www.un.org/womenwatch/daw/cedaw/states.htm>

## 5.2.2 Object and Purpose of the CEDAW Convention

The CEDAW Committee states in General Recommendation 25, regarding article 4, paragraph 1, that the overall object and purpose of the Convention is to eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of human rights and fundamental freedoms.<sup>763</sup> The CEDAW Committee further states that:

“[A] joint reading of articles 1, 5 and 24, which form the general interpretative framework for all the Convention's substantive articles, indicates that three obligations are central to States parties' efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.

Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination – committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the *de facto* position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender<sup>764</sup> relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals, but also in law, and legal and societal structures and institutions.”<sup>765</sup>

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763 Committee on the Elimination of Discrimination against Women, General Recommendation 25, § 4.

764 The term gender refers to the way in which the roles, attitudes, values and relationships regarding men and women are constructed without foundation in biological necessity. The term is contingent on a particular socio-economic, political and cultural context and is affected by other factors such as age, race, class, sexuality or ethnicity. Sex typically refers to biological differences between men and women. Although the word “gender” is not mentioned in the CEDAW Convention, Hanna Beate Schöpp-Schilling, member of the CEDAW Committee, observes that the language used in articles 1 and 5 like “marital status”, “social and cultural patterns of conduct of men and women”, “prejudices and customary practices (...) based on the idea of inferiority of the superiority of either sexes”, “stereotyped roles for men and women”, and the understanding of maternity as not merely a biological but also a “social function” putting obligations on both women and men, which point to socially and culturally conditioned expectations attached to women and men which may constitute gender discrimination. In: Hanna Beate Schöpp-Schilling, *The United Nations Convention on the Elimination of All Forms of Discrimination against Women*, International training seminar for NGOs and women's rights activists, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 2.

765 See CEDAW Committee, General Recommendation 25, §§ 6-7. A similar analysis of the Convention's object was adopted in the first National Report on CEDAW to the Dutch Parliament: L.S. Groenman, et al., *Het Vrouwenverdrag in Nederland anno 1997*, Vuga, Den Haag, 1997. The CEDAW Committee endorsed this analysis in the Concluding Comments on the situation in the Netherlands after its 25<sup>th</sup> session in July 2001. Rikki Holtmaat, *European Women and the CEDAW-Convention; the way Forward*, paper presented at the EWLA Conference, Paris, 2002, p. 3.

Rikki Holtmaat has also pointed out that the three objectives should not be separated or ranked, but should be read as three sub-objectives of one and the same general object of the CEDAW Convention: the elimination of all forms of discrimination against women.<sup>766</sup> The sub-objectives identify three different strategies that should be used in combination in order to achieve this overall purpose.<sup>767</sup> Holtmaat argues that measures under the first obligation are to ensure that men and women are equal before the law and in public and private life as provided in article 2 of the CEDAW Convention. On the basis of this article, governments are obliged to make sure that their laws and practices do not discriminate against women and that discrimination is not allowed between citizens. Holtmaat has indicated that fulfilment of this first obligation is a necessary precondition to reach equality between men and women, but measures pursuant to the second obligation have to be developed to ensure that this formal equality before the law and in public administration can also be realised in reality (see articles 3, 4 and 24 of the CEDAW Convention).<sup>768</sup> These policy measures are intended to give *de facto* equal rights and opportunities to women and to guarantee that women have full enjoyment of all human rights. These measures can either be of a structural and permanent nature or of a temporary nature as provided for under article 4(1) of the CEDAW Convention. However, as Holtmaat points out correctly, the situation of women will not improve as long as the root causes of discrimination against women are not effectively addressed. Measures taken without addressing prevailing gender relations and the persistence of gender-based stereotypes (see article 5(a) of the CEDAW Convention) will be ineffective.<sup>769</sup> Obligations under articles 2, 3, 4, 5 and 24 are discussed in detail in Section 2.4 of this chapter.

### 5.2.3 Definition of Discrimination against Women in Article 1 of the CEDAW Convention

The CEDAW Convention defines discrimination against women in article 1 as:

“[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital

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<sup>766</sup> Rikki Holtmaat, above note 765, p. 4.

<sup>767</sup> *Ibid.*

<sup>768</sup> *Ibid.*

<sup>769</sup> *Ibid.*

status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The definition refers to both the effect as well as the purpose, thus directing attention to the consequences of measures as well as the intentions underlying them, and thus envisioning not only equal opportunity (formal equality) but also equality of outcome (*de facto* equality). Equal opportunity refers to the obligation of the State to offer women access to the means, e.g. laws, policies and procedures, on equal terms with men, for the achievement of a desired goal. Equality of outcome refers to the obligation of the State to achieve a certain outcome by means it determines to be appropriate.

The definition is not limited to discrimination through State action or actions by persons under the colour of law. The definition’s concluding phrase, “or any other field”, further expands the range of fundamental freedoms and political, economic, social, cultural and civil rights by contributing to the interpretation of women’s human rights. Although the CEDAW Committee has not formulated a General Recommendation that interprets the article 1 definition, Hanna Beate Schöpp-Schilling observes that the inclusion of discrimination of effect creates great potential for complaint and inquiry procedure under the Optional Protocol.<sup>770</sup>

The phrase “on the basis of equality of men and women” contains a central principle of the CEDAW Convention which has not been without critique.<sup>771</sup> The conventional understanding of “equality of men and women” is the right of women “to be equal to men” and as such to be treated in an identical manner in order to achieve equality. As a consequence, traditional male standards are applied to women while the fact that women are different from men in nature and circumstance is ignored.<sup>772</sup> Another approach to equality adopts the protectionist angle. This approach reconstitutes the differences between men and women as weaknesses in women, viewing the woman’s gender as a problem, which has to be addressed, rather than acknowledging and challenging the environment which poses a threat to women.<sup>773</sup>

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770 Hanna Beate Schöpp-Schilling, above note 773, p. 1.

771 See e.g. Hillary Charlesworth, “What are ‘Women’s Human Rights’?”, in R. Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994, p. 64-65. She criticizes the male-centered view of equality in the CEDAW.

772 See IWRAP Asia Pacific: Optional Protocol, at <http://www.iwraw-ap.org/protocol>.

773 *Ibid.*

## 5.2.4 States Parties' Obligations under the CEDAW Convention

Articles 2 to 5 of the CEDAW Convention, together with the definition of discrimination under article 1, provide the general framework for the implementation of the substance and context recognised in articles 6 to 16. Articles 2 to 5 refer to actions that must be undertaken in order to comply with the substantive articles.

### a) Article 2 – The General Undertaking Article

The scope of obligations under article 2 of the CEDAW Convention is an extensive one. Rebecca Cook observes that the article generally requires States parties “to ensure” compliance by their governments’ organs and to take “all appropriate measures” to effect the elimination of all forms of discrimination by “any person, organisation or enterprise” and to “modify or abolish laws, regulations, customs and practices.”<sup>774</sup> Article 2 of the CEDAW Convention states:

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

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774 Rebecca Cook, above note 780, p. 230.

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.”

In pursuing a policy of eliminating all forms of discrimination against women as required by article 2, States parties are obliged to address the specific nature of each instance of discrimination.<sup>775</sup> In order to eliminate all forms of discrimination against women, one should go beyond gender-neutral norms and treatment, characteristics of women and their vulnerability to discrimination, including gender-based violence, are distinct. The very important element here is that violence against women is recognised as a form of discrimination and thus indeed a human rights violation. This recognition may justify specifically targeted responses. As the Committee states in General Recommendation 25 on temporary special measures, “a purely formal legal or programmatic approach is not sufficient to achieve women’s *de facto* equality with men, which the Committee interprets as substantive equality. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account.”<sup>776</sup>

Under the CEDAW Convention, States parties clearly have to assume obligations of both results and means. States parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and therefore must comply with an obligation of result to eliminate discrimination against women in all its forms. The seven sub-sections of article 2 and subsequent articles outline the assumed obligations of means. For example, obligations under article 2(c) “to pursue by all appropriate means and without delay... [t]o *establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination*” grant States parties a choice of means, and create at the same time a legal duty to exercise that choice diligently (emphasis added).<sup>777</sup>

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<sup>775</sup> *Ibid.*, pp. 235-36.

<sup>776</sup> See General Recommendation 25.

<sup>777</sup> Rebecca Cook, above note 780, p. 232.

Through this two-fold obligation, States parties have to take the measures prescribed in the sub-sections and to realise reasonable results in eliminating all forms of discrimination.

Article 2 has not been the subject of a General Comment by the CEDAW Committee specifying the character of States parties' obligations. On the other hand, two other Committees – the HRC and the CERD Committee - have both issued General Comments on their respective treaties concerning general undertakings. The CERD Committee notes in its General Comment 3, *The nature of States parties' obligations (Article 2, para. 1)*, adopted in 1990, the following:

“that the phrase by all appropriate means must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the ‘appropriateness’ of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most ‘appropriate’ under the circumstances.”<sup>778</sup>

In General Comment 31, on *The Nature of the General Legal Obligation Imposed on States parties to the Covenant*, the HRC provides the following analysis of Article 2 of the ICCPR: “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”.<sup>779</sup> The phrase “without delay” highlights the immediate need to take measures to ensure equality. Regarding the obligation of immediate implementation, General Comment 31 of the HRC states the following:

“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.”<sup>780</sup>

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778 ESCR Committee, General Comment 3. *The Nature of States Parties' Obligations* (art. 2, par.1), adopted in 1990, UN Doc. E/1991/23.

779 HRC, General Comment 31, § 13.

780 *Ibid.*, § 14.

This principle is in accordance with the basic rule of the Vienna Convention on the Law of Treaties, which requires that treaty obligations be fulfilled in good faith.

In addition to formal (*de jure*) compliance, Article 2 (a) refers to the practical (*de facto*) realisation of non-discrimination. This implies that national constitutions, laws, regulations and other written policies are not, standing alone, sufficient to ensure compliance with non-discrimination under CEDAW. Rather, States must ensure that their administrative and judicial systems are designed to comply with this obligation in practice as well.<sup>781</sup> According to Marsha Freeman, compliance involves the training and monitoring of administrative staff, those who deal with the public, policy makers and the judiciary, in order that they understand the non-discrimination principle. It further entails ensuring that service delivery programmes are equally accessible by women in terms of location, hours and costs. Some reallocation of resources may be necessary to meet this obligation.<sup>782</sup>

As mentioned above, an important aspect of the CEDAW Convention is the fact that the prohibition of discrimination affects not only State actors but non-state actors as well (article 2(e)). States can be held responsible for discrimination by non-state actors, i.e. individuals, organisations and enterprises. The appropriate measurers of the State include the prevention, investigation, prosecution and punishment of private acts of discrimination and to ensure reparation for the victim. The State can be held accountable for acts by non-state actors, not because of the act itself, but because of the lack of due diligence to prevent or respond to the violation of women's human rights as enshrined in the CEDAW Convention.

### **b) Article 3 – De Facto Equality**

Article 3 of the CEDAW Convention requires States parties to:

“[E]nsure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

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781 Marsha Freeman, *States Parties' Obligations under CEDAW Convention Articles 2, 3, 4, 5 and 24*, in *The Optional Protocol to CEDAW: mitigating violations of women's human rights*, International training seminar for NGOs and women's rights activists, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 5.

782 *Ibid.*

Article 3 reaffirms that States parties are obliged to fulfil both positive and negative obligations. Besides ensuring non-interference in the exercise of the rights of women, States parties must adopt measures in order to achieve women's legal equality as well as their *de facto* equality in the enjoyment of human rights and fundamental freedoms. Article 3 of the CEDAW Convention is analogous to article 3 of the ICCPR and the ICESCR, which provide for the equal enjoyment of rights in the respective treaties. The HRC and the ESCR Committee have developed their own positions and jurisprudence regarding this obligation. This jurisprudence may be useful to examine for purposes of identifying appropriate measures when preparing an individual complaint.

### **c) Article 24 - The Capstone**

Article 24 serves as a capstone of the CEDAW Convention. It is a general undertaking obligation for compliance with the Convention. It states:

“States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.”

### **d) Article 4 - Temporary Measures**

The corrective approach of substantive equality recognises that women and men must sometimes be treated differently in order to achieve an equal outcome. This goal is reinforced by article 4:

“(1) Temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

(2) Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.”

Article 4 (1) provides that States parties may adopt temporary special measures to accelerate *de facto* equality and that such measures shall not be considered discriminatory. Article 4 (2) specially addresses measures that must be in place regarding maternity protection. While the equality clause and the right to non-discrimination generally prohibit unequal treatment, article 4 explicitly permits it. General Recommendation 25 provides guidance to States on the use of

this important tool to implement the substantive obligations of the Convention. Although the language of article 4 is not mandatory, in order to fulfil women's human rights, equality and non-discrimination at a *de facto* level should be promoted through all appropriate means, including proactive measures and conditions to ensure the full development and advancement of women (see article 3 of the CEDAW Convention) and temporary special measures. Thus temporary measures should be regarded as a primary means to accomplish the Convention's objectives.

### **e) Article 5 - Elimination of Discriminatory Customs and Practices**

Article 5 of the CEDAW Convention is unique among the United Nations human rights treaties. Article 5 (a) requires States parties to take all appropriate measures to:

“modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

General Recommendation 21 of the CEDAW Committee highlights the fact that the Convention, compared to other treaties and declarations “goes further by recognizing the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights of women.”<sup>783</sup> Many discriminatory practices, including violence against women, are specifically rooted in custom and stereotypes. Because stereotyped views will not change by themselves, it is necessary to develop an active policy in which every legal measure and every public policy is critically examined to ensure the elimination of fixed gender stereotypes.<sup>784</sup> Moreover, States parties often attempt to legitimise social and cultural practices violating the human rights of women by raising arguments of custom and culture. However, article 5 (a) contains a fundamental obligation that clearly disqualifies any such defence.

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783 General Recommendation 21, § 3.

784 See Rikki Holtmaat, above note 774, p. 4.

## **f) The State Obligations under the Substantive Articles 6-16**

The Convention refers to a range of areas in which States parties must work towards the elimination of discrimination: political and public life (article 7), international organisations (article 8), education (article 10), employment (article 11), health care (article 12), financial credit (article 13 (b)), cultural life (article 13 (c)), the rural sector (article 14), the law (articles 9 and 15) and the family (article 16). Indeed, the CEDAW Convention explicitly affirms women's rights to equality within the family, unlike other human rights instruments, such as the Universal Declaration on Human Rights (article 16) and the ICCPR (article 23), which merely designate the family as a unit to be protected.<sup>785</sup> States parties shall take all appropriate measures to “suppress all forms of traffic in women and exploitation of prostitution of women” (article 6).

## **g) Obligation to Respect, Protect and Fulfil**

Obligations of States in respect to civil, political economic, social and cultural rights and with respect to violence against women may be divided into three categories: the obligations to respect, protect and fulfil. The CEDAW Committee affirmed in its General Recommendation 25 that:

“States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil [the] right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.”<sup>786</sup>

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785 Hillary Charlesworth and Christine Chinkin, *The Boundaries of International law, A Feminist Analysis*, Juris Publishing Manchester University Press, 2000, p. 218.

786 This aspect of State obligations was elaborated in a General Comment on the Right to Health by the Committee on Economic, Social and Cultural Rights: “all human rights [impose] three types or levels of obligations on States parties: the obligation to respect, protect and fulfil. In turn, the obligation to fulfil contains the obligation to facilitate, provide and promote”. ESCR Committee, General Comment 14, § 33. See also CEDAW Committee, General Recommendation 24, § 13: “The duty of States parties to ensure, on a basis of equality between men and women, access to health care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article 12.”

The obligation to *respect* requires States parties not to interfere in the enjoyment of human rights. For example, this obligation requires that a State should abstain from using violence. Rape of women and girls by a state official, for example, a prison guard or a security or military official always constitutes torture, for which the State is directly responsible. Other forms of sexual or physical abuse of women by State officials, such as virginity testing, fondling, deliberate use of threats, threats of bodily searches, sexual threats or sexually degrading or humiliating language, also constitute torture or ill-treatment.<sup>787</sup>

The obligation to *protect* requires that a State party take measures that counteract or prevent activities and processes that have a negative effect on the enjoyment of human rights. For example, the rights of women should be protected through the prevention of potential violations by establishing a judicial framework, including adopting effective laws and policies, bringing perpetrators to justice and guaranteeing women redress.

The obligation to *fulfil* entails the State's obligation to adopt appropriate legislative, judicial, administrative, budgetary and other measures towards the full realisation of human rights. In order to fulfil women's human rights, equality and non-discrimination should be promoted through all appropriate means including proactive measures and conditions to ensure the full development and advancement of women.

### 5.2.5 Justiciability

Because it is the purpose of the Optional Protocol to allow specific claims alleging a failure to comply with the obligations under the CEDAW Convention, the issue of justiciability will arise.

The CEDAW Convention does not contain a list of women's rights, but it identifies States parties' obligations to take measures to eliminate discrimination

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787 The Special Rapporteur on torture has referred to acts of rape, sexual abuse and harassment, virginity testing, forced abortion or forced miscarriage as gender-specific forms of torture in his interim report to the General Assembly in 2000. Professor Kooijmans, the first Special Rapporteur on Torture, noted in his oral introduction to his 1992 report to the Commission on Human Rights, that "[s]ince it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture," quoted in the Report of the Special Rapporteur, Mr. Nigel S. Rodley. Moreover, the Special Rapporteur on torture has pointed out that the fear of physical torture may constitute mental torture", in: Report on his visit to Azerbaijan.

against women. It has been argued that due to the vagueness of the obligations under the CEDAW Convention, in particular regarding economic, social and cultural rights, they are not justiciable. It has also been maintained that the manner in which a State carries out its obligation of result, such as the obligation to take “all appropriate measures” to achieve a stated goal, is not conducive to meaningful external scrutiny by international bodies. In other words, these obligations allegedly cannot be measured or ascertained as they leave a large degree of discretion to the States parties. The CEDAW Convention indeed does not merely provide women the right to equality and non-discrimination in all areas of public and private life, although some of the provisions do impose this type of specific obligations. Many of the obligations under the CEDAW Convention are formulated as obligations to take “all appropriate measures” towards the goal of eliminating discrimination. Consequently, the question is not whether guarantees of non-discrimination are justiciable, but whether obligations to work towards the elimination of discrimination are justiciable. The phrase “all appropriate measures,” requires States to identify the existing situation and on that basis determine the “appropriate measures” to correct that specific situation.

Andrew Byrnes and Jane Connors have analysed the justiciability issue in relation to the provisions under the CEDAW Convention and have come to the conclusion that the concerns about the justiciability of obligations contained in the Convention should not be overemphasised because a number of obligations are clearly justiciable. Even in the case of obligations “to take all appropriate measures”, it is possible for the Committee to exercise a meaningful level of scrutiny over steps taken by States parties to achieve the stated goals.<sup>788</sup> Ineke Boerefijn has observed that the CEDAW Committee in spelling out the obligations deriving from economic, social and cultural rights in its General Recommendations and Concluding Comments under the reporting procedure has clearly demonstrated that it is very well possible to address these rights in terms of violations and real guarantees, particularly when dealing with the obligation to eliminate discrimination in the enjoyment of these rights.<sup>789</sup> Thus, while States have a certain margin of choice in determining an appropriate

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788 See Andrew Byrnes and Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?* (1995-96) 21 *Brooklyn Journal of International Law* 697, p. 713.

789 See Ineke Boerefijn, *State obligations under articles 10-14: women's economic, social and cultural rights*, The Optional Protocol to CEDAW: mitigating violations of women's human rights. International training seminar for NGOs and women's rights activists, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 16.

strategy, they are at the same time under the legal duty to exercise that choice diligently. States have to assess areas where discrimination persists and develop and apply measures for its elimination with due diligence.

Monitoring the obligation to work towards the elimination of discrimination against women may not always be that simple. However, the CEDAW Committee is able to express itself on the actions of States parties and although it may on occasion be unable to identify the appropriate measures in a specific situation, it is able to determine whether a State has taken the minimum steps necessary to demonstrate a bona fide fulfilment of its obligation.<sup>790</sup> Byrnes and Connors observe that this is particularly true considering that the goal of equality and non-discrimination is not vague or open-ended, but is itself a justiciable guarantee.<sup>791</sup> Moreover, Boerefijn has underlined that guarantees of equality and non-discrimination are widely accepted as justiciable no matter whether the discrimination takes place in the sphere of civil and political rights or economic, social and cultural rights.<sup>792</sup> The General Recommendations and the Concluding Comments adopted by the CEDAW Committee under the reporting procedure may contribute to a more precise definition of the steps a State must take in order to carry out its obligations in good faith.

## 5.2.6 Violence Against Women

The CEDAW Convention does not directly refer to violence against women. In order to compensate for this omission, the CEDAW Committee issued at its eleventh session in 1992 General Recommendation 19 on Violence against Women.<sup>793</sup> The Recommendation states:

“Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”

According to General Recommendation 19:

“The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion

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<sup>790</sup> *Ibid.*, p. 12.

<sup>791</sup> Andrew Byrnes and Jane Connors, *supra* note 41, p. 717.

<sup>792</sup> Ineke Boerefijn, above note 799, p. 11.

<sup>793</sup> General Recommendation 19, § 1.

and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”

Violence against women is a subset of gender-based violence, which also includes violence against men in some circumstances, and violence against both women and men on the grounds of sexual orientation.<sup>794</sup> The Recommendation further clarifies that:

“Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.”

Examples of gender-based violence mentioned in General Recommendation 19 include: family violence and abuse, forced marriage, dowry deaths, acid attacks, female circumcision, sexual harassment, compulsory sterilization or abortion or denial of reproductive health services, battering, rape and other forms of sexual assault, and in certain circumstances, the abrogation of family responsibilities by men. The General Recommendation emphasises that “the full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women” (Paragraph 4).

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<sup>794</sup> See Amnesty International, “Making rights a reality: the duty of states to address violence against women”, 2004.

***Textbox iii***  
***Special Rapporteur on Violence against Women,***  
***its Causes and Consequences***<sup>795</sup>

Following the recognition that women's rights are human rights at the Vienna World Conference on Human Rights in 1993, and the adoption of the UN Declaration on the Elimination of All Forms of Violence against Women, the fight against violence against women was further strengthened with the appointment of the first ever Special Rapporteur on violence against women, its causes and consequences, by Resolution 1994/45, adopted by the UN Human Rights Commission on 4 March 1994.

According to her mandate, the main activities of the Special Rapporteur are :

- a) Seeking and receiving credible and reliable information from Governments, treaty bodies, the specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations (NGOs), including women's organizations;
- b) Making urgent appeals to Governments to clarify the situation of individuals whose circumstances give grounds to fear that treatment falling within the mandate of the Special Rapporteur is occurring or might occur;
- c) Transmitting to Governments information of the sort mentioned in (a) above indicating that acts falling within her mandate may have occurred or that legal or administrative measures are needed to prevent the occurrence of such acts;
- d) Carrying out visits in situ with the consent of the Governments concerned; and
- e) Reporting to the Commission on Human Rights and recommending measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes and to remedy its consequences.<sup>796</sup>

The Special Rapporteur works towards

the elimination of all forms of gender-based violence in the family, within the general community and where perpetrated or condoned by the State,

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<sup>795</sup> This *Textbox* was compiled using information available on the website of the Office of the High Commissioner for Human Rights (OHCHR), [www.ohchr.org](http://www.ohchr.org).

<sup>796</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Towards an effective implementation of international norms to end violence against women, (Ms. Yakin Ertürk), (2003) UN doc. E/CN.4/2004/66.

emphasiz[ing] the duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State, by private persons or by armed groups or warring factions, and to provide access to just and effective remedies and specialized, including medical, assistance to victims.<sup>797</sup>

From 1994 to 2003, Ms Radhika Coomaraswamy (Sri Lanka) held the post of Special Rapporteur on violence against women. She undertook thematic studies of violence against women in the family, including cultural practices in the family that are violent towards women; violence against women in the community; violence against women during armed conflict; and the issue of international trafficking in persons. More specifically, she investigated the legacy of comfort women in Japan and Korea, led a mission to the US to report on violence against women in state and federal prisons, published reports concerning policies that impact on violence against women (economic and social policies and policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women), and also developed a framework for model legislation on domestic violence.<sup>798</sup>

In 2003, Ms Coomaraswamy was succeeded by Dr Yakin Ertürk (Turkey). Dr Ertürk has carried on the mandate of the Special Rapporteur by placing emphasis on “the *universality* of violence against women, the *multiplicity* of its forms and the *intersectionality* of diverse kinds of discrimination against women and its linkage to a system of domination that is based on subordination and inequality”<sup>799</sup>. Dr Ertürk has continued to explore the issues of violence against women perpetrated by security forces in situations of armed conflict, having carried out missions to the Darfur region of Sudan, the Occupied Palestinian Territory, Afghanistan, and the Chechen Republic; the problem of trafficking in women and girls, visiting both countries of origin and destination (the Russian Federation, Netherlands, Sweden), and cultural practices repressing women (among others, the widespread practice of forced marriage in Turkey). Further, Dr Ertürk has extensively researched the interplay between the diverse forms of discrimination connected to HIV/AIDS and their impact on violence against women. Of great contribution to the operation of the Special Rapporteur's mandate, has been Dr Ertürk's report on the due diligence standard<sup>800</sup>, in which she advocates for its application at

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797 Human Rights Commission Resolution 2003/45.

798 Report of the Special Rapporteur on violence against women, its causes and consequences, A framework for model legislation on domestic violence, (Ms. Radhika Coomaraswamy), (1996) UN doc. E/CN.4/1996/53/Add.2

799 Report of the Special Rapporteur on violence against women, its causes and consequences, *supra* note 796.

800 Report of the Special Rapporteur on violence against women, its causes and consequences, The due diligence standard as a tool for the elimination of violence against women, (Ms. Yakin Ertürk), (2006) UN doc. E/CN.4/2006/61.

multiple levels, reaching beyond a State-centric approach limited to requiring States to punish the perpetrators, to pushing States to take positive action to prevent violence against women, provide compensation to the victims, and also to holding non-state actors accountable for their acts of violence.

### **Submitting a complaint to the Special Rapporteur on violence against women**

As mentioned above, a part of the Special Rapporteur's mandate is to transmit urgent appeals and communications (allegation letters) to States concerning allegations of violence against women. Allegations may relate to individuals or groups of individuals or may document a general situation in which violence against women is being perpetrated or condoned.

These complaints may be sent to:

THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN  
OHCHR-UNOG

8-14 Avenue de la Paix  
1211 Geneva 10,  
Switzerland

Fax: + 41 (0) 22 917 9006  
E-mail: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

Once received, the Special Rapporteur will assess the reliability of information transmitted and the degree of danger posed to a woman's life or personal integrity. If danger or threat of danger appears imminent, the Special Rapporteur will appeal to the government concerned requesting that urgent action be taken to ensure effective protection to those at risk. If the allegation concerns acts of violence against women which have already occurred, the Special Rapporteur will transmit an allegation letter to the government concerned seeking clarification on the substance of the alleged acts.

In order to submit a complaint to the Special Rapporteur, the "individual complaint form" made available on the Special Rapporteur's website should be completed. In addition to this, it is helpful to attach a summary of your case. Should further developments unfold upon submission of your case to the Special Rapporteur, these should also be brought to her attention.

For further details, please visit the Special Rapporteur's website, which contains useful information and advice on what points should be addressed in complaints:

<http://www.ohchr.org/english/issues/women/rapporteur/complaints.htm>

## 5.2.7 Reservations upon Ratification or Accession to the CEDAW Convention

The CEDAW Convention is subject to a large number of reservations. The principles regulating the making of reservations to treaties, objections to reservations and the legal relations among reserving, objecting and acquiescing States are contained in the Vienna Convention on the Law of Treaties.<sup>801</sup> The CEDAW Convention contains no article which prohibits reservations, nor does it classify any rights as non-derogable. Article 28 (2) of the CEDAW Convention follows the Vienna Convention by prohibiting reservations which are “incompatible with the object and purpose” of the CEDAW Convention. However, many of the reservations made by the States parties to the CEDAW Convention are clearly contrary to the object and purpose of the CEDAW Convention. This is in particular true of those reservations to central provisions such as articles 2 and 16 on the ground that national law, customs or religion are not congruent with the CEDAW principles. Consequently, a number of these reservations actually have the effect of reinforcing inequality between men and women preventing the full advancement of women and perpetuating their subordinate position relative to that of men. However, unlike article 20 (2) of the Convention to Eliminate All Forms of Racial Discrimination, which provides that a reservation shall be considered incompatible if at least two-thirds of States parties object, the only procedure provided for under the CEDAW Convention which could be used to rectify this problem is that under article 29 (1), which provides for referral of any dispute regarding the application or interpretation of the Convention to the ICJ. However, this provision is subject to a large number of reservations and has never been applied.

The CEDAW Committee has adopted two General Recommendations on reservations. General Recommendation 4 expresses concern about the significant number of reservations that appear to be incompatible with the object and purpose of the Convention and suggests that States parties reconsider such reservations with a view to withdrawing them.<sup>802</sup> In General Recommendation 20, the CEDAW Committee recommends that States should:

“a) Raise the question of the validity and the legal effect of reservations to the Convention in the context of reservations to other human rights treaties;

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801 Articles 19-23.

802 General Recommendation 4.

- (b) Reconsider such reservations with a view to strengthening the implementation of all human rights treaties;
- c) Consider introducing a procedure on reservations to the Convention comparable with that of other human rights treaties.”<sup>803</sup>

The CEDAW Committee’s Reporting Guidelines contain a paragraph on reservations. The Guidelines require as follows:

“Any reservation to or declaration as to any article of the Convention by the State party should be explained and its continued maintenance justified. Taking account of the Committee’s statement on reservations adopted at its nineteenth session (see A/53/38/Rev.1, part two, chap. I, sect. A), the precise effect of any reservation or declaration in terms of national law and policy should be explained. States parties that have entered general reservations which do not refer to any specific article, or which are directed at article 2 and/or 3 should report on the effect and the interpretation of those reservations. States parties should provide information on any reservations or declarations they may have lodged with regard to similar obligations in other human rights treaties.”<sup>804</sup>

In its statement on reservations the Committee articulates that it considers articles 2 and 16 to be core provisions of the Convention and expresses its particular concern at the number and extent of reservations entered to those articles. In General Recommendation 21, the Committee requires that States, in order to be consistent with articles 2, 3 and 24, withdraw their reservations in particular to articles 9 (on nationality), 15 (on legal capacity) and 16 (on marriage and family relations).<sup>805</sup>

The Committee, in its examination of States’ reports, enters into dialogue with the State party concerned and makes Concluding Comments that routinely express concern at the entry of reservations, in particular to articles 2 and 16, or the failure of the States parties to withdraw or modify them.<sup>806</sup> However,

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803 General Recommendation 20, § 2.

804 UN Doc. HRI/GEN/2/Rev. 1/Add.2, 5 May 2003.

805 General Recommendation 21.

806 See, for example, the comment of the Committee at its 34<sup>th</sup> session in 2006 on Thailand’s maintenance of its reservations to article 16, UN Doc. CEDAW/C/THA/CO/5, or the comment of the Committee at its 32<sup>nd</sup> session in 2005 on Algeria’s reservation to articles 2, 9(2), 15(4) and article 16. In relation to Algeria, the Committee noted that “reservations to articles 2 and 16 are contrary to the object and purpose of the Convention”, UN Doc. CEDAW/C/DZA/CC/2.

only a few States have withdrawn or modified their reservations in relation to articles 2 and 16.<sup>807</sup> One problem is that the Concluding Comments, like the General Recommendations, are not legally binding; another problem is the lack of guidelines to determine what is and is not compatible with the object and purpose of the CEDAW Convention. Moreover, there are no procedural limitations on making reservations, and the consequences of incompatible reservations are not spelled out.

Despite its concern, the CEDAW Committee has not adopted a recommendation similar to that of the Human Rights Committee with respect to reservations to the ICCPR.<sup>808</sup> The Human Rights Committee holds:

“It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”<sup>809</sup>

The Human Rights Committee states further that in order that the “reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law.”<sup>810</sup> Moreover, the Human Rights Committee also criticises imprecise,

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807 See, for example, the comments of the CEDAW Committee at its 35<sup>th</sup> session in 2006 on Malaysia’s decision to withdraw its reservation to articles 2 (f), 9 (l), 16 (b), (d) (e) and (h) of the Convention, UN Doc. CEDAW/C/MYS/CO/2 or the comments of the CEDAW Committee at its 32 session in 2005 on Turkey’s decision to withdraw its reservations, including to article 16 paragraphs 1 (c), (d), (f), (g) of the Convention,

808 Human Rights Committee, General Comment 24.

809 *Ibid.*, para 18.

810 *Ibid.*, para 19.

general reservations and emphasises that the effect of reservations on the treaty as a whole should be weighed.

The effect of reservations in terms of the Optional Protocol to the CEDAW Convention will be discussed hereunder.

### **5.3 Introduction to the Optional Protocol to the CEDAW Convention**

The Optional Protocol to the CEDAW Convention, adopted by the General Assembly on 6 October 1999,<sup>811</sup> was a response to calls for stronger enforcement mechanisms that could provide a means through which women might directly access justice at the international level. States parties to the CEDAW Convention are not automatically States parties to the Optional Protocol. Instead, States are required either to ratify or accede to the Optional Protocol in order to become a party. The Optional Protocol entered into force on 22 December 2000, following the ratification of the tenth State party to the Convention. As of 20 September 2006, the Optional Protocol had been ratified or acceded to by 81 States parties.<sup>812</sup> See *Table 2* below for the status of ratification of the Optional Protocol, presented by region.

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811 UN Doc. GA Res. 54/4, 15 October 1999.

812 <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>.

*Table 2*  
*Ratifications of the Optional Protocol to the CEDAW*<sup>813</sup>  
*(Countries by Region)*

<i>Country (by region)</i>	<b>Optional Protocol to CEDAW</b> <sup>814</sup>
<b>Africa</b>	
Burkina Faso	10 October 2005
Cameroon	7 January 2005
Gabon	5 November 2004
Lesotho	24 September 2004
Libyan Arab Jamahiriya	18 June 2004
Mali	5 December 2000
Namibia	26 May 2000
Niger	30 September 2004
Nigeria	22 November 2004
Senegal	26 May 2000
South Africa	18 October 2005
United Republic of Tanzania	12 January 2006
<b>Americas</b>	
<b>Optional Protocol to CEDAW</b>	
Antigua & Barbuda	5 June 2006
Belize	9 December 2002
Bolivia	27 September 2000
Brazil	28 June 2002
Canada	18 October 2002
Costa Rica	20 September 2001

813 Table compiled using information available on the UN Treaty Bodies Database (see <http://www.unhchr.ch/tbs/doc.nsf>); information in table is current as of 1 November 2006.

814 For States which ratified the Optional Protocol to the CEDAW before its entry into force on 22 December 2000, the present Protocol entered into force three months from this date. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol entered into force three months after the date of the deposit of its own instrument of ratification or accession (Article 16, Optional Protocol to CEDAW).

Dominican Republic	10 August 2001
Ecuador	5 February 2002
Guatemala	9 May 2002
Mexico	15 March 2002
Panama	9 May 2001
Paraguay	14 May 2001
Peru	9 April 3002
St Kitts and Nevis	20 January 2006
Uruguay	26 July 2001
Venezuela	13 May 2002
<b>Asia</b>	<b>Optional Protocol to CEDAW</b>
Bangladesh	6 September 2000
Maldives	13 March 2006
Mongolia	28 March 2002
New Zealand	7 September 2000
Philippines	12 November 2003
Republic of Korea	18 October 2006
Solomon Islands	6 May 2002
Sri Lanka	15 October 2002
Thailand	14 June 2000
Timor Leste	16 April 2003
<b>Europe / Central Asia</b>	<b>Optional Protocol to CEDAW</b>
Albania	23 June 2003
Andorra	14 October 2002
Armenia	14 September 2006
Austria	6 September 2000
Azerbaijan	1 June 2001
Belarus	3 February 2004
Belgium	17 June 2004
Bosnia and Herzegovina	4 September 2002

Bulgaria	20 September 2006
Croatia	7 March 2001
Cyprus	26 April 2002
Czech Republic	26 February 2001
Denmark	31 May 2000
Finland	29 December 2000
France	9 June 2000
Georgia	1 August 2002
Germany	15 January 2002
Greece	24 January 2002
Hungary	22 December 2000
Iceland	6 March 2001
Ireland	7 September 2000
Italy	22 September 2000
Kazakhstan	24 August 2001
Kyrgyzstan	22 July 2002
Liechtenstein	24 October 2001
Lithuania	5 August 2004
Luxembourg	1 July 2003
Netherlands	22 May 2002
Norway	5 March 2002
Poland	22 December 2003
Portugal	26 April 2002
Republic of Moldova	28 February 2006
Romania	25 August 2003
Russian Federation	28 July 2004
San Marino	15 September 2005
Serbia and Montenegro	31 July 2003
Slovakia	17 November 2000
Slovenia	23 September 2004
Spain	6 July 2001
Sweden	24 April 2003
The Former Yugoslav Republic of Macedonia	17 October 2003

Turkey	29 October 2002
Ukraine	26 September 2003
United Kingdom of Great Britain and Northern Ireland	17 December 2004

The Protocol contains two procedures: a communication and an inquiry procedure. The first procedure offers the individual or a group of individuals the possibility to submit a complaint to the CEDAW Committee claiming that a State party has violated the complainant's rights under the Convention. It provides a means of seeking redress for *specific* violation(s) which result from an act or omission by a State party.

The inquiry procedure enables the CEDAW Committee to initiate inquiries into situations of grave or systematic violations of women's rights. In either procedure, States must be parties to the Convention and the Protocol. The two procedures are not mutually exclusive: it is not prohibited to submit an individual communication based on a human rights situation which is already the subject of an inquiry procedure. Article 17 of the Protocol explicitly provides that no reservations may be entered to its terms. However, the Protocol contains an "opt-out clause", allowing States upon ratification or accession to declare that they do not accept the inquiry procedure.

The original Maastricht draft of the Optional Protocol was modelled on existing treaty complaints mechanisms, but offered in many respects a broader procedure.<sup>815</sup> For example, the draft enlarged the category of those who could bring complaints to include individuals, groups or organisations claiming to be affected by a violation, as well as individuals, groups or organisations "with a sufficient interest".<sup>816</sup> This broader standing provision, which would have also allowed complaints of systematic discrimination in addition to individual complaints, was deleted at the meeting of the Commission on the Status of Women in 1998.<sup>817</sup> The Maastricht draft contained another innovative provision which placed an obligation on States to take steps to remedy violations identified

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815 For a discussion on the Maastricht draft and a copy of the draft, see Andrew Byrnes and Jane Connors, above note 798, pp. 747-797.

816 *Ibid.*, article 2 (1) (b) of the Maastricht draft.

817 *Ibid.*, see GA Res. 54/4, 15 October 1999, article 2.

through the complaints mechanisms.<sup>818</sup> As views adopted by treaty monitoring bodies under existing complaints procedures are not expressly regarded as binding on concerned States, and instead are regarded simply as recommendations, this provision met resistance and consequently was dropped. As a result, instead of such a requirement, States are encouraged to give due consideration to CEDAW's views and to respond to them.<sup>819</sup> The third improvement in the Maastricht draft survived and has given the CEDAW Committee the power to inquire into allegations of systematic violations of the CEDAW Convention without a prior specific complaint.<sup>820</sup>

The CEDAW Committee has adopted a set of official guidelines on the administration of communications and inquiries under the Optional Protocol, referred to as the "Rules of Procedure".<sup>821</sup> From the moment the Committee receives an individual complaint or initiates an inquiry, it must follow this set of rules and procedures, which regulates the Committee members' approach to and assessment of the communications received. According to Rule 62 of the Rules of Procedure, the Committee may establish one or more working groups, each comprising no more than five of its members, and may designate one or more rapporteurs to make recommendations to the Committee and assist in any matter as the Committee may decide. In accordance with this Rule, the CEDAW Committee has established a Working Group on Communications, comprised of five CEDAW Committee members. The Working Group works closely with the Secretariat (the Division for the Advancement of Women) and meets prior to the regular sessions of the CEDAW Committee.

The tasks of the Working Group are to:

- Determine whether a communication should be registered. Such a decision can be made on a majority basis within the Working Group;
- Declare whether a communication is admissible under the Optional Protocol. In accordance with Rule 64 of the Rules of Procedure, this decision must be made unanimously. If the decision cannot be made unanimously at this stage, then the entire CEDAW Committee must by simple majority decide whether the communication is admissible;

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818 *Ibid.*, article 8 of the Maastricht draft.

819 See article 7 (4) of the Optional Protocol.

820 See article 8 of the Optional Protocol.

821 They can be found at <http://www.un.org/womenwatch/daw/cedaw/index.html>.

- Request the State party, where necessary, to take interim measures in order to avoid irreparable damage to the victim or victims of the alleged violation, in accordance with Rule 63 of the Rules of Procedure;
- Make recommendations, in accordance with Rule 72 of the Rules of Procedure, to the CEDAW Committee on the merits of a communication.<sup>822</sup>

The current members of the Working Group on Communications under the Optional Protocol, whose two-year terms end on 31 December 2006, are: Magalys Arocha Dominguez (Cuba); Cornelis Flinterman (Netherlands); Krisztina Morvai (Hungary); Pramila Patten (Mauritius); Anamah Tan (Singapore).

## **5.4 Stages of the Communications Procedure<sup>823</sup>**

### **5.4.1 Submission of a Communication**

Although the communication need not follow a set format, there exists a model form containing guidelines for submission of communications to the CEDAW Committee.<sup>824</sup> It is highly recommended that complainants follow these guidelines carefully when filing a petition. The model form identifies eight types of information that are necessary for a proper consideration of the case:

1. Information concerning the author(s) of the communication;
2. Information concerning the alleged victim(s) (if other than the author);
3. Information on the State party;
4. Nature of the alleged violation(s);
5. Steps taken to exhaust domestic remedies;
6. Other international procedures;
7. Date and signature of author(s) and/or victim(s);
8. List of documents that are attached to the communication form.

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822 See IRAW Asia Pacific at <http://www.iwraw-ap.org/protocol/working.htm>.

823 International Women's Rights Actions Watch Asia Pacific also includes on its website a comprehensive overview of the different stages of the communications procedure at: <http://www.iwraw-ap.org/protocol/overview.htm>

824 This model form can be found at <http://www.un.org/womenwatch/daw/cedaw/protocol/modelform-E.PDF>.

The communications must be signed and submitted to:

Committee on the Elimination of Discrimination against Women  
c/o Division for the Advancement of Women  
Department of Economic and Social Affairs  
United Nations Secretariat  
2 United Nations Plaza, DC-2/12th Floor  
New York, NY 10017  
USA  
Fax : 1-212-963-3463

All communications submitted to the CEDAW Committee are first received and reviewed by the Secretariat of the Committee, i.e. the Division for the Advancement of Women (DAW). The Secretariat's role and responsibilities in the administration of the communications procedure are defined in detail in the abovementioned Rules of Procedure. The Secretariat can be contacted at [daw@un.org](mailto:daw@un.org).

The Secretariat determines the initial admissibility of the communication. In doing so the Secretariat will consider whether sufficient information has been provided in the communication. If the communication lacks information the Secretariat will seek further details from the author(s) of the petition in accordance with Rule 58 of the Rules of Procedure. Under Rule 59 of the Rules of Procedure, the Secretariat prepares a summary of the communication with a view to registration.

The Committee examines a complaint in two different stages. The first stage concerns the admissibility of the communication. A number of conditions must be fulfilled before the merits of the alleged violation can be considered. In accordance with Rule 64 of its Rules of Procedure, the Committee shall decide whether the communication is admissible or inadmissible. The second stage of consideration concerns the merits of the claim, i.e. whether the alleged facts constitute a violation of the CEDAW Convention. All documents relevant to both stages of inquiry should accompany the initial communication. Thus, relevant national laws and details of any administrative or judicial decisions with respect to the matter at the national level, including copies of such decisions, should be sent together with the communication. It is critically important to fulfil all formal admissibility requirements in order to avoid having the case declared inadmissible at the outset. The admissibility requirements are therefore set out in detail below.

## 5.4.2 Admissibility Requirements

### a) Pre-admissibility Requirements

#### i. *Author of the Communication*

Article 2 of the Optional Protocol and Rule 68 of the Rules of Procedure establish that a communication may be submitted:

- By individuals or groups of individuals, under the jurisdiction of a State party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State party; or
- On behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received.

The communication must demonstrate that the complainant has been directly affected by the law, policy, practice, act or omission of the State party which she claims has violated, or is violating, her rights under the CEDAW Convention.<sup>825</sup> A communication that challenges a law or policy which has not been applied to the complainant will be deemed inadmissible. Rather, the complainant or complainants must show that the law, policy or practice victimises her or them as an individual or group of individuals.<sup>826</sup> This is also sometimes referred to as the rule against “*actio popularis*”.

The individual or group of individuals submitting the communication must demonstrate that she or they are under the jurisdiction of the State party concerned. This is of particular importance in cases of alleged violations of the rights of female immigrants, non-nationals and individuals residing in States other than their own.<sup>827</sup> However, the individual who claims to be a victim of a State violation does not have to be a national or even a resident of the State concerned. States are legally responsible for respecting and implementing international human rights law within their territories and in territories where they exercise effective control in respect of *all* persons and regardless of a particular individual’s citizenship or migration status.<sup>828</sup> The violations must

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825 See Jane Connors, *Introduction to the Optional Protocol and its Mechanisms*, in *The Optional Protocol to CEDAW: mitigating violations of women’s human rights. International training seminar for NGOs and women’s rights activists*, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 18.

826 *Ibid.*

827 *Ibid.*

828 See for example Article 12, International Law Commission’s Articles on responsibility of states for internationally wrongful acts, and Human Rights Committee General Comment 31.

have occurred during the time when the individuals(s) was subject to the jurisdiction of the State against which the communication is brought.

Although the Optional Protocol allows for individuals or groups of individuals to submit a communication on their own, the assistance of a lawyer or other trained advocate (NGO, etc.) may be advisable given the legal and procedural complexity of complaints. Moreover, some complainants might face other obstacles including illiteracy, fear of retaliation by family or community members, or even lack of financial resources. Article 2 of the Optional Protocol provides that communications may be submitted on behalf of individuals or groups of individuals, with their consent. The requirement of consent is again a safeguard against an *actio popularis* because it ensures that the communication is brought by those who have a sufficiently close connection to the original alleged violation and that the authors are committed to representing the best interests of the alleged victims of the violation. Evidence of consent can be in the form of an agreement to legal representation, power of attorney or other documentation indicating that the victim has authorised the representative to act on her behalf.<sup>829</sup> In certain situations, a complaint may also be submitted where the consent of the individual or group of individuals has not been obtained, if the author can reasonably justify the lack of consent. For example, where a communication is brought on behalf of a very large group of individuals, one may argue that it is unreasonable to obtain consent from each individual victim. Other examples include cases in which a victim runs the risk of reprisals if she consents to the communication on her behalf or where the victim is unable to give her consent for reasons such as detention or other confinement, serious ill health or the lack of legal authority to consent.<sup>830</sup>

It should be noted, however, that the United Nations does not provide legal aid or financial assistance for complainants, and the CEDAW Committee does not mandate that States parties provide legal aid. Complainants should verify whether legal aid in their countries is available for bringing complaints under international mechanisms and whether NGOs or women's organisations offer assistance free of charge.

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829 Inter-American Institute of Human Rights, *Optional Protocol. Convention on the Elimination of All Forms of Discrimination against Women*, San Jose, 2000, pp. 41-44, at IWRAP Asia Pacific, <http://www.iwraw-ap.org/protocol/jurisdiction.htm>.

830 *Ibid.*

*ii. Format of the Communication*

Article 3 of the Optional Protocol and Rule 56 of the Rules of Procedure establish that in order to be considered by the Committee, the communication:

- Must be in writing;
- May not be anonymous;
- Must refer to a State which is a party to both the Convention on the Elimination of Discrimination against Women and the Optional Protocol.

In terms of confidentiality, decisions concerning inadmissibility, discontinuation and merits are public documents. However, under Rule 74 of the Rules of Procedure, the CEDAW Committee may decide that “the name or names and identifying details of the author or authors of a communication or the individuals who are alleged to be the victim or victims of a violation of rights set forth in the Convention shall not be made public by the Committee, the author or the State party concerned.” However, the identity of the victim and the author of the complaint must be provided to the State party. In terms of submissions, the author of the complaint and the State party may make any submissions or provide any information related to the complaint available to the public unless the Committee decides “to keep confidential the whole or part of any submission or information relating to the proceedings.”

**b) Infringement of a Right Protected by the CEDAW Convention – Violence against Women**

Article 2 of the Optional Protocol states: “Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State party, claiming to be victims of *a violation of any of the rights set forth in the Convention by that state party*” (emphasis added).

In order to substantiate the individual complaint:

- The alleged violation in the communication must infringe a right (or rights) that is protected by the CEDAW Convention;
- The specifics of the communication must reveal discrimination based on sex or gender (how the alleged violation is linked to article 1 of the CEDAW Convention).

The CEDAW Convention does not contain a list of women’s rights, as discussed above. By becoming a State party to the CEDAW Convention, a State accepts a range of legally binding obligations to eliminate all forms of

discrimination against women and to establish equality between women and men. In that sense, the formulation of article 2 is somewhat peculiar as it refers to “*the rights set forth in the Convention*”. The authors of the individual complaint thus have to identify and define the right(s) and subsequently the violation of the right(s) on the basis of a careful analysis of obligations set forth in the CEDAW Convention and the particular circumstances of the alleged victim(s). Hence, the claim should provide information on the perpetrator of the violation and what action or inaction resulted from the violation in order demonstrate clearly the responsibility of the State. The claim should also describe how the violation has had a negative effect on the fulfilment of other obligations set out in the CEDAW Convention, as they are all interrelated.

It is extremely important to understand that a communication concerning arbitrary detention, torture, summary and extra-judicial executions, forced disappearances and other serious human rights violations will not be admissible under the Optional Protocol unless the complainant can show that there are elements of discrimination on the basis of sex or gender. The CEDAW Convention does not otherwise protect against these human rights violations. In other words, the Convention does not consist of obligations to ensure the enjoyment of independent human rights by women, but rather obliges States parties to afford women equality with men in the enjoyment of rights and to eliminate discrimination against women.<sup>831</sup>

The analysis of violations should go beyond the obligations set out in the articles of the CEDAW Convention. The CEDAW Convention is not a static document. It is a living instrument, and therefore the jurisprudence of the CEDAW Committee, including General Recommendations, Concluding Comments adopted by the Committee in the State reporting process as well as views adopted by the CEDAW Committee in the individual communications and inquiry processes, are important to take into account while arguing a case. General Recommendations adopted by the CEDAW Committee have expanded the meaning of the provisions of the CEDAW Convention, of particular importance in the area of violence against women.<sup>832</sup> As also mentioned above, while the CEDAW Convention does not contain a provision protecting women from violence, General Recommendation 19 explicitly affirms that “the definition of discrimination [as laid down in article 1 of the Convention]

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831 A. Byrnes and J. Connors, above note 798, p. 716.

832 In Communication No. 2/2003, *Mrs A.T. v. Hungary* (2/2003), the Committee explicitly considers the merits of the case against the backdrop of General Recommendation 19. This case is discussed hereunder.

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”<sup>833</sup>

*i. Protection of Women from Violence by State Actors*

As mentioned above, General Recommendation 19 provides that “[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include (...) the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>834</sup>

General Recommendation 19 also states: “The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach State obligations under general international human rights law and under other conventions, in addition to breaching this Convention.” Thus a case of a woman who is tortured or has been subjected to ill-treatment by a State official can be the basis of a communication to the CEDAW Committee, provided, as mentioned above, that the facts of the violation disclose discrimination based on sex or gender. In isolation, some acts of violence are not necessarily identifiable as gender-based. Thus, communications may require an evaluation of how certain acts affect women in comparison with men and how gender affects the act of violence. Other acts are commonly gender-specific, such as forced abortion and forced sterilisation.

According to the UN Declaration on the Elimination of Violence against Women, the term “violence against women” means:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>835</sup>

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833 General Recommendation 19.

834 *Ibid.*

835 Article 1 of the UN Declaration on the Elimination of Violence against Women.

Elements upon which gender often has a determinative impact and which should be examined in determining whether an act of torture or ill-treatment is gender-based include: (a) the form of the violence, for example, if the torture and ill-treatment of a women is sexual in nature (although men are also targeted with sexual violence, sexual forms of torture and ill-treatment are more consistently perpetrated against women); (b) the circumstances under which the violence occurs, for example, violence against women of a certain group in a situation of armed conflict, or punishments such as flogging and stoning, particularly those imposed by religious (e.g. *Sharia*) and *ad hoc* courts, and which are disproportionately applied to women, largely as a result of laws that criminalise adultery and sexual relations outside of marriage;<sup>836</sup> (c) the consequences of the torture. Examples include threats of expulsion from their homes or communities or risk of being killed or subjected to other acts of violence at the hands of family members or communities (secondary victimisation) based on concepts of honour, fear and shame, and as a consequence silence of the victim and impunity for perpetrators; and (d) the availability and accessibility of reparation and redress. Factors might include lack of legal aid, need of male family member support to access the justice system, or to provide the financial means for such access.

*ii. Protection of Women from Violence by Private Actors*

Although the main focus of this guide is torture and ill-treatment by State actors, some words need to be devoted to the subject of violence against women by non-state actors, as violence against women occurs to a great extent in the domestic/private or general community sphere.

Over the past decade, a growing body of international human rights standards has recognised State responsibility for human rights violations by private actors when the State fails to exercise due diligence in preventing, investigating, prosecuting, punishing or granting redress for human rights violations. The “due diligence” standard has become the primary human rights test to

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836 These punishments are disproportionately applied to women, largely as a result of laws that criminalise adultery and sexual relations outside of marriage. These laws are often used as means to circumscribe and control female sexuality. Evidentiary rules that provide that pregnancy constitutes irrefutable “evidence” of adultery or that give less weight to the testimony of women than to that of men, reinforce gender discrimination in the administration of justice. As a result, women are sentenced to corporal or capital punishment in far larger numbers than men. Punishments like flogging and stoning are indisputably in violation of international standards that prohibit torture and other cruel, inhuman or degrading treatment or punishment.

determine whether a State has met or failed to meet its obligations in combating violence against women. Women face violence to a great extent in the domestic and the community sphere, such as domestic violence, marital rape, trafficking, rape, violence against women in the name of honour and female genital mutilation. The recognition that States have certain positive obligations to prevent rights violations perpetrated by private actors, and that a State's failure to take measures to this end puts the State in breach of its responsibilities under international human rights law, plays an absolutely crucial role in efforts to eradicate gender-based violence. This recognition is perhaps one of the most important contributions of the women's movement to the human rights field.<sup>837</sup> This is particularly true because violence against women by private actors continues to attract limited government attention. It is therefore not surprising that the trend towards holding States responsible for actions of private actors is specifically reflected in the gender specific instruments, such as the CEDAW Convention, which explicitly provides that States parties are under an obligation to take appropriate measures to eliminate discrimination by any person, including private persons.<sup>838</sup> Also, General Recommendation 19 emphasises that:

“Under general international human rights law, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and providing compensation.”<sup>839</sup>

Furthermore, Article 4 (c) of the Declaration on the Elimination of Violence against Women explicitly proclaims that States should:

“exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”

Issues of State responsibility where non-state actors have committed human rights violations have been considered with increasing frequency in recent years by international human rights bodies.<sup>840</sup> The *Velásquez Rodríguez* case

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837 See Report of the Special Rapporteur on violence against women to the Commission on Human Rights, (Ms. Radhika Coomaraswamy), (1995), UN Doc. E/CN.4/1995/42, para. 107.

838 Article 2 (e).

839 General Recommendation 19, § 9.

840 See, e.g., *Velásquez Rodríguez v. Honduras*, Series C, No. 4, judgment of the Inter-American Court of Human Rights of 29 July 1988.

has become a classic judicial opinion in international human rights law because it highlighted the State's duty to exercise due diligence with respect to violence committed by non-governmental actors.<sup>841</sup> In this case, the Inter-American Court of Human Rights held that:

“An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>842</sup>

The Court further stated:

“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.”<sup>843</sup>

In a 2001 case, the Inter-American Commission on Human Rights concluded that Brazil had failed to exercise due diligence to prevent and respond to a domestic violence case in spite of the clear evidence against the accused and the gravity of the charges. The Commission found that the case could be viewed as:

“part of a general pattern of negligence and lack of effective action by the state in prosecuting and convicting aggressors” and that it involved “not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.”<sup>844</sup>

Since its decision in *Osman v. the United Kingdom*, in which threats against an individual were brought to the attention of the police, who failed to intervene, the European Court of Human Rights has developed jurisprudence in relation to the obligations of States to provide protection against human rights

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841 *Osman v. the United Kingdom*, No. 23452/94, Eur. Ct. of Hum. Rts. (28 October 1998); *Z. and Others v. United Kingdom*, No. 39392/95, Eur. Ct. of Hum. Rts. (10 May 2001); *E. and Others v. the United Kingdom*, No. 33218/96, Eur. Ct. of Hum. Rts. (26 November 2002); *X & Y v. Netherlands*, No. 91-A, Eur. Ct. of Hum. Rts. (26 March 1985).

842 *Ibid.*, para. 172.

843 *Ibid.*, para. 174.

844 Inter-American Commission on Human Rights, *Maria da Penha Maia Fernandes*, Report no. 54/01, Case 12.051, (Brazil), 16 April 2001, para. 56.

violations by non-state actors.<sup>845</sup> According to the European Court, a failure to take reasonable available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State. It is sufficient to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.

While not every infringement by an individual establishes a State's lack of due diligence and is considered a violation of human rights for which the State can be held responsible, States have to undertake their obligations seriously. This requirement includes the duty to provide and enforce adequate remedies to survivors of private violence. The existence of a legal system criminalising and providing sanctions for violence in the private sphere would not in itself be sufficient to pass the due diligence test; the government would also have to perform its functions effectively to ensure that incidents of family violence are *de facto* investigated, punished and remedied. The due diligence standard means that when a private actor commits an abuse to which the State fails to respond with due diligence, the State itself is responsible for the human rights violation.

The Optional Protocol to the CEDAW Convention offers great potential to seek justice for suffering violence at the hands of non-state actors for which the State can be held responsible. The individual complaint should clearly demonstrate the link between the alleged violations of the CEDAW Convention and the responsibility of the State concerned. The second individual communication dealt with by the CEDAW Committee concerned a domestic violence case.<sup>846</sup>

Ms. A.T., a Hungarian national born in 1968, mother of two children, one of whom was severely brain-damaged, claimed that for four years she had sought help against her violent husband L.F., with no result. Despite repeated threats to kill her, the complainant had not gone to a shelter as there was none that could accommodate the needs of a disabled child. Protection and restraining orders were not available under Hungarian law. In 1999, L.F. moved out of the

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845 European Court of Human Rights, *Osman v. the United Kingdom*, 23452/94, 28 October 1998; European Court of Human Rights, *Z. and Others v. United Kingdom*, 39392/95, 10 May 2001, European Court of Human Rights, *E. and Others v. the United Kingdom* 33218/96, 26 November 2002. See also European Court of Human Rights, *X & Y v. Netherlands*, Judgment of 26 March 1985, Series A, No. 91-A.

846 *Mrs A.T. v. Hungary*, above note 832.

family apartment, but he continued to threaten A.T., forced himself into the apartment and used violence. The author had produced several medical certificates documenting her injuries between 1998 and July 2001, when she was subjected to such a severe beating that she needed to be hospitalised. There had been civil proceedings regarding L.F.'s access to the family residence and the distribution of the common property. With regard to L.F.'s access to the family residence, the Budapest Regional Court decided on 4 September 2003 that L.F. was authorised to return and use the apartment. The judges reportedly based their decision on the following grounds: (1) lack of substantiation of the claim that L.F. regularly battered the author and (2) that L.F.'s right to the property, including possession, could not be restricted. The author submitted a petition for review of this decision that was pending at the time of her submission of supplementary information. The civil proceeding regarding the division of property was suspended. Moreover, there had been two criminal ongoing procedures against L.F. concerning battery and assault causing her bodily harm. L.F. was however never detained in this connection, and the authorities had not taken any measures to protect the complainant or her children. She had also requested assistance from local child protection authorities, but this request had also been to no avail.

In its consideration of the merits, the CEDAW Committee recalled its General Recommendation 19 which addresses whether States parties can be held accountable for the conduct of non-state actors:

“[D]iscrimination under the Convention is not restricted to action by or on behalf of Governments ... [U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

Against this backdrop, the CEDAW Committee faced the issue of whether the author of the communication was the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleged, for the past four years the State party had failed in its duty to provide her with effective protection from serious risk to her physical and mental health and her life by her former common-law husband. The Committee concluded:

“9.3 With regard to article 2 (a), (b) and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former husband and, furthermore, that legal and insti-

tutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.(...) The Committee further notes that the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author may have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comment from August 2002 on the State party's combined fourth and fifth periodic report that States. "... [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion order or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party that are set out in article (a), (b), and (e) of the Convention extend to the prevention of, and protection from violence against women and, in the instant case, remain unfulfilled and constitute a violations of the author's human rights and fundamental freedoms, particularly her rights to security of person."

"9.4 The Committee addresses articles 5 and 16 together in its general recommendation 19 in dealing with family violence. (...) It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002, and was concerned about 'the persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family ...'. In respect of the instant case before the committee, the facts of the communication reveal aspects of the relationships between the sexes and the attitudes towards women that the Committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband - the father of her two children. The author has been battered by the same man, i.e. her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L.F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in

the State party. She has been unable to flee to a shelter because none are equipped to take her in together with her children, one of whom is fully disabled.(...) [C]onsidered together, [these facts] indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.”

“9.6 ...[T]he Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b), and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women ...”

### c) Exhaustion of Domestic Remedies

Article 4 (1) of the Optional Protocol specifies that “[t]he Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted.” This basic rule of international law requires that a complainant first attempt to remedy the alleged violation through the domestic legal system of the State party. Only when all domestic remedies have been exhausted may the complainant resort to the CEDAW Committee for remedy. This rule guarantees that that State party has the opportunity to remedy a violation of any of the rights set forth under their legal system before the Committee considers the violation. In *Rahime Kayan v. Turkey*,<sup>847</sup> the CEDAW Committee followed the requirements of the Human Rights Committee<sup>848</sup> and noted that “[t]his would be an empty rule if authors were to bring the substance of a complaint to the Committee that has not been brought before an appropriate local authority.”

This case concerned the dismissal and termination of a civil servant for wearing a headscarf, and none of the complaints made before domestic authorities by the author raised the issue of discrimination based on sex. The first time that the author referred to filing an appeal, she stated that in her petition to the court she declared that the penalty for her infraction should have been a warning and not a “higher prosecution”. On the next occasion, the subject of sex-based discrimination, when the author defended herself while she was under

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847 *Rahime Kayan v. Turkey*, (8/2005).

848 See for example, Human Rights Committee, *Antonio Parra Corral v. Spain* (1356/05), § 4.2.

investigation for having allegedly entered the classroom with her hair covered, the author focused on political and ideological issues. Her lawyer defended her before the Higher Disciplinary Council by arguing a mistake in the law. Her lawyer also referred to violations of rights to freedom of work, religion, conscience, thought, choice, the prohibition of discrimination, immunity of person and the right to develop one's physical and spiritual being. The lawyer further referenced national and international principles of law. When the author appealed against her dismissal she based her claim on nine grounds, none of which were based on sex discrimination. Also in her appeal to the Council of State she failed to raise sex discrimination. No further domestic remedies were pursued. Therefore, the CEDAW Committee concluded:

“7.7 In Sharp contrast to the complaints before the local authorities, the crux of the author's complaint made to the Committee is that she is a victim of a violation by the State party of article 11 of the Convention by the act of dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women. By doing this, the State party allegedly violated the author's right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security pensions rights and equal treatment. The Committee cannot but conclude that the author should have put forward arguments that raised the matter of discrimination based on sex in substance before the administrative bodies she addressed before submitting a communication to the Committee. For this reason the Committee concludes that the domestic remedies have not been exhausted for purposes of admissibility with regard to the author's allegation relating to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women.”

However, the requirement that all domestic remedies must be exhausted is not absolute. Article 4 (1) of the Optional Protocol allows exceptions to the obligation of exhaustion of domestic remedies when “the application of such remedies is unreasonably prolonged or unlikely to bring effective relief”. The meanings of “unreasonably prolonged” and “unlikely to bring effective relief” allow for some amount of discretion by the CEDAW Committee. If it is alleged that domestic remedies have proven inadequate or unavailable, the communication must include evidence and a full, detailed description of all steps taken at the domestic level. Rule 69, paragraph 9, of the Rules of Procedure provides that where a claimant under the Optional Protocol claims to have exhausted domestic remedies or invokes one of the exceptions to this requirement, and the State party disputes that claim, the State party is required to provide details of the remedies available in the particular circumstances of that case.

In *A.T. v. Hungary*,<sup>849</sup> discussed above, domestic proceedings were still pending at the date of the submission of the communication. In the civil matter regarding the husband's access to the family apartment, the petition for review by the Supreme Court was dismissed at the time of the Committee's consideration of admissibility (but after the date of submission), and the civil matter regarding the distribution of the common property was suspended based on the issue of registration for an undisclosed period of time. The Committee found:

“[T]he eventual outcome of this proceeding is not likely to bring effective relief vis-à-vis the current life threatening violation of the Convention of which the author has complained.”

Moreover, two criminal proceedings against the perpetrator on charges of assault and battery were decided by convicting him and imposing a fine after the submission of the communication. Nonetheless, the Committee found:

“[S]uch a delay of over three years from the dates of incidents in question would amount to an unreasonably prolonged delay within the meaning of article 4, paragraph 1, of the Optional Protocol, particularly considering that the author has been at risk of irreparable harm and threats to her life during that period. Additionally, the Committee takes account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.”

#### **d) Inadmissibility for Concurrent Examination of the Same Matter**

Article 4, paragraph 2 establishes another five criteria by which a complaint shall be declared inadmissible by the CEDAW Committee, the first of which is where “the same matter has already been examined by the CEDAW Committee or has been or is being examined under a procedure of another international investigation or settlement”. This admissibility criterion aims to avoid duplication at the international level. At the same time, it underlines the importance of steering communications to the most appropriate treaty body, the one which can provide the most appropriate remedy for the victim. In many cases, victims of human rights violations have also the possibility of issuing the claim under other procedures, such as the First Optional Protocol to the ICCPR, the CAT, the International Convention on the Elimination of All

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849 *Mrs A.T. v. Hungary*, above note 832.

Forms of Racial Discrimination or regional procedures (the Council of Europe, the Organisation of American States and the African Union).

Regarding the meaning of “the same matter”, the HRC Committee has noted in its jurisprudence that this phrase implies that the same claim has been advanced by the same person.<sup>850</sup> In Communication *Fanali v. Italy*, the HRC Committee held,

“[T]he concept of the ‘same matter’ within the meaning of article 5 (2) (a) of the Optional Protocol has to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing act on his behalf before the other international body.”<sup>851</sup>

The CEDAW Committee has followed the HRC Committee in *Rahime Kayan v. Turkey*.<sup>852</sup> The communication was found admissible under Optional Protocol article 4, paragraph 2 (a), as the author was a different individual than the woman which the State party named in its argument that the communication was inadmissible because of a similar case before the European Court of Human Rights.

The criterion allows some discretion by the CEDAW Committee as to the meaning of the phrase “under a procedure of another international investigation or settlement.” The HRC Committee has taken the position that inasmuch as the ICCPR provides greater protection than is available under other international instruments, facts that have already been submitted to another international mechanism can be brought before the HRC Committee if broader protections are invoked. Thus mechanisms such as the 1503 procedure of the Human Rights Council, the communications procedure of the Committee on the Status of Women or those developed by special procedures will fairly clearly not be meant by this definition.<sup>853</sup> The HRC Committee also takes the view that if an individual complaint is dismissed by another international procedure, not on the merits but on procedural grounds, the same facts may be brought before the HRC Committee. The CEDAW Committee will likely take a similar view on these issues.<sup>854</sup>

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850 *Rahime Kayan v. Turkey*, *supra* note 847.

851 Human Rights Committee, *Fanali v. Italy* (75/80).

852 Communication No. 8/2005, decision adopted at the 34<sup>th</sup> session, 27 January 2006.

853 Jane Connors, above note 825, p. 18.

854 In an interview on 9 December 2006, this view was also expressed by Cees Flinterman, member of the CEDAW Committee and Working Group dealing with communications under the Optional Protocol.

### e) Other Admissibility Requirements under Article 4(2)

Article 4(2) states that the Committee shall also declare a communication inadmissible where:

- “(b) It is incompatible with the provisions of the Convention;
- (c) It is manifestly ill-founded or not sufficiently substantiated;
- (d) It is an abuse of the right to submit a communication;
- (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date.”

With regard to the last admissibility criterion, the violation must have taken place after both the Convention and the Optional Protocol came into force (which is three months after ratification or accession). This criterion may cause difficulties because a communication may also be based on a continuing violation, one that began before the Optional Protocol came into force for the State party concerned and that continued thereafter. Details of such continuing violations should be clearly presented to the CEDAW Committee.

*B.-J. v. Germany*<sup>855</sup> dealt with the consequences of divorce, particularly equalisation of accrued gains, equalisation of pensions, and maintenance after termination of marriage. Considering the issues and proceedings before the CEDAW Committee concerning the admissibility of the communication, it notes that the divorce became final together with the matter of the equalisation of pensions before the entry into force of the Optional Protocol in respect of the State party. The Committee further found that the author has not made any convincing arguments that would indicate that the facts continued after this date. The Committee concluded that:

“[I]n accordance with article 4, paragraph 2 (e) of the Optional Protocol, it is precluded *ratione temporis* from considering the part of the communication that relates to the equalization of pensions.”

In *A.T. v. Hungary*<sup>856</sup>, discussed above, most of the incidents complained of also took place prior to the date on which the Optional Protocol entered into

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855 *B.-J. v. Germany* (1/2003).

856 *Mrs A.T. v. Hungary*, above note 832.

force for the State party. However, the CEDAW Committee decided differently. It was persuaded that it was:

“competent *ratione temporis* to consider the communication in its entirety, because the facts that are the subject of the communication cover the alleged lack of protection/alleged culpable inaction on the part of the State party for the series of severe incidents of battering and threats of further violence that has uninterruptedly characterized the period beginning in 1998 to the present.”

With regard to *Rahime Kayan v. Turkey*<sup>857</sup> the State party argued that the crucial date was 9 June 2000, when the author was dismissed from her position as a teacher. This date preceded the entry into force of the Optional Protocol for Turkey on 29 January 2003. The CEDAW Committee noted, however, that:

“7.4 ...[A]s a consequence of her dismissal, the author has lost her status as a civil servant in accordance with article 125 E7a of the Public Servants Law No. 657. The effects of the loss of her status are also at issue, namely her means of subsistence to a great extent, the deductions that would go toward her pension entitlement, interest on her salary and income, her education grant and her health insurance. The Committee therefore considers that the facts continue after the entry into force of the Optional Protocol for the State party and justify admissibility of the communication *ratione temporis*.”

#### **f) The Effect of Reservations on the Admissibility of Individual Complaints**

Although the Optional Protocol prohibits reservations to its terms, as discussed above, the CEDAW Convention is subject to a large number of reservations. Many of these reservations are incompatible with the object and purpose of the CEDAW Convention and are thus prohibited by article 28 (2). It is to be expected that communications will address provisions of the CEDAW Convention to which the State party concerned has submitted general or specific reservations which affect the whole CEDAW Convention. In such a circumstance, the CEDAW Committee has to determine whether the communication is inadmissible or whether it may continue to consider the communication on the basis that the reservations are contrary to the object and purpose of the CEDAW

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<sup>857</sup> *Rahime Kayan v. Turkey*, above note 847.

Convention. In the latter circumstance, the Convention will be operative for the reserving State party without benefit of the reservation.<sup>858</sup>

### **5.4.3 Submission of the Communication to the State Party**

When a communication has/have been deemed admissible, in accordance with article 6 (1) of the Optional Protocol and Rule 69 of the Rules of Procedure, the Committee shall bring the communication confidentially to the attention of the State party concerned. The identity(ies) of the complainant(s) will also be communicated to the State party if the complainant(s) has consented to disclose her or their identity.

### **5.4.4 Consideration of the Complaint by the CEDAW Committee**

According to article 6 (2) of the Optional Protocol, States must respond within six months from the time that the Committee sends the complaint to them. Article 7 of the Optional Protocol outlines the process of the complaint consideration. Rule 69 of the Rules of Procedure details the procedure with regards to the communications received.

Normally the Committee asks the State to respond to the admissibility and merits of the case. This request shall include a statement that no decision has been reached on the question of admissibility of the communication. Upon receipt of the State's response, the Committee will send the response to the complainant, who will then have an opportunity to respond within a time frame determined by the Committee. Article 7 (1) stipulates that any information submitted to the CEDAW Committee for consideration in relation to the

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858 The HRC Committee follows this line of thought. Where an individual communication is based on a provision to which the State party in question has entered a reservation, this reservation will be without effect for the reserving State party when the reservation is contrary to the object and purpose of the ICCPR, and the individual communication will therefore not be precluded from consideration. See General Comment 24; *Rawle Kennedy v. Trinidad and Tobago* (HRC 845/1999). Cees Flinterman, member of the CEDAW Committee and Working Group dealing with communications under the Optional Protocol, in an interview on 9 December 2006 explained that he could very well imagine that the CEDAW Committee would follow the same track.

complaint must also be made available to all concerned parties. This allows both parties to respond to the information presented. If the Committee requests further information from either party, the other party will have an opportunity to respond to the information submitted, and the same holds if the Committee requests information from third parties.

Depending on the case, the Committee has the discretion to request that the State party only respond on the issue of admissibility, but in such cases the State party may nonetheless submit a written explanation or statement that relates also to the merits of the complaint, provided that such a written explanation or statement is submitted within the original six-month deadline. Alternatively, the State has two months upon receipt of a complaint to request that the communication be deemed inadmissible. This request does not affect the State party's obligation to respond to the merits of the complaint within the original six-month period unless the Committee decides that an extension of time is appropriate.

The Committee then decides whether to rule the communication inadmissible or deal with the two issues separately. After the complainant comments on the State party's response, the Committee reviews all the information and decides whether the complaint is admissible or not. If the complaint is ruled inadmissible, the complaint ceases; however, the complainant may seek a review of the decision if the circumstances that deemed the complaint inadmissible no longer exist. After deciding that a communication is admissible, the Committee considers the merits. The Committee may, after reviewing the State party's merits arguments, revoke its initial decision deeming the communication admissible. The Committee informs both parties of its decision.

In accordance with article 7 (2) of the Optional Protocol, the Committee holds closed meetings when examining the communications. The final views and recommendations are adopted by the full CEDAW Committee and will be transmitted to the parties concerned as mandated by article 7 (3) of the Optional Protocol and Rule 72 of the Rules of Procedure.

#### **5.4.5 Interim Measures**

According to article 5 (1) of the Optional Protocol and Rule 63 of the Rules of Procedure, the Committee can request, *at its discretion*, that a State party take interim measures to avoid irreparable damage to a complainant at any time after the receipt of a communication and before the merits determination.

Article 5 (2) of the Optional Protocol states that that such a request does not have any bearing on the determination of admissibility or merits of the communication.

#### **5.4.6 Views and Recommendations of the Committee**

When the CEDAW Committee has come to the conclusion that the State party has violated a right set forth in the Convention as alleged in the communication, the Committee will recommend to the State party actions to address the violation. The recommendations may have a direct impact on the individual woman and/or may advance women's human rights under the jurisdiction of the State party in general. It should of course be underlined that in contributing to the jurisprudence of the CEDAW Committee, each remedy suggested will have an impact on the advancement of human rights of women generally.

As the CEDAW Committee is a quasi-judicial body, its views are of a recommendatory rather than obligatory character. However, although not legally enforceable within the jurisdiction of States parties, the recommendations of the CEDAW Committee authoritatively indicate the content of rights under the CEDAW Convention. They should be implemented by States parties as they have assumed international legal obligations to remedy violations of rights enshrined in the Convention.

#### **5.4.7 Follow up**

Article 7 (4) of the Optional Protocol stipulates that the State party should give due consideration to the views and the recommendations of the Committee and shall provide the CEDAW Committee within six months a written response regarding any actions it has taken in response to the Committee's views or recommendations. The Committee may request that the State party provide further information if it is not satisfied and may also ask the State to give updates on measures taken in light of the Committee's earlier expressed views and recommendations under Article 18's reporting obligation (article (5)).

## 5.5 The Optional Protocol to the CEDAW Convention in Relation to Other Complaint Procedures - Choosing the Most Appropriate Avenue

The Optional Protocol to the CEDAW Convention constitutes but one part of the framework of the United Nations human rights monitoring mechanisms, which seek to provide protection to women from torture and related violence at the national level. As mentioned above, the HRC and the CAT Committees provide scope for claims concerning violence against women, including torture.<sup>859</sup>

In addition to procedures under the auspices of the United Nations, the Council of Europe, the European Union, the Organisation of American States and the African Commission on Human and Peoples Rights provide protection against sex discrimination, and their decisions, with the exception of the latter, are legally binding. In particular, the Council of Europe and the Organisation of American States have developed strong jurisprudence with regard to discrimination against women.

Thus women who have been subjected to torture or other forms of violence may be able to choose among a number of procedures at both the international and regional levels. Such a choice should be based on strategic considerations, the specific facts, the admissibility conditions under the several procedures as well as the approach of the various bodies with respect to women subjected to torture and other forms of violence. If, for example, immediate relief for an individual is sought, it may be more appropriate to file an individual complaint with a regional procedure empowered to make legally binding decisions. On the other hand, when the purpose of an individual complaint is also to effect legal or policy change at the national level, a United Nations procedure may be the more effective avenue.<sup>860</sup>

With regard to the facts specific to the violation, as mentioned above, before choosing the Optional Protocol to the CEDAW Convention, the applicant must be confident that the alleged violation in the communication infringes a

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859 The Committee on Migrant Workers, which monitors the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, will also under certain circumstances consider individual communications claiming violations of rights under the Convention, once 10 States parties have accepted this procedure in accordance with article 77 of that Convention.

860 See Jane Connors, above note 67, p. 22. Another route would be the inquiry procedure under the Optional Protocol to the CEDAW Convention.

right(s) protected by the CEDAW Convention, and the violation must entail discrimination on the basis of sex or gender, whether direct or indirect. Sometimes it is difficult to detect discrimination against women based on sex or gender when dealing with a torture case. In light of the fact that women often experience torture and other cruel, inhuman and degrading treatment or punishment in gender-specific ways or for reasons that are related to gender, it is essential to “gender” the victim, the form, the circumstances and the consequences of torture as well as the availability of remedies and reparations. Should there be no discrimination based on sex or gender, the case would be inadmissible under the Optional Protocol to the CEDAW Convention but could very well be admissible under the communications procedures of the HRC or CAT Committee.

The admissibility requirements and procedures of the other UN treaty bodies are similar to those under the Optional Protocol to the CEDAW Convention. Because the Optional Protocol to the CEDAW Convention is relatively new compared to the other mechanisms, one should make sure that the violation of rights(s) dealt with in the communication took place after the Optional Protocol entered into force for the State party concerned.

The identification of the scope of the human rights obligations under the different treaties by the respective treaty monitoring bodies should also be taken into account before choosing the appropriate avenue. The sources one can draw from are: the relevant provisions of human rights treaties, the General Recommendations adopted by the treaty monitoring bodies, the Concluding Comments adopted by the treaty monitoring bodies under reporting procedures and the views adopted by the treaty monitoring bodies under communication and inquiry procedures.

The CEDAW Committee is at the forefront of efforts to develop standards by which States have positive duties to protect individuals from violence at the hands of non-state actors. In addition to the article 2 (e) provision for protection from human rights violations by private individuals, General Recommendation 19 on violence against women and General Recommendation 24 on women and health, have emphasised the obligations of States to prevent and punish private discrimination. Therefore, the Optional Protocol to the CEDAW Convention raises particularly high expectations in relation to communications dealing with violence against women perpetrated by private individuals.

While the CEDAW Committee has given limited attention to the issue of gender-based violence at the hands of State agents during its examination of initial

or periodical government reports, the CEDAW Convention contemplates such claims. In accordance with General Recommendation 19, States parties to the CEDAW Convention are under the obligation to refrain from gender-based torture and cruel, inhuman or degrading treatment or punishment. Accordingly, the CEDAW Committee is amenable to receiving such claims in order to protect women from such violence and to ensure that the gendered dimensions of torture and cruel, inhuman or degrading treatment or punishment are fully considered within the framework of its mandate.<sup>861</sup>

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861 Expressed by Committee Member Cees Flinterman in an interview, 9 December 2006.

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**Y****Z**



**FURTHER RESOURCES & BIBLIOGRAPHY**



*Online*

**Office of the United Nations High Commissioner for Human Rights  
Human Rights Bodies**

<http://www.ohchr.org/english/bodies/index.htm>

Site contains comprehensive coverage of both covenants and bodies including;

Information relating to the Treaty/Convention

- Text of the relevant treaty/convention (including optional protocols)
- Status of ratification
- Reservations and declarations

Information about the Committee and its work including

- Membership, Mandate, Sessions, Working Methods
- Rules of Procedure
- General Comments
- Press Releases

Information regarding reporting to the Committee

- Reporting Process
- Initial and periodic reports
- Concluding observations
- Reporting Guidelines
- Follow-up

Other ways to raise an issue with the Committee

- Petitions
- Individual Complaints

Other useful information such as the Fact Sheets on various aspects of UN Human Rights Machinery, information on the Special Rapporteur and updates on recent developments and events is also accessible from this site.

**Treaty Bodies Database**

<http://www.unhchr.ch/tbs/doc.nsf>

Contains information on CAT and HRC in the following categories, Committee Members (listed by country), Documents, Reporting, Ratification and Reservation status. Information in documents folder includes; Basic Reference Document, Concluding Observations/Comments, Follow-up Response by State Party, General Comments, Inquiry under Article 20, Jurisprudence, List of Issues, Meeting of States Parties, Provisional Agenda, Sessional /Annual Report of Committee, State Party Report, Statement, Summary Record.

## **The United Nations Human Rights Treaties**

<http://www.bayefsky.com/>

This website is aimed at increasing access to information about UN human rights standards and treaties, as well as the mechanisms associated with these treaties. It includes text of treaties, amendments to treaties, documents and also detailed information on how to complain about a human rights treaty violation including consideration in choosing the appropriate forum.

## **Castan Centre Human Rights Links**

<http://www.law.monash.edu.au/castancentre/public-edu/links.html>

This site contains many links to numerous human rights sites, including links to global and regional human rights case law, NGOs, and academic human rights centres.

## **SIM Documentation Site**

<http://sim.law.uu.nl/SIM/Dochome.nsf?Open>

This website provides access to documentation from the UN treaty bodies as well as the European Court of Human Rights, and the International Criminal Tribunal for Rwanda. The database also contains a very useful index of human rights books and other materials.

## **University of Minnesota's Human Rights Library**

<http://www1.umn.edu/humanrts/>

A massive site, which contains links to human rights cases, treaties, research guides, and other resources.

## **Books**

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## APPENDICES



## **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS\***

**Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966  
entry into force 23 March 1976, in accordance with Article 49**

### **PREAMBLE**

The States Parties to the present Covenant,

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that these rights derive from the inherent dignity of the human person,

*Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

### **PART I**

#### **Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

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\* Source: [www.ohchr.org](http://www.ohchr.org)

## PART II

### Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

### Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## **PART III**

### **Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

### **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 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;  
(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;  
(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
  - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

#### **Article 9**

1. 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 procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### **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.
2. (a) 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;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### **Article 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

#### **Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*),

public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

### Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### **Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

#### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### **Article 21**

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 22**

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

#### **Article 23**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

#### **Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

#### **Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

#### **Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## **PART IV**

#### **Article 28**

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

#### **Article 29**

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

#### **Article 30**

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### **Article 31**

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

#### **Article 32**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

#### **Article 33**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

#### **Article 34**

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

#### **Article 35**

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

#### **Article 36**

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

#### **Article 37**

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

#### **Article 38**

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

#### **Article 39**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
  - (a) Twelve members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.

#### **Article 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

- (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
  - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
  3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
  4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
  5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

#### **Article 41**

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
  - (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;
  - (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
  - (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;
  - (d) The Committee shall hold closed meetings when examining communications under this article;
  - (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

- (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
  - (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;
  - (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
    - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
    - (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.
2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

#### **Article 42**

- 1.
- (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
  - (b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.
7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:
  - (a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;
  - (b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;
  - (c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;
  - (d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.
8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.
9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

#### **Article 43**

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### **Article 44**

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

#### **Article 45**

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

## PART V

### Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

### Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

## PART VI

### Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
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 which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

### Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

### Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

### Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event

that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

**Article 52**

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:
  - (a) Signatures, ratifications and accessions under article 48;
  - (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

**Article 53**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

## **OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS\***

**Adopted and opened for signature, ratification and accession by General  
Assembly resolution 2200A (XXI) of 16 December 1966  
entry into force 23 March 1976, in accordance with Article 9**

The States Parties to the present Protocol,

*Considering* that in order further to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

### **Article 1**

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

### **Article 2**

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

### **Article 3**

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

### **Article 4**

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.
2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

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\* Source: [www.ohchr.org](http://www.ohchr.org)

### **Article 5**

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:
  - (a) The same matter is not being examined under another procedure of international investigation or settlement;
  - (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.
3. The Committee shall hold closed meetings when examining communications under the present Protocol.
4. The Committee shall forward its views to the State Party concerned and to the individual.

### **Article 6**

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

### **Article 7**

Pending the achievement of the objectives of resolution 1514(XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

### **Article 8**

1. The present Protocol is open for signature by any State which has signed the Covenant.
2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. 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 which has ratified or acceded to the Covenant.
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 which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

### **Article 9**

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into

force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Article 10**

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 11**

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 any proposed amendments 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 at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and 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 which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

#### **Article 12**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

#### **Article 13**

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph I, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under article 8;
- (b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;
- (c) Denunciations under article 12.

#### **Article 14**

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.



## **CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT\***

**Adopted and opened for signature, ratification and accession by General  
Assembly resolution 39/46 of 10 December 1984  
entry into force 26 June 1987, in accordance with article 27 (1)**

The States Parties to this Convention,

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that those rights derive from the inherent dignity of the human person,

*Considering* the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having regard* to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

*Having regard* also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

*Desiring* to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

### **PART I**

#### **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.

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\* Source: [www.ohchr.org](http://www.ohchr.org)

## **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 in stability 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:
  - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - (b) When the alleged offender is a national of that State;
  - (c) 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 person.

#### **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 I, 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.

## **PART II**

### **Article 17**

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of 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 Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, 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 prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, 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.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

### **Article 18**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

- (a) Six members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
  4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
  5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

#### **Article 19**

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

#### **Article 20**

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

#### **Article 21**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;
  - (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
  - (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
  - (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
  - (d) The Committee shall hold closed meetings when examining communications under this article;
  - (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
  - (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
  - (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
  - (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

- (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
- (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
  - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
  - (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

#### **Article 23**

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### **Article 24**

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

### **PART III**

#### **Article 25**

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 26**

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

#### **Article 27**

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

#### **Article 28**

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

### **Article 29**

1. Any State Party to this Convention 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 with a request that they notify him whether they favour a conference of States Parties for the purpose of considering an d 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 favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

### **Article 30**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

### **Article 31**

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective 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 this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

### **Article 32**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

**Article 33**

1. This Convention, 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 this Convention to all States.

**UNITED  
NATIONS**

**CCPR**



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE

**RULES OF PROCEDURE OF THE HUMAN RIGHTS COMMITTEE \***

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\* Source: [www.ohchr.org](http://www.ohchr.org). The Rules of Procedure of the Treaty Bodies are periodically updated. Please see the website of the OHCHR for the latest document.

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**Note:** The rules of procedure of the Human Rights Committee have been edited and renumbered consecutively. The following rules have been renumbered:

<i>New rule number</i>	<i>Old rule number</i>
70	69A
71	70
72	70A
73	71
74	72
75	73
76	74
77	75
78	76
79	77A
80	77B
81	77C
82	77D
83	77E
84	78
85	79
86	80
87	81
88	82
89	83
90	84
91	85
92	86
93	87
94	88
95	89
96	90
97	91
98	92
99	93
100	94
101	95
102	96
103	97
104	98

**RULES OF PROCEDURE OF THE HUMAN RIGHTS COMMITTEE\***

**PART I. GENERAL RULES**

**I. SESSIONS**

**Rule 1**

The Human Rights Committee (hereinafter referred to as “the Committee”) shall hold sessions as may be required for the satisfactory performance of its functions in accordance with the International Covenant on Civil and Political Rights (hereinafter referred to as “the Covenant”).

**Rule 2**

1. The Committee shall normally hold three regular sessions each year.
2. Regular sessions of the Committee shall be convened at dates decided by the Committee in consultation with the Secretary-General of the United Nations (hereinafter referred to as “the Secretary-General”), taking into account the calendar of conferences as approved by the General Assembly.

**Rule 3**

1. Special sessions of the Committee shall be convened by decision of the Committee. When the Committee is not in session, the Chairperson may convene special sessions in consultation with the other officers of the Committee. The Chairperson of the Committee shall also convene special sessions:
  - (a) At the request of a majority of the members of the Committee;
  - (b) At the request of a State party to the Covenant.
2. Special sessions shall be convened as soon as possible at a date fixed by the Chairperson in consultation with the Secretary-General and with the other officers of the Committee, taking into account the calendar of conferences as approved by the General Assembly.

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\* Provisional rules of procedure were initially adopted by the Committee at its first and second sessions and subsequently amended at its third, seventh and thirty-sixth sessions. At its 918th meeting, on 26 July 1989, the Committee decided to make its rules of procedure definitive, eliminating the term “provisional” from the title. The rules of procedure were subsequently amended at the forty-seventh, forty-ninth, fiftieth and fifty-ninth sessions. The current version of the rules was adopted at the Committee’s 1924th meeting during its seventy-first session.

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#### **Rule 4**

The Secretary-General shall notify the members of the Committee of the date and place of the first meeting of each session. Such notification shall be sent, in the case of a regular session, at least six weeks in advance and, in the case of a special session, at least 18 days in advance.

#### **Rule 5**

Sessions of the Committee shall normally be held at United Nations Headquarters or at the United Nations Office at Geneva. Another place for a session may be designated by the Committee in consultation with the Secretary-General.

### **II. AGENDA**

#### **Rule 6**

The provisional agenda for each regular session shall be prepared by the Secretary-General in consultation with the Chairperson of the Committee, in conformity with the relevant provisions of the Covenant and of the Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter referred to as "the Protocol"), and shall include:

- (a) Any item the inclusion of which has been ordered by the Committee at a previous session;
- (b) Any item proposed by the Chairperson of the Committee;
- (c) Any item proposed by a State party to the Covenant;
- (d) Any item proposed by a member of the Committee;
- (e) Any item proposed by the Secretary-General relating to functions of the Secretary-General under the Covenant, the Protocol or these rules.

#### **Rule 7**

The provisional agenda for a special session of the Committee shall consist only of those items which are proposed for consideration at that special session.

#### **Rule 8**

The first item on the provisional agenda for any session shall be the adoption of the agenda, except for the election of officers when required under rule 17 of these rules.

#### **Rule 9**

During a session, the Committee may revise the agenda and may, as appropriate, defer or delete items; only urgent and important items may be added to the agenda.

**Rule 10**

The provisional agenda and the basic documents relating to each item appearing thereon shall be transmitted to the members of the Committee by the Secretary-General, who shall endeavour to have the documents transmitted to the members at least six weeks prior to the opening of the session.

**III. MEMBERS OF THE COMMITTEE**

**Rule 11**

The members of the Committee shall be the 18 persons elected in accordance with articles 28 to 34 of the Covenant.

**Rule 12**

The term of office of the members of the Committee elected at the first election shall begin on 1 January 1977. The term of office of members of the Committee elected at subsequent elections shall begin on the day after the date of expiry of the term of office of the members of the Committee whom they replace.

**Rule 13**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out the functions of member for any reason other than absence of a temporary character, the Chairperson of the Committee shall notify the Secretary-General, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairperson shall immediately notify the Secretary-General, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect. The resignation of a member of the Committee shall be notified by that member in writing directly to the Chairperson or to the Secretary-General and action shall be taken to declare the seat of that member vacant only after such notification has been received.

**Rule 14**

A vacancy declared in accordance with rule 13 of these rules shall be dealt with in accordance with article 34 of the Covenant.

**Rule 15**

Any member of the Committee elected to fill a vacancy declared in accordance with article 33 of the Covenant shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

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#### **Rule 16**

Before assuming duties as a member, each member of the Committee shall give the following solemn undertaking in open Committee:

“I solemnly undertake to discharge my duties as a member of the Human Rights Committee impartially and conscientiously.”

### **IV. OFFICERS**

#### **Rule 17**

The Committee shall elect from among its members a Chairperson, three Vice-Chairpersons and a Rapporteur.

#### **Rule 18**

The officers of the Committee shall be elected for a term of two years. They shall be eligible for re-election. None of them, however, may hold office after ceasing to be a member of the Committee.

#### **Rule 19**

The Chairperson shall perform the functions conferred upon the Chairperson by the Covenant, the rules of procedure and the decisions of the Committee. In the exercise of those functions, the Chairperson shall remain under the authority of the Committee.

#### **Rule 20**

If during a session the Chairperson is unable to be present at a meeting or any part thereof, the Chairperson shall designate one of the Vice-Chairpersons to act as Chairperson.

#### **Rule 21**

A Vice-Chairperson acting as Chairperson shall have the same rights and duties as the Chairperson.

#### **Rule 22**

If any of the officers of the Committee ceases to serve or declares to be unable to continue serving as a member of the Committee or for any reason is no longer able to act as an officer, a new officer shall be elected for the unexpired term of the predecessor.

## **V. SECRETARIAT**

### **Rule 23**

1. The secretariat of the Committee and of such subsidiary bodies as may be established by the Committee (hereinafter referred to as “the secretariat”) shall be provided by the Secretary-General.

2. The Secretary-General shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Covenant.

### **Rule 24**

The Secretary-General or a representative of the Secretary-General shall attend all meetings of the Committee. Subject to rule 38 of these rules, the Secretary-General or the representative may make oral or written statements at meetings of the Committee or its subsidiary bodies.

### **Rule 25**

The Secretary-General shall be responsible for all the necessary arrangements for meetings of the Committee and its subsidiary bodies.

### **Rule 26**

The Secretary-General shall be responsible for informing the members of the Committee without delay of any questions which may be brought before it for consideration.

### **Rule 27**

Before any proposal which involves expenditure is approved by the Committee or by any of its subsidiary bodies, the Secretary-General shall prepare and circulate to the members of the Committee or subsidiary body, as early as possible, an estimate of the cost involved in the proposal. It shall be the duty of the Chairperson to draw the attention of members to this estimate and to invite discussion on it when the proposal is considered by the Committee or subsidiary body.

## **VI. LANGUAGES**

### **Rule 28**

Arabic, Chinese, English, French, Russian and Spanish shall be the official languages, and Arabic, English, French, Russian and Spanish the working languages of the Committee.

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#### **Rule 29**

Interpretation shall be provided by the Secretariat of the United Nations. Speeches made in any of the working languages shall be interpreted into the other working languages. Speeches made in an official language shall be interpreted into the working languages.

#### **Rule 30**

Any speaker addressing the Committee and using a language other than one of the official languages shall normally provide for interpretation into one of the working languages. Interpretation into the other working languages may be based on the interpretation given in the first working language.

#### **Rule 31**

Summary records of the meetings of the Committee shall be drawn up in the working languages.

#### **Rule 32**

All formal decisions of the Committee shall be made available in the official languages. All other official documents of the Committee shall be issued in the working languages and any of them may, if the Committee so decides, be issued in all the official languages.

### **VII. PUBLIC AND PRIVATE MEETINGS**

#### **Rule 33**

The meetings of the Committee and its subsidiary bodies shall be held in public unless the Committee decides otherwise or it appears from the relevant provisions of the Covenant or the Protocol that the meeting should be held in private. The adoption of concluding observations under article 40 shall take place in closed meetings.

#### **Rule 34**

At the close of each private meeting the Committee or its subsidiary body may issue a communiqué through the Secretary-General.

### **VIII. RECORDS**

#### **Rule 35**

Summary records of the public and private meetings of the Committee and its subsidiary bodies shall be prepared by the Secretariat. They shall be distributed in provisional form as soon as possible to the members of the Committee and to any others participating in the meeting. All such participants may, within three working days after receipt of the provisional record of the meeting, submit corrections to the Secretariat. Any disagreement concerning such corrections shall be settled by the Chairperson of the Committee or the chairperson of the subsidiary body to

which the record relates or, in the case of continued disagreement, by decision of the Committee or of the subsidiary body.

### **Rule 36**

1. The summary records of public meetings of the Committee in their final form shall be documents of general distribution unless, in exceptional circumstances, the Committee decides otherwise.

2. The summary records of private meetings shall be distributed to the members of the Committee and to other participants in the meetings. They may be made available to others upon decision of the Committee at such time and under such circumstances as the Committee may decide.

## **IX. CONDUCT OF BUSINESS**

### **Rule 37**

Twelve members of the Committee shall constitute a quorum.

### **Rule 38**

The Chairperson shall declare the opening and closing of each meeting of the Committee, direct the discussion, ensure observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The Chairperson, subject to these rules, shall have control over the proceedings of the Committee and over the maintenance of order at its meetings. The Chairperson may, in the course of the discussion of an item, propose to the Committee the limitation of the time to be allowed to speakers, the limitation of the number of times each speaker may speak on any question and the closure of the list of speakers. The Chairperson shall rule on points of order and shall have the power to propose adjournment or closure of the debate or adjournment or suspension of a meeting. Debate shall be confined to the question before the Committee, and the Chairperson may call a speaker to order if that speaker's remarks are not relevant to the subject under discussion.

### **Rule 39**

During the discussion of any matter, a member may at any time raise a point of order, and the point of order shall immediately be decided by the Chairperson in accordance with the rules of procedure. Any appeal against the ruling of the Chairperson shall immediately be put to the vote, and the ruling of the Chairperson shall stand unless overruled by a majority of the members present. A member may not, in raising a point of order, speak on the substance of the matter under discussion.

### **Rule 40**

During the discussion of any matter, a member may move the adjournment of the debate on the item under discussion. In addition to the proposer of the motion, one member may speak

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in favour of and one against the motion, after which the motion shall immediately be put to the vote.

**Rule 41**

The Committee may limit the time allowed to each speaker on any question. When debate is limited and a speaker exceeds his allotted time, the Chairperson shall call that speaker to order without delay.

**Rule 42**

When the debate on an item is concluded because there are no other speakers, the Chairperson shall declare the debate closed. Such closure shall have the same effect as closure by the consent of the Committee.

**Rule 43**

A member may at any time move the closure of the debate on the item under discussion, regardless of whether any other member or representative has signified a wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall immediately be put to the vote.

**Rule 44**

During the discussion of any matter, a member may move the suspension or the adjournment of the meeting. No discussion on such motions shall be permitted, and they shall immediately be put to the vote.

**Rule 45**

Subject to rule 39 of these rules, the following motions shall have precedence, in the following order, over all other proposals or motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the item under discussion;
- (d) For the closure of the debate on the item under discussion.

**Rule 46**

Unless otherwise decided by the Committee, proposals and substantive amendments or motions submitted by members shall be introduced in writing and handed to the secretariat, and their consideration shall, if so requested by any member, be deferred until the next meeting on the following day.

**Rule 47**

Subject to rule 45 of these rules, any motion by a member calling for a decision on the competence of the Committee to adopt a proposal submitted to it shall be put to the vote immediately before a vote is taken on the proposal in question.

**Rule 48**

A motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that the motion has not been amended. A motion which has thus been withdrawn may be reintroduced by another member.

**Rule 49**

When a proposal has been adopted or rejected, it may not be reconsidered at the same session unless the Committee so decides. Permission to speak on a motion to reconsider shall be accorded only to two speakers in favour of the motion and two speakers opposing the motion, after which it shall immediately be put to the vote.

**X. VOTING**

**Rule 50**

Each member of the Committee shall have one vote.

**Rule 51\***

Except as otherwise provided in the Covenant or elsewhere in these rules, decisions of the Committee shall be made by a majority of the members present.

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\* The Committee decided, at its first session, that in a footnote to rule 51 of the provisional rules of procedure attention should be drawn to the following:

1. The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the rules of procedure were observed and that such attempts did not unduly delay the work of the Committee.
2. Bearing in mind paragraph 1 above, the Chairperson at any meeting may, and at the request of any member shall, put the proposal to a vote.

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#### **Rule 52**

Subject to rule 58 of these rules, the Committee shall normally vote by show of hands, except that any member may request a roll-call, which shall then be taken in the alphabetical order of the names of the members of the Committee, beginning with the member whose name is drawn by lot by the Chairperson.

#### **Rule 53**

The vote of each member participating in a roll-call shall be inserted in the record.

#### **Rule 54**

After the voting has commenced, it shall not be interrupted unless a member raises a point of order in connection with the actual conduct of the voting. Brief statements by members consisting solely of explanations of their votes may be permitted by the Chairperson before the voting has commenced or after the voting has been completed.

#### **Rule 55**

Parts of a proposal shall be voted on separately if a member requests that the proposal be divided. Those parts of the proposal which have been approved shall then be put to the vote as a whole; if all the operative parts of a proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

#### **Rule 56**

1. When an amendment to a proposal is moved, the amendment shall be voted on first. When two or more amendments to a proposal are moved, the Committee shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all the amendments have been put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.

2. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of that proposal.

#### **Rule 57**

1. If two or more proposals relate to the same question, the Committee shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.

2. The Committee may, after each vote on a proposal, decide whether to vote on the next proposal.

3. Any motions requiring that no decision be taken on the substance of such proposals shall, however, be considered as previous questions and shall be put to the vote before them.

**Rule 58**

Elections shall be held by secret ballot, unless the Committee decides otherwise in the case of an election to fill a place for which there is only one candidate.

**Rule 59**

1. When only one person or member is to be elected and no candidate obtains the required majority in the first ballot, a second ballot shall be taken, which shall be restricted to the two candidates who obtained the greatest number of votes.

2. If the second ballot is inconclusive and a majority vote of members present is required, a third ballot shall be taken in which votes may be cast for any eligible candidate. If the third ballot is inconclusive, the next ballot shall be restricted to the two candidates who obtained the greatest number of votes in the third ballot and so on, with unrestricted and restricted ballots alternating, until a person or member is elected.

3. If the second ballot is inconclusive and a two-thirds majority is required, the balloting shall be continued until one candidate secures the necessary two-thirds majority. In the next three ballots, votes may be cast for any eligible candidate. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the two candidates who obtained the greatest number of votes in the third unrestricted ballot, and the following three ballots shall be unrestricted, and so on until a person or member is elected.

**Rule 60**

When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining the required majority in the first ballot shall be elected. If the number of candidates obtaining such majority is less than the number of persons or members to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, whose number shall not be more than twice the number of places remaining to be filled; however, after the third inconclusive ballot, votes may be cast for any eligible candidate. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest number of votes in the third of the unrestricted ballots, whose number shall not be more than twice the number of places remaining to be filled; the following three ballots shall be unrestricted, and so on until all the places have been filled.

**Rule 61**

If a vote is equally divided on a matter other than an election, the proposal shall be regarded as rejected.

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## **XI. SUBSIDIARY BODIES**

### **Rule 62**

1. The Committee may, taking into account the provisions of the Covenant and the Protocol, set up such subcommittees and other ad hoc subsidiary bodies as it deems necessary for the performance of its functions, and define their composition and powers.

2. Subject to the provisions of the Covenant and the Protocol and unless the Committee decides otherwise, each subsidiary body shall elect its own officers and may adopt its own rules of procedure. Failing such rules, the present rules of procedure shall apply *mutatis mutandis*.

## **XII. ANNUAL REPORT OF THE COMMITTEE**

### **Rule 63**

As prescribed in article 45 of the Covenant, the Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities, including a summary of its activities under the Protocol as prescribed in article 6 thereof.

## **XIII. DISTRIBUTION OF REPORTS AND OTHER OFFICIAL DOCUMENTS OF THE COMMITTEE**

### **Rule 64**

1. Without prejudice to the provisions of rule 36 of these rules of procedure and subject to paragraphs 2 and 3 of the present rule, reports, formal decisions and all other official documents of the Committee and its subsidiary bodies shall be documents of general distribution unless the Committee decides otherwise.

2. All reports, formal decisions and other official documents of the Committee and its subsidiary bodies relating to articles 41 and 42 of the Covenant and to the Protocol shall be distributed by the secretariat to all members of the Committee, to the States parties concerned and, as may be decided by the Committee, to members of its subsidiary bodies and to others concerned.

3. Reports and additional information submitted by States parties pursuant to article 40 of the Covenant shall be documents of general distribution. The same applies to other information provided by a State party unless the State party concerned requests otherwise.

## **XIV. AMENDMENTS**

### **Rule 65**

These rules of procedure may be amended by a decision of the Committee, without prejudice to the relevant provisions of the Covenant and the Protocol.

## **PART II. RULES RELATING TO THE FUNCTIONS OF THE COMMITTEE**

### **XV. REPORTS FROM STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT**

#### **Rule 66**

1. The States parties to the Covenant shall submit reports on the measures they have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the Covenant.

2. Requests for submission of a report under article 40, paragraph 1 (b), of the Covenant may be made in accordance with the periodicity decided by the Committee or at any other time the Committee may deem appropriate. In the case of an exceptional situation when the Committee is not in session, a request may be made through the Chairperson, acting in consultation with the members of the Committee.

3. Whenever the Committee requests States parties to submit reports under article 40, paragraph 1 (b), of the Covenant, it shall determine the dates by which such reports shall be submitted.

4. The Committee may, through the Secretary-General, inform the States parties of its wishes regarding the form and content of the reports to be submitted under article 40 of the Covenant.

#### **Rule 67**

1. The Secretary-General may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports of States members of those agencies as may fall within their field of competence.

2. The Committee may invite the specialized agencies to which the Secretary-General has transmitted parts of the reports to submit comments on those parts within such time limits as it may specify.

#### **Rule 68**

1. The Committee shall, through the Secretary-General, notify the States parties as early as possible of the opening date, duration and place of the session at which their respective reports will be examined. Representatives of the States parties may be present at the meetings of the Committee when their reports are examined. The Committee may also inform a State party from which it decides to seek further information that it may authorize its representative to be present at a specified meeting. Such a representative should be able to answer questions which may be put to that representative by the Committee and make statements on reports already submitted by the State party concerned, and may also submit additional information from that State party.

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2. If a State party has submitted a report under article 40, paragraph 1, of the Covenant, but fails to send any representative, in accordance with rule 68, paragraph 1, of these rules to the session at which it has been notified that its report will be examined, the Committee may, at its discretion, take one of the following courses:

(a) Notify the State party through the Secretary-General that at a specified session it intends to examine the report in accordance with rule 68, paragraph 2, and thereafter act in accordance with rule 71, paragraph 3, of these rules; or

(b) Proceed at the session originally specified to examine the report and thereafter make and submit to the State party its provisional concluding observations and determine the date on which the report shall be examined under rule 68 or the date on which a new periodic report shall be submitted under rule 66 of these rules.

3. Where the Committee acts under this rule, it shall so state in the annual report submitted under article 45 of the Covenant provided that, where it acts under paragraph 2 (b) above, the report shall not include the text of the provisional concluding observations.

#### **Rule 69**

1. At each session the Secretary-General shall notify the Committee of all cases of non-submission of reports or additional information requested under rules 66 and 71 of these rules. In such cases the Committee may transmit to the State party concerned, through the Secretary-General, a reminder concerning the submission of the report or additional information.

2. If, after the reminder referred to in paragraph 1 of this rule, the State party does not submit the report or additional information required under rules 66 and 71 of these rules, the Committee shall so state in the annual report which it submits to the General Assembly of the United Nations through the Economic and Social Council.

#### **Rule 70**

1. In cases where the Committee has been notified under rule 69, paragraph 1, of the failure of a State to submit under rule 66, paragraph 3, of these rules, any report under article 40, paragraph 1 (a) or (b), of the Covenant and has sent reminders to the State party, the Committee may, at its discretion, notify the State party through the Secretary-General that it intends, on a date or at a session specified in the notification, to examine in a private session the measures taken by the State party to give effect to the rights recognized in the Covenant and to proceed by adopting provisional concluding observations which will be submitted to the State party.

2. Where the Committee acts under paragraph 1 of this rule, it shall transmit to the State party, well in advance of the date or session specified, information in its possession which it considers appropriate as to the matters to be examined.

3. Taking into account any comments that may have been provided by the State party in response to the Committee's provisional concluding observations, the Committee may proceed to the adoption of final concluding observations, which shall be communicated to the State party, in accordance with rule 71, paragraph 3, of these rules, and made public.

4. Where the Committee acts under this rule, it shall proceed in accordance with rule 68, paragraph 3, and may set a date when it proceeds to act under rule 68, paragraph 1, of these rules.

### **Rule 71**

1. When considering a report submitted by a State party under article 40 of the Covenant, the Committee shall first satisfy itself that the report provides all the information required under rule 66 of these rules.

2. If a report of a State party under article 40 of the Covenant, in the opinion of the Committee, does not contain sufficient information, the Committee may request that State to furnish the additional information which is required, indicating by what date the said information should be submitted.

3. On the basis of its examination of any report or information supplied by a State party, the Committee may make appropriate concluding observations which shall be communicated to the State party, together with notification of the date by which the next report under article 40 of the Covenant shall be submitted.

4. No member of the Committee shall participate in the examination of State party reports or the discussion and adoption of concluding observations if they involve the State party in respect of which he or she was elected to the Committee.

5. The Committee may request the State party to give priority to such aspects of its concluding observations as it may specify.

### **Rule 72**

Where the Committee has specified, under rule 71, paragraph 5, of these rules, that priority should be given to certain aspects of its concluding observations on a State party's report, it shall establish a procedure for considering replies by the State party on those aspects and deciding what consequent action, including the date set for the next periodic report, may be appropriate.

### **Rule 73**

The Committee shall communicate, through the Secretary-General, to States parties the general comments it has adopted under article 40, paragraph 4, of the Covenant.

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**XVI. PROCEDURE FOR THE CONSIDERATION OF  
COMMUNICATIONS RECEIVED UNDER  
ARTICLE 41 OF THE COVENANT**

**Rule 74**

1. A communication under article 41 of the Covenant may be referred to the Committee by either State party concerned by notice given in accordance with paragraph 1 (b) of that article.

2. The notice referred to in paragraph 1 of this rule shall contain or be accompanied by information regarding:

(a) Steps taken to seek adjustment of the matter in accordance with article 41, paragraphs 1 (a) and (b), of the Covenant, including the text of the initial communication and of any subsequent written explanations or statements by the States parties concerned which are pertinent to the matter;

(b) Steps taken to exhaust domestic remedies;

(c) Any other procedure of international investigation or settlement resorted to by the States parties concerned.

**Rule 75**

The Secretary-General shall maintain a permanent register of all communications received by the Committee under article 41 of the Covenant.

**Rule 76**

The Secretary-General shall inform the members of the Committee without delay of any notice given under rule 74 of these rules and shall transmit to them as soon as possible copies of the notice and relevant information.

**Rule 77**

1. The Committee shall examine communications under article 41 of the Covenant at closed meetings.

2. The Committee may, after consultation with the States parties concerned, issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee at its closed meetings.

### **Rule 78**

A communication shall not be considered by the Committee unless:

- (a) Both States parties concerned have made declarations under article 41, paragraph 1, of the Covenant that are applicable to the communication;
- (b) The time limit prescribed in article 41, paragraph 1 (b), of the Covenant has expired;
- (c) The Committee has ascertained that all available domestic remedies have been invoked and exhausted in the matter in conformity with the generally recognized principles of international law, or that the application of the remedies is unreasonably prolonged.

### **Rule 79**

Subject to the provisions of rule 78 of these rules, the Committee shall proceed to make its good offices available to the States parties concerned with a view to a friendly resolution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the Covenant.

### **Rule 80**

The Committee may, through the Secretary-General, request the States parties concerned, or either of them, to submit additional information or observations orally or in writing. The Committee shall indicate a time limit for the submission of such written information or observations.

### **Rule 81**

1. The States parties concerned shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.
2. The Committee shall, through the Secretary-General, notify the States parties concerned as early as possible of the opening date, duration and place of the session at which the matter will be examined.
3. The procedure for making oral and/or written submissions shall be decided by the Committee, after consultation with the States parties concerned.

### **Rule 82**

1. Within 12 months after the date on which the Committee received the notice referred to in rule 74 of these rules, the Committee shall adopt a report in accordance with article 41, paragraph 1 (h), of the Covenant.

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2. The provisions of paragraph 1 of rule 81 of these rules shall not apply to the deliberations of the Committee concerning the adoption of the report.
3. The Committee's report shall be communicated, through the Secretary-General, to the States parties concerned.

### **Rule 83**

If a matter referred to the Committee in accordance with article 41 of the Covenant is not resolved to the satisfaction of the States parties concerned, the Committee may, with their prior consent, proceed to apply the procedure prescribed in article 42 of the Covenant.

## **XVII. PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED UNDER THE OPTIONAL PROTOCOL**

### **A. Transmission of communications to the Committee**

#### **Rule 84**

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, communications which are or appear to be submitted for consideration by the Committee under article 1 of the Optional Protocol.
2. The Secretary-General, when necessary, may request clarification from the author of a communication as to whether the author wishes to have the communication submitted to the Committee for consideration under the Optional Protocol. In case there is still doubt as to the wish of the author, the Committee shall be seized of the communication.
3. No communication shall be received by the Committee or included in a list under rule 85 if it concerns a State which is not a party to the Optional Protocol.

#### **Rule 85**

1. The Secretary-General shall prepare lists of the communications submitted to the Committee in accordance with rule 84 above, with a brief summary of their contents, and shall circulate such lists to the members of the Committee at regular intervals. The Secretary-General shall also maintain a permanent register of all such communications.
2. The full text of any communication brought to the attention of the Committee shall be made available to any member of the Committee upon request by that member.

#### **Rule 86**

1. The Secretary-General may request clarification from the author of a communication concerning the applicability of the Optional Protocol to his communication, in particular regarding:

- (a) The name, address, age and occupation of the author and the verification of the author's identity;
- (b) The name of the State party against which the communication is directed;
- (c) The object of the communication;
- (d) The provision or provisions of the Covenant alleged to have been violated;
- (e) The facts of the claim;
- (f) Steps taken by the author to exhaust domestic remedies;
- (g) The extent to which the same matter is being examined under another procedure of international investigation or settlement.

2. When requesting clarification or information, the Secretary-General shall indicate an appropriate time limit to the author of the communication with a view to avoiding undue delays in the procedure under the Optional Protocol.

3. The Committee may approve a questionnaire for the purpose of requesting the above-mentioned information from the author of the communication.

4. The request for clarification referred to in paragraph 1 of the present rule shall not preclude the inclusion of the communication in the list provided for in rule 85, paragraph 1, of these rules.

#### **Rule 87**

For each registered communication the Secretary-General shall as soon as possible prepare and circulate to the members of the Committee a summary of the relevant information obtained.

#### **B. General provisions regarding the consideration of communications by the Committee or its subsidiary bodies**

#### **Rule 88**

Meetings of the Committee or its subsidiary bodies during which communications under the Optional Protocol will be examined shall be closed. Meetings during which the Committee may consider general issues such as procedures for the application of the Optional Protocol may be public if the Committee so decides.

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### **Rule 89**

The Committee may issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee at its closed meetings.

### **Rule 90**

1. A member shall not take part in the examination of a communication by the Committee:
  - (a) If the State party in respect of which he or she was elected to the Committee is a party to the case;
  - (b) If the member has any personal interest in the case; or
  - (c) If the member has participated in any capacity in the making of any decision on the case covered by the communication.
2. Any question which may arise under paragraph 1 above shall be decided by the Committee.

### **Rule 91**

If, for any reason, a member considers that he or she should not take part or continue to take part in the examination of a communication, the member shall inform the Chairperson of his or her withdrawal.

### **Rule 92**

The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication.

## **C. Procedure to determine admissibility**

### **Rule 93**

1. The Committee shall decide as soon as possible and in accordance with the following rules whether the communication is admissible or is inadmissible under the Optional Protocol.
2. A working group established under rule 95, paragraph 1, of these rules may also declare a communication admissible when it is composed of five members and all the members so decide.

3. A working group established under rule 95, paragraph 1, of these rules of procedure may decide to declare a communication inadmissible, when it is composed of at least five members and all the members so agree. The decision will be transmitted to the Committee plenary, which may confirm it without formal discussion. If any Committee member requests a plenary discussion, the plenary will examine the communication and take a decision.

#### **Rule 94**

1. Communications shall be dealt with in the order in which they are received by the secretariat, unless the Committee or a working group established under rule 95, paragraph 1, of these rules decides otherwise.

2. Two or more communications may be dealt with jointly if deemed appropriate by the Committee or a working group established under rule 95, paragraph 1, of these rules.

#### **Rule 95**

1. The Committee may establish one or more working groups to make recommendations to the Committee regarding the fulfilment of the conditions of admissibility laid down in articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol.

2. The rules of procedure of the Committee shall apply as far as possible to the meetings of the working group.

3. The Committee may designate special rapporteurs from among its members to assist in the handling of communications.

#### **Rule 96**

With a view to reaching a decision on the admissibility of a communication, the Committee, or a working group established under rule 95, paragraph 1, of these rules shall ascertain:

(a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Optional Protocol;

(b) That the individual claims, in a manner sufficiently substantiated, to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally;

(c) That the communication does not constitute an abuse of the right of submission;

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- (d) That the communication is not incompatible with the provisions of the Covenant;
- (e) That the same matter is not being examined under another procedure of international investigation or settlement;
- (f) That the individual has exhausted all available domestic remedies.

#### **Rule 97**

1. As soon as possible after the communication has been received, the Committee, a working group established under rule 95, paragraph 1, of these rules or a special rapporteur designated under rule 95, paragraph 3, shall request the State party concerned to submit a written reply to the communication.

2. Within six months the State party concerned shall submit to the Committee written explanations or statements that shall relate both to the communication's admissibility and its merits as well as to any remedy that may have been provided in the matter, unless the Committee, working group or special rapporteur has decided, because of the exceptional nature of the case, to request a written reply that relates only to the question of admissibility. A State party that has been requested to submit a written reply that relates only to the question of admissibility is not precluded thereby from submitting, within six months of the request, a written reply that shall relate both to the communication's admissibility and its merits.

3. A State party that has received a request for a written reply under paragraph 1 both on admissibility and on the merits of the communication may apply in writing, within two months, for the communication to be rejected as inadmissible, setting out the grounds for such inadmissibility. Submission of such an application shall not extend the period of six months given to the State party to submit its written reply to the communication, unless the Committee, a working group established under rule 95, paragraph 1, of these rules or a special rapporteur designated under rule 95, paragraph 3, decides to extend the time for submission of the reply, because of the special circumstances of the case, until the Committee has ruled on the question of admissibility.

4. The Committee, a working group established under rule 95, paragraph 1, of these rules or a special rapporteur designated under rule 95, paragraph 3, may request the State party or the author of the communication to submit, within specified time limits, additional written information or observations relevant to the question of admissibility of the communication or its merits.

5. A request addressed to a State party under paragraph 1 of this rule shall include a statement of the fact that such a request does not imply that any decision has been reached on the question of admissibility.

6. Within fixed time limits, each party may be afforded an opportunity to comment on submissions made by the other party pursuant to this rule.

### **Rule 98**

1. Where the Committee decides that a communication is inadmissible under the Optional Protocol it shall as soon as possible communicate its decision, through the Secretary-General, to the author of the communication and, where the communication has been transmitted to a State party concerned, to that State party.

2. If the Committee has declared a communication inadmissible under article 5, paragraph 2, of the Optional Protocol, this decision may be reviewed at a later date by the Committee upon a written request by or on behalf of the individual concerned containing information to the effect that the reasons for inadmissibility referred to in article 5, paragraph 2, no longer apply.

## **D. Procedure for the consideration of communications on the merits**

### **Rule 99**

1. In those cases in which the issue of admissibility is decided before receiving the State party's reply on the merits, if the Committee or a working group established under rule 95, paragraph 1, of these rules decides that the communication is admissible, that decision and all other relevant information shall be submitted, through the Secretary-General, to the State party concerned. The author of the communication shall also be informed, through the Secretary-General, of the decision.

2. Within six months, the State party concerned shall submit to the Committee written explanations or statements clarifying the matter under consideration and the remedy, if any, that may have been taken by that State party.

3. Any explanations or statements submitted by a State party pursuant to this rule shall be communicated, through the Secretary-General, to the author of the communication, who may submit any additional written information or observations within fixed time limits.

4. Upon consideration of the merits, the Committee may review a decision that a communication is admissible in the light of any explanations or statements submitted by the State party pursuant to this rule.

### **Rule 100**

1. In those cases in which the parties have submitted information relating both to the questions of admissibility and the merits, or in which a decision on admissibility has already been taken and the parties have submitted information on the merits, the Committee shall consider the communication in the light of all written information made available to it by the individual and the State party concerned and shall formulate its Views thereon. Prior thereto, the Committee may refer the communication to a working group established under rule 95, paragraph 1, of these rules or to a special rapporteur designated under rule 95, paragraph 3, to make recommendations to the Committee.

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2. The Committee shall not decide on the merits of the communication without having considered the applicability of all the admissibility grounds referred to in the Optional Protocol.

3. The Views of the Committee shall be communicated to the individual and to the State party concerned.

### **Rule 101**

1. The Committee shall designate a Special Rapporteur for follow-up on Views adopted under article 5, paragraph 4, of the Optional Protocol, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's Views.

2. The Special Rapporteur may make such contacts and take such action as appropriate for the due performance of the follow-up mandate. The Special Rapporteur shall make such recommendations for further action by the Committee as may be necessary.

3. The Special Rapporteur shall regularly report to the Committee on follow-up activities.

4. The Committee shall include information on follow-up activities in its annual report.

### **E. Rules concerning confidentiality**

#### **Rule 102**

1. Communications under the Optional Protocol shall be examined by the Committee and a working group established pursuant to rule 95, paragraph 1, of these rules in closed session. Oral deliberations and summary records shall remain confidential.

2. All working documents issued for the Committee, the Working Group established pursuant to rule 95, paragraph 1, or the Special Rapporteur designated pursuant to rule 95, paragraph 3, by the secretariat, including summaries of communications prepared prior to registration, the list of summaries of communications and all drafts prepared for the Committee, its Working Group established pursuant to rule 95, paragraph 1, or the Special Rapporteur designated pursuant to rule 95, paragraph 3, shall remain confidential, unless the Committee decides otherwise.

3. Paragraph 1 above shall not affect the right of the author of a communication or the State party concerned to make public any submissions or information bearing on the proceedings. However, the Committee, the Working Group established pursuant to rule 95, paragraph 1, or the Special Rapporteur designated pursuant to rule 95, paragraph 3, may, as deemed appropriate, request the author of a communication or the State party concerned to keep confidential the whole or part of any such submissions or information.

4. When a decision has been taken on the confidentiality pursuant to paragraph 3 above, the Committee, the Working Group established pursuant to rule 95, paragraph 1, or the

Special Rapporteur designated pursuant to rule 95, paragraph 3, may decide that all or part of the submissions and other information, such as the identity of the author, may remain confidential after the Committee's decision on inadmissibility, the merits or discontinuance has been adopted.

5. Subject to paragraph 4 above, the Committee's decisions on inadmissibility, the merits and discontinuance shall be made public. The decisions of the Committee or the Special Rapporteur designated pursuant to rule 95, paragraph 3, under rule 92 of these rules shall be made public. No advance copies of any decision by the Committee shall be issued.

6. The secretariat is responsible for the distribution of the Committee's final decisions. It shall not be responsible for the reproduction and the distribution of submissions concerning communications.

### **Rule 103**

Information furnished by the parties within the framework of follow-up to the Committee's Views is not subject to confidentiality, unless the Committee decides otherwise. Decisions of the Committee relating to follow-up activities are equally not subject to confidentiality, unless the Committee decides otherwise.

## **F. Individual opinions**

### **Rule 104**

Any member of the Committee who has participated in a decision may request that his or her individual opinion be appended to the Committee's Views or decision.

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UNITED  
NATIONS

**CAT**



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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COMMITTEE AGAINST TORTURE

**RULES OF PROCEDURE\***

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\* Source: [www.ohchr.org](http://www.ohchr.org). The Rules of Procedure of the Treaty Bodies are periodically updated. Please see the website of the OHCHR for the latest document.

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## **PART ONE. GENERAL RULES**

### **I. SESSIONS**

#### **Meetings of the Committee**

##### **Rule 1**

The Committee against Torture (hereinafter referred to as “the Committee”) shall hold meetings as may be required for the satisfactory performance of its functions in accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as “the Convention”).

#### **Regular sessions**

##### **Rule 2**

1. The Committee shall normally hold two regular sessions each year.
2. Regular sessions of the Committee shall be convened at dates decided by the Committee in consultation with the Secretary-General of the United Nations (hereinafter referred to as “the Secretary-General”), taking into account the calendar of conferences as approved by the General Assembly.

#### **Special sessions**

##### **Rule 3**

1. Special sessions of the Committee shall be convened by decision of the Committee. When the Committee is not in session, the Chairman may convene special sessions of the Committee in consultation with the other officers of the Committee. The Chairman of the Committee shall also convene special sessions:
  - (a) At the request of a majority of the members of the Committee;
  - (b) At the request of a State party to the Convention.
2. Special sessions shall be convened as soon as possible at a date fixed by the Chairman in consultation with the Secretary-General and with the other officers of the Committee, taking into account the calendar of conferences as approved by the General Assembly.

### **Place of sessions**

#### **Rule 4**

Sessions of the Committee shall normally be held at the United Nations Office at Geneva. Another place for a session may be designated by the Committee in consultation with the Secretary-General, taking into account the relevant rules of the United Nations.

### **Notification of opening date of sessions**

#### **Rule 5**

The Secretary-General shall notify the members of the Committee of the date and place of the first meeting of each session. Such notifications shall be sent, in the case of regular sessions, at least six weeks in advance, and in the case of a special session, at least three weeks in advance, of the first meeting.

## **II. AGENDA**

### **Provisional agenda for regular sessions**

#### **Rule 6**

The provisional agenda of each regular session shall be prepared by the Secretary-General in consultation with the Chairman of the Committee, in conformity with the relevant provisions of the Convention, and shall include:

- (a) Any item decided upon by the Committee at a previous session;
- (b) Any item proposed by the Chairman of the Committee;
- (c) Any item proposed by a State party to the Convention;
- (d) Any item proposed by a member of the Committee;
- (e) Any item proposed by the Secretary-General relating to his functions under the Convention or these Rules.

### **Provisional agenda for special sessions**

#### **Rule 7**

The provisional agenda for a special session of the Committee shall consist only of those items which are proposed for consideration at that special session.

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### **Adoption of the agenda**

#### **Rule 8**

The first item on the provisional agenda of any session shall be the adoption of the agenda, except for the election of the officers when required under rule 15.

### **Revision of the agenda**

#### **Rule 9**

During a session, the Committee may revise the agenda and may, as appropriate, defer or delete items; only urgent and important items may be added to the agenda.

### **Transmission of the provisional agenda and basic documents**

#### **Rule 10**

The provisional agenda and basic documents relating to each item appearing thereon shall be transmitted to the members of the Committee by the Secretary-General as early as possible. The provisional agenda of a special session shall be transmitted to the members of the Committee by the Secretary-General simultaneously with the notification of the meeting under rule 5.

## **III. MEMBERS OF THE COMMITTEE**

### **Members**

#### **Rule 11**

Members of the Committee shall be the 10 experts elected in accordance with article 17 of the Convention.

### **Beginning of term of office**

#### **Rule 12**

1. The term of office of the members of the Committee elected at the first election shall begin on 1 January 1988. The term of office of members elected at subsequent elections shall begin on the day after the date of expiry of the term of office of the members whom they replace.
2. The Chairperson, members of the Bureau and rapporteurs may continue performing the duties assigned to them until one day before the first meeting of the Committee, composed of its new members, at which it elects its officers.

### **Filling of casual vacancies**

#### **Rule 13**

1. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the Secretary-General shall immediately declare the seat of that member to be vacant and shall request the State party whose expert has ceased to function as a member of the Committee to appoint another expert from among its nationals within two months, if possible, to serve for the remainder of his predecessor's term.
2. The name and the curriculum vitae of the expert so appointed shall be transmitted by the Secretary-General to the States parties for their approval. 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 proposed appointment to fill the vacancy.
3. Except in the case of a vacancy arising from a member's death or disability, the Secretary-General shall act in accordance with the provisions of paragraphs 1 and 2 of the present rule only after receiving, from the member concerned, written notification of his decision to cease to function as a member of the Committee.

### **Solemn declaration**

#### **Rule 14**

Before assuming his duties after his first election, each member of the Committee shall make the following solemn declaration in open Committee:

"I solemnly declare that I will perform my duties and exercise my powers as a member of the Committee against Torture honourably, faithfully, impartially and conscientiously."

## **IV. OFFICERS**

### **Elections**

#### **Rule 15**

The Committee shall elect from among its members a Chairman, three Vice-Chairmen and a Rapporteur.

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### **Term of office**

#### **Rule 16**

Subject to the provisions of rule 12 regarding the Chairperson, members of the Bureau and Rapporteurs, the officers of the Committee shall be elected for a term of two years. They shall be eligible for re-election. None of them, however, may hold office if he or she ceases to be a member of the Committee.

### **Position of Chairman in relation to the Committee**

#### **Rule 17**

1. The Chairman shall perform the functions conferred upon him by the Committee and by these rules of procedure. In exercising his functions as Chairman, the Chairman shall remain under the authority of the Committee.
2. Between sessions, at times when it is not possible or practical to convene a special session of the Committee in accordance with rule 3, the Chairman is authorized to take action to promote compliance with the Convention on the Committee's behalf if he receives information which leads him to believe that it is necessary to do so. The Chairman shall report on the action taken to the Committee at its following session at the latest.

### **Acting Chairman**

#### **Rule 18**

1. If during a session the Chairman is unable to be present at a meeting or any part thereof, he shall designate one of the Vice-Chairmen to act in his place.
2. In the event of the absence or temporary disability of the Chairman, one of the Vice-Chairmen shall serve as Chairman, in the order of precedence determined by their seniority as members of the Committee; where they have the same seniority, the order of seniority in age shall be followed.
3. If the Chairman ceases to be a member of the Committee in the period between sessions or is in any of the situations referred to in rule 20, the Acting Chairman shall exercise this function until the beginning of the next ordinary or special session.

### **Powers and duties of the Acting Chairman**

#### **Rule 19**

A Vice-Chairman acting as Chairman shall have the same powers and duties as the Chairman.

## **Replacement of officers**

### **Rule 20**

If any of the officers of the Committee ceases to serve or declares his inability to continue serving as a member of the Committee or for any reason is no longer able to act as an officer, a new officer shall be elected for the unexpired term of his predecessor.

## **V. SECRETARIAT**

### **Duties of the Secretary-General**

#### **Rule 21**

1. Subject to the fulfilment of the financial obligations undertaken by States parties in accordance with article 18, paragraph 5, of the Convention, the secretariat of the Committee and of such subsidiary bodies as may be established by the Committee (hereinafter referred to as “the secretariat”) shall be provided by the Secretary-General.

2. Subject to the fulfilment of the requirements referred to in paragraph 1 of the present rule, the Secretary-General shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Convention.

### **Statements**

#### **Rule 22**

The Secretary-General or his representative shall attend all meetings of the Committee. Subject to rule 37 of these rules, he or his representative may make oral or written statements at meetings of the Committee or its subsidiary bodies.

### **Servicing of meetings**

#### **Rule 23**

The Secretary-General shall be responsible for all the necessary arrangements for meetings of the Committee and its subsidiary bodies.

### **Keeping the members informed**

#### **Rule 24**

The Secretary-General shall be responsible for keeping the members of the Committee informed of any questions which may be brought before it for consideration.

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### **Financial implications of proposals**

#### **Rule 25**

Before any proposal which involves expenditures is approved by the Committee or by any of its subsidiary bodies, the Secretary-General shall prepare and circulate to its members, as early as possible, an estimate of the cost involved in the proposal. It shall be the duty of the Chairman to draw the attention of members to this estimate and to invite discussions on it when the proposal is considered by the Committee or by a subsidiary body.

## **VI. LANGUAGES**

### **Official and working languages**

#### **Rule 26**

English, French, Russian and Spanish shall be the official and the working languages of the Committee.

### **Interpretation from a working language**

#### **Rule 27**

Speeches made in any of the working languages shall be interpreted into the other working languages.

### **Interpretation from other languages**

#### **Rule 28**

Any speaker addressing the Committee and using a language other than one of the working languages shall normally provide for interpretation into one of the working languages. Interpretation into the other working languages by interpreters of the Secretariat may be based on the interpretation given in the first working language.

### **Languages of records**

#### **Rule 29**

Summary records of meetings of the Committee shall be drawn up in the official languages.

## **Languages of formal decisions and official documents**

### **Rule 30**

All formal decisions and official documents of the Committee shall be issued in the official languages.

## **VII. PUBLIC AND PRIVATE MEETINGS**

### **Public and private meetings**

#### **Rule 31**

The meetings of the Committee and its subsidiary bodies shall be held in public, unless the Committee decides otherwise or it appears from the relevant provisions of the Convention that the meeting should be held in private.

### **Issue of communiqués concerning private meetings**

#### **Rule 32**

At the close of each private meeting, the Committee or its subsidiary body may issue a communiqué, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee at its closed meetings.

## **VIII. RECORDS**

### **Correction of summary records**

#### **Rule 33**

Summary records of the public and private meetings of the Committee and its subsidiary bodies shall be prepared by the Secretariat. They shall be distributed as soon as possible to the members of the Committee and to any others participating in the meetings. All such participants may, within three working days of the receipt of the records of the meetings, submit corrections to the Secretariat in the languages in which the records have been issued. Corrections to the records of the meetings shall be consolidated in a single corrigendum to be issued after the end of the session concerned. Any disagreement concerning such corrections shall be decided by the Chairman of the Committee or the Chairman of the subsidiary body to which the record relates or, in case of continued disagreement, by decision of the Committee or of the subsidiary body.

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**Distribution of summary records**

**Rule 34**

1. The summary records of public meetings shall be documents for general distribution.
2. The summary records of private meetings shall be distributed to the members of the Committee and to other participants in the meetings. They may be made available to others upon decision of the Committee at such time and under such conditions as the Committee may decide.

**IX. DISTRIBUTION OF REPORTS AND OTHER OFFICIAL DOCUMENTS OF THE COMMITTEE**

**Distribution of official documents**

**Rule 35**

1. Without prejudice to the provisions of rule 34 of these rules of procedure and subject to paragraphs 2 and 3 of the present rule, reports, formal decisions and all other official documents of the Committee and its subsidiary bodies shall be documents for general distribution, unless the Committee decides otherwise.
2. Reports, formal decisions and other official documents of the Committee and its subsidiary bodies relating to articles 20, 21 and 22 of the Convention shall be distributed by the secretariat to all members of the Committee, to the States parties concerned and, as may be decided by the Committee, to members of its subsidiary bodies and to others concerned.
3. Reports and additional information submitted by States parties under article 19 of the Convention shall be documents for general distribution, unless the State party concerned requests otherwise.

**X. CONDUCT OF BUSINESS**

**Quorum**

**Rule 36**

Six members of the Committee shall constitute a quorum.

## **Powers of the Chairman**

### **Rule 37**

The Chairman shall declare the opening and closing of each meeting of the Committee, direct the discussion, ensure observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The Chairman, subject to these rules, shall have control over the proceedings of the Committee and over the maintenance of order at its meetings. The Chairman may, in the course of the discussion of an item, propose to the Committee the limitation of the time to be allowed to speakers, the limitation of the number of times each speaker may speak on any question and the closure of the list of speakers. He shall rule on points of order. He shall also have the power to propose adjournment or closure of the debate or adjournment or suspension of a meeting. Debate shall be confined to the question before the Committee, and the Chairman may call a speaker to order if his remarks are not relevant to the subject under discussion.

## **Points of order**

### **Rule 38**

During the discussion of any matter, a member may, at any time, raise a point of order, and such point of order shall immediately be decided upon by the Chairman in accordance with the rules of procedure. Any appeal against the ruling of the Chairman shall immediately be put to the vote, and the ruling of the Chairman shall stand unless overruled by a majority of the members present. A member raising a point of order may not speak on the substance of the matter under discussion.

## **Time limit on statements**

### **Rule 39**

The Committee may limit the time allowed to each speaker on any question. When debate is limited and a speaker exceeds his allotted time, the Chairman shall call him to order without delay.

## **List of speakers**

### **Rule 40**

During the course of a debate, the Chairman may announce the list of speakers and, with the consent of the Committee, declare the list closed. The Chairman may, however, accord the

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right of reply to any member or representative if a speech delivered after he has declared the list closed makes this desirable. When the debate on an item is concluded because there are no other speakers, the Chairman shall declare the debate closed. Such closure shall have the same effect as closure by the consent of the Committee.

### **Suspension or adjournment of meetings**

#### **Rule 41**

During the discussion of any matter, a member may move the suspension or the adjournment of the meeting. No discussion on such motions shall be permitted, and they shall immediately be put to the vote.

### **Adjournment of debate**

#### **Rule 42**

During the discussion of any matter, a member may move the adjournment of the debate on the item under discussion. In addition to the proposer of the motion, one member may speak in favour of and one against the motion, after which the motion shall immediately be put to the vote.

### **Closure of debate**

#### **Rule 43**

A member may, at any time, move the closure of the debate on the item under discussion, whether or not any other member has signified his wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall immediately be put to the vote.

### **Order of motions**

#### **Rule 44**

Subject to rule 38, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;

- (c) To adjourn the debate on the item under discussion;
- (d) For the closure of the debate on the item under discussion.

### **Submission of proposals**

#### **Rule 45**

Unless otherwise decided by the Committee, proposals and substantive amendments or motions submitted by members shall be introduced in writing and handed to the secretariat, and their consideration shall, if so requested by any member, be deferred until the next meeting on a following day.

### **Decisions on competence**

#### **Rule 46**

Subject to rule 44, any motion by a member calling for a decision on the competence of the Committee to adopt a proposal submitted to it shall be put to the vote immediately before a vote is taken on the proposal in question.

### **Withdrawal of motions**

#### **Rule 47**

A motion may be withdrawn by the member who proposed it at any time before voting on it has commenced, provided that the motion has not been amended. A motion which has thus been withdrawn may be reintroduced by any member.

### **Reconsideration of proposals**

#### **Rule 48**

When a proposal has been adopted or rejected, it may not be reconsidered at the same session unless the Committee so decides. Permission to speak on a motion to reconsider shall be accorded only to two speakers in favour of the motion and to two speakers opposing the motion, after which it shall be immediately put to the vote.

## **XI. VOTING**

### **Voting rights**

#### **Rule 49**

Each member of the Committee shall have one vote.

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### **Adoption of decisions**

#### **Rule 50<sup>a</sup>**

Decisions of the Committee shall be made by a majority vote of the members present.

### **Equally divided votes**

#### **Rule 51**

If a vote is equally divided on matters other than elections, the proposal shall be regarded as rejected.

### **Method of voting**

#### **Rule 52**

Subject to rule 58 of these rules, the Committee shall normally vote by show of hands, except that any member may request a roll-call, which shall then be taken in the alphabetical order of the names of the members of the Committee, beginning with the member whose name is drawn by lot by the Chairman.

### **Roll-call votes**

#### **Rule 53**

The vote of each member participating in any roll-call shall be inserted in the record.

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<sup>a</sup> The Committee decided, at its first session, that in a footnote to rule 50 of the rules of procedure attention should be drawn to the following:

1. The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Convention and the rules of procedure were observed and that such attempts did not unduly delay the work of the Committee.
2. Bearing in mind paragraph 1 above, the Chairman at any meeting may, and at the request of any member shall, put the proposal to a vote.

## **Conduct during voting and explanation of votes**

### **Rule 54**

After the voting has commenced, there shall be no interruption of the voting except on a point of order by a member in connection with the actual conduct of the voting. Brief statements by members consisting solely of explanations of their votes may be permitted by the Chairman before the voting has commenced or after the voting has been completed.

## **Division of proposals**

### **Rule 55**

Parts of a proposal shall be voted on separately if a member requests that the proposal be divided. Those parts of the proposal which have been approved shall then be put to the vote as a whole; if all the operative parts of a proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

## **Order of voting on amendments**

### **Rule 56**

1. When an amendment to a proposal is moved, the amendment shall be voted on first. When two or more amendments to a proposal are moved the Committee shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on, until all amendments have been put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.
2. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of that proposal.

## **Order of voting on proposals**

### **Rule 57**

1. If two or more proposals relate to the same question, the Committee shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.
2. The Committee may, after each vote on a proposal, decide whether to vote on the next proposal.
3. Any motions requiring that no decision be taken on the substance of such proposals shall, however, be considered as previous questions and shall be put to the vote before them.

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## **XII. ELECTIONS**

### **Method of elections**

#### **Rule 58**

Elections shall be held by secret ballot, unless the Committee decides otherwise in the case of elections to fill a place for which there is only one candidate.

### **Conduct of elections when only one elective place is to be filled**

#### **Rule 59**

1. When only one person or member is to be elected and no candidate obtains in the first ballot the majority required, a second ballot shall be taken, which shall be restricted to the two candidates who obtained the greatest number of votes.
2. If the second ballot is inconclusive and a majority vote of members present is required, a third ballot shall be taken in which votes may be cast for any eligible candidate. If the third ballot is inconclusive, the next ballot shall be restricted to the two candidates who obtained the greatest number of votes in the third ballot and so on, with unrestricted and restricted ballots alternating, until a person or member is elected.
3. If the second ballot is inconclusive and a two-thirds majority is required, the balloting shall be continued until one candidate secures the necessary two-thirds majority. In the next three ballots, votes may be cast for any eligible candidate. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the two candidates who obtained the greatest number of votes in the third such unrestricted ballot, and the following three ballots shall be unrestricted, and so on until a person or member is elected.

### **Conduct of elections when two or more elective places are to be filled**

#### **Rule 60**

When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining in the first ballot the majority required shall be elected. If the number of candidates obtaining such majority is less than the number of persons or members to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after the third inconclusive ballot, votes may be cast for any eligible candidates. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest number of votes in the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.

### **XIII. SUBSIDIARY BODIES**

#### **Establishment of subsidiary bodies**

##### **Rule 61**

1. The Committee may, in accordance with the provisions of the Convention and subject to the provisions of rule 25, set up ad hoc subsidiary bodies as it deems necessary and define their composition and mandates.
2. Each subsidiary body shall elect its own officers and adopt its own rules of procedure. Failing such rules, the present rules of procedure shall apply *mutatis mutandis*.
3. The Committee may also appoint one or more of its members as Rapporteurs to perform such duties as mandated by the Committee.

### **XIV. INFORMATION AND DOCUMENTATION**

#### **Submission of information, documentation and written statements**

##### **Rule 62**

1. The Committee may invite specialized agencies, United Nations bodies concerned, regional intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council to submit to it information, documentation and written statements, as appropriate, relevant to the Committee's activities under the Convention.
2. The Committee shall determine the form and the manner in which such information, documentation and written statements may be made available to members of the Committee.

### **XV. ANNUAL REPORT OF THE COMMITTEE**

#### **Annual report**

##### **Rule 63**

The Committee shall submit an annual report on its activities under the Convention to the States parties and to the General Assembly of the United Nations.

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## **PART TWO. RULES RELATING TO THE FUNCTIONS OF THE COMMITTEE**

### **XVI. REPORTS FROM STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION**

#### **Submission of reports**

##### **Rule 64**

1. The States parties shall submit to the Committee, through the Secretary-General, reports on the measures they have taken to give effect to their undertakings under the Convention, within one year after the entry into force of the Convention for the State party concerned. Thereafter the States parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. In appropriate cases the Committee may consider the information contained in a recent report as covering information that should have been included in overdue reports.
3. The Committee may, through the Secretary-General, inform the States parties of its wishes regarding the form and contents as well as the methodology for consideration of the reports to be submitted under article 19 of the Convention, and issue guidelines to that effect.

#### **Non-submission of reports**

##### **Rule 65**

1. At each session, the Secretary-General shall notify the Committee of all cases of non-submission of reports under rules 64 and 67 of these rules. In such cases the Committee may transmit to the State party concerned, through the Secretary-General, a reminder concerning the submission of such report or reports.
2. If, after the reminder referred to in paragraph 1 of this rule, the State party does not submit the report required under rules 64 and 67 of these rules, the Committee shall so state in the annual report which it submits to the States parties and to the General Assembly of the United Nations.
3. In appropriate cases the Committee may notify the defaulting State party through the Secretary-General that it intends, on a date specified in the notification, to examine the measures taken by the State party to protect or give effect to the rights recognized in the Convention, and make such general comments as it deems appropriate in the circumstances.

## **Attendance by States parties at examination of reports**

### **Rule 66**

1. The Committee shall, through the Secretary-General, notify the States parties, as early as possible, of the opening date, duration and place of the session at which their respective reports will be examined. Representatives of the States parties shall be invited to attend the meetings of the Committee when their reports are examined. The Committee may also inform a State party from which it decides to seek further information that it may authorize its representative to be present at a specified meeting. Such a representative should be able to answer questions which may be put to him/her by the Committee and make statements on reports already submitted by his/her State, and may also submit additional information from his/her State.
2. If a State party has submitted a report under article 19, paragraph (1), of the Convention but fails to send a representative, in accordance with paragraph 1 of this rule, to the session at which it has been notified that its report will be examined, the Committee may, at its discretion, take one of the followings courses:

(a) Notify the State party through the Secretary-General that, at a specified session, it intends to examine the report in accordance with rule 66, paragraph (2), and thereafter act in accordance with rule 68; or

(b) Proceed at the session originally specified to examine the report and thereafter make and submit to the State party its provisional concluding observations. The Committee will determine the date on which the report shall be examined under rule 66, or the date on which a new periodic report shall be submitted under rule 67.

## **Request for additional reports**

### **Rule 67**

1. When considering a report submitted by a State party under article 19 of the Convention, the Committee shall first determine whether the report provides all the information required under rule 64 of these rules.
2. If a report of a State party to the Convention, in the opinion of the Committee, does not contain sufficient information, the Committee may request that State to furnish an additional report, indicating by what date the said report should be submitted.

## **Conclusions and recommendations by the Committee**

### **Rule 68**

1. After its consideration of each report, the Committee, in accordance with article 19, paragraph 3, of the Convention, may make such general comments, conclusions or recommendations on the report as it may consider appropriate and shall forward these, through the Secretary-General, to the State party concerned, which in reply may submit to the Committee

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any comment that it considers appropriate. The Committee may, in particular, indicate whether, on the basis of its examination of the reports and information supplied by the State party, it appears that some of the obligations of that State under the Convention have not been discharged and may, as appropriate, appoint one or more rapporteurs to follow up with its compliance of the Committee's conclusions and recommendations.

2. The Committee may, where necessary, indicate a time limit within which observations from States parties are to be received.

3. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 1 of this rule, together with any observations thereon received from the State party concerned, in its annual report made in accordance with article 24 of the Convention. If so requested by the State party concerned, the Committee may also include a copy of the report submitted under article 19, paragraph 1, of the Convention.

## **XVII. PROCEEDINGS UNDER ARTICLE 20 OF THE CONVENTION**

### **Transmission of information to the Committee**

#### **Rule 69**

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, information which is, or appears to be, submitted for the Committee's consideration under article 20, paragraph 1, of the Convention.

2. No information shall be received by the Committee if it concerns a State party which, in accordance with article 28, paragraph 1, of the Convention, declared at the time of ratification of or accession to the Convention that it did not recognize the competence of the Committee provided for in article 20, unless that State has subsequently withdrawn its reservation in accordance with article 28, paragraph 2, of the Convention.

### **Register of information submitted**

#### **Rule 70**

The Secretary-General shall maintain a permanent register of information brought to the attention of the Committee in accordance with rule 69 above and shall make the information available to any member of the Committee upon request.

### **Summary of the information**

#### **Rule 71**

The Secretary-General, when necessary, shall prepare and circulate to the members of the Committee a brief summary of the information submitted in accordance with rule 69 above.

## **Confidentiality of documents and proceedings**

### **Rule 72**

All documents and proceedings of the Committee relating to its functions under article 20 of the Convention shall be confidential, until such time when the Committee decides, in accordance with the provisions of article 20, paragraph 5, of the Convention, to make them public.

## **Meetings**

### **Rule 73**

1. Meetings of the Committee concerning its proceedings under article 20 of the Convention shall be closed.
2. Meetings during which the Committee considers general issues, such as procedures for the application of article 20 of the Convention, shall be public, unless the Committee decides otherwise.

## **Issue of communiqués concerning closed meetings**

### **Rule 74**

The Committee may decide to issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding its activities under article 20 of the Convention.

## **Preliminary consideration of information by the Committee**

### **Rule 75**

1. The Committee, when necessary, may ascertain, through the Secretary-General, the reliability of the information and/or of the sources of the information brought to its attention under article 20 of the Convention or obtain additional relevant information substantiating the facts of the situation.
2. The Committee shall determine whether it appears to it that the information received contains well-founded indications that torture, as defined in article 1 of the Convention, is being systematically practised in the territory of the State party concerned.

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### **Examination of the information**

#### **Rule 76**

1. If it appears to the Committee that the information received is reliable and contains well-founded indications that torture is being systematically practised in the territory of a State party, the Committee shall invite the State party concerned, through the Secretary-General, to cooperate in its examination of the information and, to this end, to submit observations with regard to that information.
2. The Committee shall indicate a time limit for the submission of observations by the State party concerned, with a view to avoiding undue delay in its proceedings.
3. In examining the information received, the Committee shall take into account any observations which may have been submitted by the State party concerned, as well as any other relevant information available to it.
4. The Committee may decide, if it deems it appropriate, to obtain from the representatives of the State party concerned, governmental and non-governmental organizations, as well as individuals, additional information or answers to questions relating to the information under examination.
5. The Committee shall decide, on its initiative and on the basis of its rules of procedure, the form and manner in which such additional information may be obtained.

### **Documentation from United Nations bodies and specialized agencies**

#### **Rule 77**

The Committee may at any time obtain, through the Secretary-General, any relevant documentation from United Nations bodies or specialized agencies that may assist it in the examination of the information received under article 20 of the Convention.

### **Establishment of an inquiry**

#### **Rule 78**

1. The Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to it within a time limit which may be set by the Committee.
2. When the Committee decides to make an inquiry in accordance with paragraph 1 of this rule, it shall establish the modalities of the inquiry as it deems it appropriate.

3. The members designated by the Committee for the confidential inquiry shall determine their own methods of work in conformity with the provisions of the Convention and the rules of procedure of the Committee.
4. While the confidential inquiry is in progress, the Committee may defer the consideration of any report the State party may have submitted during this period in accordance with article 19, paragraph 1, of the Convention.

### **Cooperation of the State party concerned**

#### **Rule 79**

The Committee shall invite the State party concerned, through the Secretary-General, to cooperate with it in the conduct of the inquiry. To this end, the Committee may request the State party concerned:

- (a) To designate an accredited representative to meet with the members designated by the Committee;
- (b) To provide its designated members with any information that they, or the State party, may consider useful for ascertaining the facts relating to the inquiry;
- (c) To indicate any other form of cooperation that the State may wish to extend to the Committee and to its designated members with a view to facilitating the conduct of the inquiry.

### **Visiting mission**

#### **Rule 80**

If the Committee deems it necessary to include in its inquiry a visit of one or more of its members to the territory of the State party concerned, it shall request, through the Secretary-General, the agreement of that State party and shall inform the State party of its wishes regarding the timing of the mission and the facilities required to allow the designated members of the Committee to carry out their task.

### **Hearings in connection with the inquiry**

#### **Rule 81**

1. The designated members may decide to conduct hearings in connection with the inquiry as they deem it appropriate.
2. The designated members shall establish, in cooperation with the State party concerned, the conditions and guarantees required for conducting such hearings. They shall request the State party to ensure that no obstacles are placed in the way of witnesses and other individuals wishing to meet with the designated members of the Committee and that no retaliatory measure is taken against those individuals or their families.

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3. Every person appearing before the designated members for the purpose of giving testimony shall be requested to take an oath or make a solemn declaration concerning the veracity of his/her testimony and the respect for confidentiality of the proceedings.

### **Assistance during the inquiry**

#### **Rule 82**

1. In addition to the staff and facilities to be provided by the Secretary-General in connection with the inquiry and/or the visiting mission to the territory of the State party concerned, the designated members may invite, through the Secretary-General, persons with special competence in the medical field or in the treatment of prisoners as well as interpreters to provide assistance at all stages of the inquiry.

2. If the persons providing assistance during the inquiry are not bound by an oath of office to the United Nations, they shall be required to declare solemnly that they will perform their duties honestly, faithfully and impartially, and that they will respect the confidentiality of the proceedings.

3. The persons referred to in paragraphs 1 and 2 of the present rule shall be entitled to the same facilities, privileges and immunities provided for in respect of the members of the Committee, under article 23 of the Convention.

### **Transmission of findings, comments or suggestions**

#### **Rule 83**

1. After examining the findings of its designated members submitted to it in accordance with rule 78, paragraph 1, the Committee shall transmit, through the Secretary-General, these findings to the State party concerned, together with any comments or suggestions that it deems appropriate.

2. The State party concerned shall be invited to inform the Committee within a reasonable delay of the action it takes with regard to the Committee's findings and in response to the Committee's comments or suggestions.

### **Summary account of the results of the proceedings**

#### **Rule 84**

1. After all the proceedings of the Committee regarding an inquiry made under article 20 of the Convention have been completed, the Committee may decide, after consultations with the State party concerned, to include a summary account of the results of the proceedings in its annual report made in accordance with article 24 of the Convention.

2. The Committee shall invite the State party concerned, through the Secretary-General, to inform the Committee directly or through its designated representative of its observations concerning the question of a possible publication, and may indicate a time limit within which the observations of the State party should be communicated to the Committee.
3. If it decides to include a summary account of the results of the proceedings relating to an inquiry in its annual report, the Committee shall forward, through the Secretary-General, the text of the summary account to the State party concerned.

### **XVIII. PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED UNDER ARTICLE 21 OF THE CONVENTION**

#### **Declarations by States parties**

##### **Rule 85**

1. The Secretary-General shall transmit to the other States parties copies of the declarations deposited with him by States parties recognizing the competence of the Committee, in accordance with article 21 of the Convention.
2. The withdrawal of a declaration made under article 21 of the Convention shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under that article; no further communication by any State party shall be received under that article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party has made a new declaration.

#### **Notification by the States parties concerned**

##### **Rule 86**

1. A communication under article 21 of the Convention may be referred to the Committee by either State party concerned by notice given in accordance with paragraph 1 (b) of that article.
2. The notice referred to in paragraph 1 of this rule shall contain or be accompanied by information regarding:
  - (a) Steps taken to seek adjustment of the matter in accordance with article 21, paragraphs 1 (a) and (b), of the Convention, including the text of the initial communication and of any subsequent written explanations or statements by the States parties concerned which are pertinent to the matter;
  - (b) Steps taken to exhaust domestic remedies;
  - (c) Any other procedure of international investigation or settlement resorted to by the States parties concerned.

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## **Register of communications**

### **Rule 87**

The Secretary-General shall maintain a permanent register of all communications received by the Committee under article 21 of the Convention.

## **Information to the members of the Committee**

### **Rule 88**

The Secretary-General shall inform the members of the Committee without delay of any notice given under rule 86 of these rules and shall transmit to them as soon as possible copies of the notice and relevant information.

## **Meetings**

### **Rule 89**

The Committee shall examine communications under article 21 of the Convention at closed meetings.

## **Issue of communiqués concerning closed meetings**

### **Rule 90**

The Committee may, after consultation with the States parties concerned, issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee under article 21 of the Convention.

## **Requirements for the consideration of communications**

### **Rule 91**

A communication shall not be considered by the Committee unless:

- (a) Both States parties concerned have made declarations under article 21, paragraph 1, of the Convention;
- (b) The time limit prescribed in article 21, paragraph 1 (b), of the Convention has expired;
- (c) The Committee has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law, or that the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention.

## **Good offices**

### **Rule 92**

1. Subject to the provisions of rule 91 of these rules, the Committee shall proceed to make its good offices available to the States parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the Convention.
2. For the purpose indicated in paragraph 1 of this rule, the Committee may, when appropriate, set up an ad hoc conciliation commission.

## **Request for information**

### **Rule 93**

The Committee may, through the Secretary-General, request the States parties concerned or either of them to submit additional information or observations orally or in writing. The Committee shall indicate a time limit for the submission of such written information or observations.

## **Attendance by the States parties concerned**

### **Rule 94**

1. The States parties concerned shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.
2. The Committee shall, through the Secretary-General, notify the States parties concerned as early as possible of the opening date, duration and place of the session at which the matter will be examined.
3. The procedure for making oral and/or written submissions shall be decided by the Committee, after consultation with the States parties concerned.

## **Report of the Committee**

### **Rule 95**

1. Within 12 months after the date on which the Committee received the notice referred to in rule 86 of these rules, the Committee shall adopt a report in accordance with article 21, paragraph 1 (h), of the Convention.
2. The provisions of paragraph 1 of rule 94 of these rules shall not apply to the deliberations of the Committee concerning the adoption of the report.

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3. The Committee's report shall be communicated, through the Secretary-General, to the States parties concerned.

## **XIX. PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED UNDER ARTICLE 22 OF THE CONVENTION**

### **A. General provisions**

#### **Declarations by States parties**

##### **Rule 96**

1. The Secretary-General shall transmit to the other States parties copies of the declarations deposited with him by States parties recognizing the competence of the Committee, in accordance with article 22 of the Convention.
2. The withdrawal of a declaration made under article 22 of the Convention shall not prejudice the consideration of any matter which is the subject of a complaint already transmitted under that article; no further complaint by or on behalf of an individual shall be received under that article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party has made a new declaration.

#### **Transmission of complaints**

##### **Rule 97**

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, complaints which are or appear to be submitted for consideration by the Committee under paragraph 1 of article 22 of the Convention.
2. The Secretary-General, when necessary, may request clarification from the complainant of a complaint as to his/her wish to have his/her complaint submitted to the Committee for consideration under article 22 of the Convention. In case there is still doubt as to the wish of the complainant, the Committee shall be seized of the complaint.

#### **Registration of complaints; Rapporteur for new complaints and interim measures**

##### **Rule 98**

1. Complaints may be registered by the Secretary-General or by decision of the Committee or by the Rapporteur on new complaints and interim measures.
2. No complaint shall be registered by the Secretary-General if:
  - (a) It concerns a State which has not made the declaration provided for in article 22, paragraph 1, of the Convention; or

(b) It is anonymous; or

(c) It is not submitted in writing by the alleged victim or by close relatives of the alleged victim on his/her behalf or by a representative with appropriate written authorization.

3. The Secretary-General shall prepare lists of the complaints brought to the attention of the Committee in accordance with rule 97 above with a brief summary of their contents, and shall circulate such lists to the members of the Committee at regular intervals. The Secretary-General shall also maintain a permanent register of all such complaints.

4. An original case file shall be kept for each summarized complaint. The full text of any complaint brought to the attention of the Committee shall be made available to any member of the Committee upon his/her request.

### **Request for clarification or additional information**

#### **Rule 99**

1. The Secretary-General or the Rapporteur on new complaints and interim measures may request clarification from the complainant concerning the applicability of article 22 of the Convention to his complaint, in particular regarding:

(a) The name, address, age and occupation of the complainant and the verification of his/her identity;

(b) The name of the State party against which the complaint is directed;

(c) The object of the complaint;

(d) The provision or provisions of the Convention alleged to have been violated;

(e) The facts of the claim;

(f) Steps taken by the complainant to exhaust domestic remedies;

(g) Whether the same matter is being examined under another procedure of international investigation or settlement.

2. When requesting clarification or information, the Secretary-General shall indicate an appropriate time limit to the complainant of the complaint with a view to avoiding undue delays in the procedure under article 22 of the Convention. Such time limit may be extended in appropriate circumstances.

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3. The Committee may approve a questionnaire for the purpose of requesting the above-mentioned information from the complainant.
4. The request for clarification referred to in paragraph 1 (c)-(g) of the present rule shall not preclude the inclusion of the complaint in the list provided for in rule 98, paragraph 3.
5. The Secretary-General shall instruct the complainant on the procedure that will be followed and inform him/her that the text of the complaint shall be transmitted confidentially to the State party concerned in accordance with article 22, paragraph 3, of the Convention.

### **Summary of the information**

#### **Rule 100**

For each registered complaint the Secretary-General shall prepare and circulate to the members of the Committee a summary of the relevant information obtained.

### **Meetings and hearings**

#### **Rule 101**

1. Meetings of the Committee or its subsidiary bodies during which complaints under article 22 of the Convention will be examined shall be closed.
2. Meetings during which the Committee may consider general issues, such as procedures for the application of article 22 of the Convention, may be public if the Committee so decides.

### **Issue of communiqués concerning closed meetings**

#### **Rule 102**

The Committee may issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee under article 22 of the Convention.

### **Obligatory non-participation of a member in the examination of a complaint**

#### **Rule 103**

1. A member shall not take part in the examination of a complaint by the Committee or its subsidiary body:
  - (a) If he/she has any personal interest in the case; or

- (b) If he/she has participated in any capacity, other than as a member of the Committee, in the making of any decision; or
  - (c) If he/she is a national of the State party concerned or is employed by that country.
2. Any question which may arise under paragraph 1 above shall be decided by the Committee without the participation of the member concerned.

### **Optional non-participation of a member in the examination of a complaint**

#### **Rule 104**

If, for any reason, a member considers that he/she should not take part or continue to take part in the examination of a complaint, he/she shall inform the Chairman of his/her withdrawal.

### **B. Procedure for determining admissibility of complaints**

#### **Method of dealing with complaints**

#### **Rule 105**

1. In accordance with the following rules, the Committee shall decide by simple majority as soon as practicable whether or not a complaint is admissible under article 22 of the Convention.
2. The Working Group established under rule 106, paragraph 1, may also declare a complaint admissible by majority vote or inadmissible by unanimity.
3. The Committee, the working group established under rule 106, paragraph 1, or the rapporteur(s) designated under rule 106, paragraph 3, shall, unless they decide otherwise, deal with complaints in the order in which they are received by the secretariat.
4. The Committee may, if it deems it appropriate, decide to consider two or more communications jointly.
5. The Committee may, if it deems appropriate, decide to sever consideration of complaints of multiple complainants. Severed complaints may receive a separate registry number.

#### **Establishment of a working group and designation of special rapporteurs for specific complaints**

#### **Rule 106**

1. The Committee may, in accordance with rule 61, set up a working group to meet shortly before its sessions, or at any other convenient time to be decided by the Committee, in consultation with the Secretary-General, for the purpose of taking decisions on admissibility or inadmissibility and making recommendations to the Committee regarding the merits of complaints, and assisting the Committee in any manner which the Committee may decide.

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2. The Working Group shall comprise no less than three and no more than five members of the Committee. The Working Group shall elect its own officers, develop its own working methods, and apply as far as possible the rules of procedure of the Committee to its meetings. The members of the Working Group shall be elected by the Committee every other session.
3. The Working Group may designate rapporteurs from among its members to deal with specific complaints.

### **Conditions for admissibility of complaints**

#### **Rule 107**

With a view to reaching a decision on the admissibility of a complaint, the Committee, its Working Group or a rapporteur designated under rules 98 or 106, paragraph 3, shall ascertain:

- (a) That the individual claims to be a victim of a violation by the State party concerned of the provisions of the Convention. The complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint, and, when appropriate authorization is submitted to the Committee;
- (b) That the complaint is not an abuse of the Committee's process or manifestly unfounded;
- (c) That the complaint is not incompatible with the provisions of the Convention;
- (d) That the same matter has not been and is not being examined under another procedure of international investigation or settlement;
- (e) That the individual has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
- (f) That the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party.

### **Interim measures**

#### **Rule 108**

1. At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) for new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.

2. Where the Committee, the Working Group, or Rapporteur(s) request(s) interim measures under this rule, the request shall not imply a determination of the admissibility or the merits of the complaint. The State party shall be so informed upon transmittal.
3. Where a request for interim measures is made by the Working Group or Rapporteur(s) under the present rule, the Working Group or Rapporteur(s) should inform the Committee members of the nature of the request and the complaint to which the request relates at the next regular session of the Committee.
4. The Secretary-General shall maintain a list of such requests for interim measures.
5. The Rapporteur for new complaints and interim measures shall also monitor compliance with the Committee's requests for interim measures.
6. The State party may inform the Committee that the reasons for the interim measures have lapsed or present arguments why the request for interim measures should be lifted.
7. The Rapporteur, the Committee or the Working Group may withdraw the request for interim measures.

**Additional information, clarifications and observations**

**Rule 109**

1. As soon as possible after the complaint has been registered, it should be transmitted to the State party, requesting it to submit a written reply within six months.
2. The State party concerned shall include in its written reply explanations or statements that shall relate both to the admissibility and the merits of the complaint as well as to any remedy that may have been provided in the matter, unless the Committee, Working Group or Rapporteur in new complaints and interim measures has decided, because of the exceptional nature of the case, to request a written reply that relates only to the question of admissibility.
3. A State party that has received a request for a written reply under paragraph 1 both on admissibility and on the merits of the complaint may apply in writing, within two months, for the complaint to be rejected as inadmissible, setting out the grounds for such inadmissibility. The Committee or the Rapporteur on new complaints and interim measures may or may not agree to consider admissibility separately from the merits.
4. Following a separate decision on admissibility, the Committee shall fix the deadline for submissions on a case-by-case basis.

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5. The Committee or the Working Group established under rule 106 or rapporteur(s) designated under rule 106, paragraph 3, may request, through the Secretary-General, the State party concerned or the complainant to submit additional written information, clarifications or observations relevant to the question of admissibility or merits.
6. The Committee or the Working Group or rapporteur(s) designated under rule 106, paragraph 3, shall indicate a time limit for the submission of additional information or clarification with a view to avoiding undue delay.
7. If the time limit provided is not respected by the State party concerned or the complainant, the Committee or the Working Group may decide to consider the admissibility and/or merits of the complaint in the light of available information.
8. A complaint may not be declared admissible unless the State party concerned has received its text and has been given an opportunity to furnish information or observations as provided in paragraph 1 of this rule.
9. If the State party concerned disputes the contention of the complainant that all available domestic remedies have been exhausted, the State party is required to give details of the effective remedies available to the alleged victim in the particular circumstances of the case and in accordance with the provisions of article 22, paragraph 5 (b), of the Convention.
10. Within such time limit as indicated by the Committee or the Working Group or rapporteur(s) designated under rule 106, paragraph 3, the State party or the complainant may be afforded an opportunity to comment on any submission received from the other party pursuant to a request made under the present rule. Non-receipt of such comments within the established time limit should not generally delay the consideration of the admissibility of the complaint.

### **Inadmissible complaints**

#### **Rule 110**

1. Where the Committee or the Working Group decides that a complaint is inadmissible under article 22 of the Convention, or its consideration is suspended or discontinued, the Committee shall as soon as possible transmit its decision, through the Secretary-General, to the complainant and to the State party concerned.
2. If the Committee or the Working Group has declared a complaint inadmissible under article 22, paragraph 5, of the Convention, this decision may be reviewed at a later date by the Committee upon a request from a member of the Committee or a written request by or on behalf of the individual concerned. Such written request shall contain evidence to the effect that the reasons for inadmissibility referred to in article 22, paragraph 5, of the Convention no longer apply.

### **C. Consideration of the merits**

#### **Method of dealing with admissible complaints; oral hearings**

##### **Rule 111**

1. When the Committee or the Working Group has decided that a complaint is admissible under article 22 of the Convention, before receiving the State party's reply on the merits, the Committee shall transmit to the State party, through the Secretary-General, the text of its decision together with any submission received from the author of the communication not already transmitted to the State party under rule 109, paragraph 1. The Committee shall also inform the complainant, through the Secretary-General, of its decision.
2. Within the period established by the Committee, the State party concerned shall submit to the Committee written explanations or statements clarifying the case under consideration and the measures, if any, that may have been taken by it. The Committee may indicate, if it deems it necessary, the type of information it wishes to receive from the State party concerned.
3. Any explanations or statements submitted by a State party pursuant to this rule shall be transmitted, through the Secretary-General, to the complainant who may submit any additional written information or observations within such time limit as the Committee shall decide.
4. The Committee may invite the complainant or his/her representative and representatives of the State party concerned to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits of the complaint. Whenever one party is so invited, the other party shall be informed and invited to attend and make appropriate submissions. The non-appearance of a party will not prejudice the consideration of the case.
5. The Committee may revoke its decision that a complaint is admissible in the light of any explanations or statements thereafter submitted by the State party pursuant to this rule. However, before the Committee considers revoking that decision, the explanations or statements concerned must be transmitted to the complainant so that he/she may submit additional information or observations within a time limit set by the Committee.

#### **Findings of the Committee; decisions on the merits**

##### **Rule 112**

1. In those cases in which the parties have submitted information relating both to the questions of admissibility and the merits, or in which a decision on admissibility has already been taken and the parties have submitted information on the merits, the Committee shall

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consider the complaint in the light of all information made available to it by or on behalf of the complainant and by the State party concerned and shall formulate its findings thereon. Prior thereto, the Committee may refer the communication to the Working Group or to a case rapporteur designated under rule 106, paragraph 3, to make recommendations to the Committee.

2. The Committee, the Working Group, or the rapporteur may at any time in the course of the examination obtain any document from United Nations bodies, specialized agencies, or other sources that may assist in the consideration of the complaint.
3. The Committee shall not decide on the merits of a complaint without having considered the applicability of all the admissibility grounds referred to in article 22 of the Convention. The findings of the Committee shall be forwarded, through the Secretary-General, to the complainant and to the State party concerned.
4. The Committee's findings on the merits shall be known as "decisions".
5. The State party concerned shall generally be invited to inform the Committee within a specific time period of the action it has taken in conformity with the Committee's decisions.

### **Individual opinions**

#### **Rule 113**

Any member of the Committee who has participated in a decision may request that his/her individual opinion be appended to the Committee's decisions.

### **Follow-up procedure**

#### **Rule 114**

1. The Committee may designate one or more rapporteur(s) for follow-up on decisions adopted under article 22 of the Convention, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's findings.
2. The Rapporteur(s) may make such contacts and take such action as appropriate for the due performance of the follow-up mandate and report accordingly to the Committee. The Rapporteur(s) may make such recommendations for further action by the Committee as may be necessary for follow-up.
3. The Rapporteur(s) shall regularly report to the Committee on follow-up activities.
4. The Rapporteur(s), in discharge of the follow-up mandate, may, with the approval of the Committee, engage in necessary visits to the State party concerned.

**Summaries in the Committee's annual report and inclusion of texts of final decisions**

**Rule 115**

1. The Committee may decide to include in its annual report a summary of the complaints examined and, where the Committee considers appropriate, a summary of the explanations and statements of the States parties concerned and of the Committee's evaluation thereof.
2. The Committee shall include in its annual report the text of its final decisions, including its views under article 22, paragraph 7, of the Convention, as well as the text of any decision declaring a complaint inadmissible under article 22 of the Convention.
3. The Committee shall include information on follow-up activities in its annual report.

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## **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN<sup>\*</sup>**

**Adopted and opened for signature, ratification and accession by General  
Assembly resolution 34/180 of 18 December 1979  
entry into force 3 September 1981, in accordance with article 27(1)**

The States Parties to the present Convention,

*Noting* that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

*Noting* that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

*Noting* that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

*Considering* the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

*Noting* also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

*Concerned*, however, that despite these various instruments extensive discrimination against women continues to exist,

*Recalling* that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

*Concerned* that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

*Convinced* that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

*Emphasizing* that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

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\* Source: [www.ohchr.org](http://www.ohchr.org)

*Affirming* that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

*Convinced* that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

*Bearing* in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

*Aware* that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

*Determined* to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## PART I

### Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

### **Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

### **Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

### **Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

## **PART II**

### **Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

#### **Article 8**

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

#### **Article 9**

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

### **PART III**

#### **Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

#### **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
  - (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
    - (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
    - (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
    - (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
    - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
  3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

#### **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

#### **Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;

- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

#### **Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
  - (a) To participate in the elaboration and implementation of development planning at all levels;
  - (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
  - (c) To benefit directly from social security programmes;
  - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
  - (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
  - (f) To participate in all community activities;
  - (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
  - (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

### **PART IV**

#### **Article 15**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

## Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
  - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
  - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## PART V

### Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to

submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.
7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.
9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

#### **Article 18**

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:
  - (a) Within one year after the entry into force for the State concerned;
  - (b) Thereafter at least every four years and further whenever the Committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

#### **Article 19**

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.

#### **Article 20**

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

### **Article 21**

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

### **Article 22**

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

## **PART VI**

### **Article 23**

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

### **Article 24**

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

### **Article 25**

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### **Article 26**

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

### **Article 27**

1. The present Convention 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 Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

### **Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

### **Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

### **Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

# **OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN<sup>\*</sup>**

**Adopted by General Assembly resolution A/54/4 on  
6 October 1999 and opened for signature on 10 December 1999,  
Human Rights Day  
entry into force 22 December 2000**

The States Parties to the present Protocol,

*Noting* that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

*Also noting* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

*Recalling* that the International Covenants on Human Rights Resolution 2200 A (XXI), annex. and other international human rights instruments prohibit discrimination on the basis of sex,

*Also recalling* the Convention on the Elimination of All Forms of Discrimination against Women ("the Convention"), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

*Reaffirming* their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

Have agreed as follows:

## **Article 1**

A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2.

## **Article 2**

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

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\* Source: [www.ohchr.org](http://www.ohchr.org)

### **Article 3**

Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

### **Article 4**

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.
2. The Committee shall declare a communication inadmissible where:
  - (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
  - (b) It is incompatible with the provisions of the Convention;
  - (c) It is manifestly ill-founded or not sufficiently substantiated;
  - (d) It is an abuse of the right to submit a communication;
  - (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

### **Article 5**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

### **Article 6**

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

### **Article 7**

1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

4. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
5. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under article 18 of the Convention.

#### **Article 8**

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

#### **Article 9**

1. The Committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

#### **Article 10**

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.
2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

#### **Article 11**

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

### **Article 12**

The Committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

### **Article 13**

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

### **Article 14**

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

### **Article 15**

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.
2. The present Protocol shall be 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.

### **Article 16**

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

### **Article 17**

No reservations to the present Protocol shall be permitted.

### **Article 18**

1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that 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 the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and 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 amendments that they have accepted.

**Article 19**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

**Article 20**

The Secretary-General of the United Nations shall inform all States of:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 18;
- (c) Any denunciation under article 19.

**Article 21**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 25 of the Convention.

*Note: The following document is Annex I of the Report of the Committee on the Elimination of Discrimination against Women (A/56/38)*

**ANNEX I**  
**RULES OF PROCEDURE OF THE COMMITTEE ON**  
**THE ELIMINATION OF DISCRIMINATION AGAINST**  
**WOMEN\***

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\* Source: website of the United Nation's Division for the Advancement of Women (DAW): [www.un.org/womenwatch/daw/](http://www.un.org/womenwatch/daw/) The Rules of Procedure of the Treaty Bodies are periodically updated. Please consult DAW's website of the for the latest document.

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## **PART ONE**

### **General rules**

#### **I. Sessions**

##### **Rule 1** **Sessions**

The Committee on the Elimination of Discrimination against Women (hereinafter referred to as “the Committee”) shall hold such sessions as may be required for the effective performance of its functions in accordance with the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as “the Convention”).

##### **Rule 2** **Regular sessions**

1. The Committee shall hold such regular sessions each year as shall be authorized by the States parties to the Convention.
2. Regular sessions of the Committee shall be convened on dates decided upon by the Committee in consultation with the Secretary-General of the United Nations (hereinafter referred to as “the Secretary-General”), taking into account the calendar of conferences and meetings approved by the General Assembly.

##### **Rule 3** **Special sessions**

1. Special sessions of the Committee shall be convened by decision of the Committee or at the request of a State party to the Convention. The Chairperson of the Committee may also convene special sessions:
  - (a) At the request of a majority of members of the Committee;
  - (b) At the request of a State party to the Convention.
2. Special sessions shall be convened as soon as possible at a date fixed by the Chairperson in consultation with the Secretary-General and with the Committee.

##### **Rule 4** **Pre-sessional working group**

1. A pre-sessional working group, which shall consist of no more than five members of the Committee designated by the Chairperson in consultation with the Committee at a regular session, and reflecting equitable geographical representation, shall normally be convened prior to each regular session.
2. The pre-sessional working group shall formulate a list of issues and questions on substantive issues arising from reports submitted by States parties in accordance with article 18 of the Convention and submit that list of issues and questions to the States parties concerned.

##### **Rule 5** **Place of sessions**

Sessions of the Committee shall normally be held at the Headquarters or the other offices of the United Nations. Another venue for a session may be proposed by the Committee in consultation with the Secretary-General.

## **Rule 6**

### **Notification of opening date of sessions**

The Secretary-General shall notify members of the Committee of the date, duration and place of the first meeting of each session. Such notification shall be sent, in the case of a regular session, at least six weeks in advance.

## **II. Agenda**

### **Rule 7**

#### **Provisional agenda**

The provisional agenda for each regular or special session shall be prepared by the Secretary-General in consultation with the Chairperson of the Committee, in conformity with the relevant provisions of the Convention, and shall include:

- (a) Any item decided upon by the Committee at a previous session;
- (b) Any item proposed by the Chairperson of the Committee;
- (c) Any item proposed by a member of the Committee;
- (d) Any item proposed by a State party to the Convention;
- (e) Any item proposed by the Secretary-General relating to her or his functions under the Convention or the present rules of procedure.

### **Rule 8**

#### **Transmission of the provisional agenda**

The provisional agenda and the basic documents relating to each item thereof, the report of the pre-sessional working group, the reports of States parties submitted under article 18 of the Convention and the responses by States parties to issues raised by the pre-sessional working group shall be prepared in all of the official languages of the United Nations by the Secretary-General, who shall endeavour to have the documents transmitted to members of the Committee at least six weeks prior to the opening of the session.

### **Rule 9**

#### **Adoption of the agenda**

The first item on the provisional agenda for any session shall be the adoption of the agenda.

### **Rule 10**

#### **Revision of the agenda**

During a session, the Committee may amend the agenda and may, as appropriate, delete or defer items by the decision of a majority of the members present and voting. Additional items of an urgent nature may be included in the agenda by a majority of the members.

## **III. Members of the Committee**

### **Rule 11**

#### **Members of the Committee**

Members of the Committee may not be represented by alternates.

**Rule 12**  
**Term of office**

The term of office of members begins:

- (a) On the 1st day of January of the year after their election by the meeting of States parties and shall end on the 31st day of December four years later;
- (b) On the date of the approval by the Committee, if appointed to fill a casual vacancy, and shall end on the date of expiration of the term of office of the member or members being replaced.

**Rule 13**  
**Casual vacancies**

1. A casual vacancy may occur through death, the inability of a Committee member to perform her or his function as a member of the Committee or the resignation of a member of the Committee. The Chairperson shall immediately notify the Secretary-General who shall inform the State party of the member so that action may be taken in accordance with article 17, paragraph 7, of the Convention.
2. Notification of the resignation of a member of the Committee shall be in writing to the Chairperson or to the Secretary-General, and action shall be taken in accordance with article 17, paragraph 7, of the Convention only after such notification has been received.
3. A member who is unable to attend meetings of the Committee shall inform the Secretary-General as early as possible and, if this inability is likely to be extended, the member should resign.
4. When a member of the Committee is consistently unable to carry out her or his functions for any cause other than absence of a temporary nature, the Chairperson shall draw the above rule to her or his attention.
5. Where a member of the Committee has rule 13, paragraph 4, drawn to her or his attention and does not resign in accordance with that rule, the Chairperson shall notify the Secretary-General who shall then inform the State party of the member to enable action to be taken in accordance with article 17, paragraph 7, of the Convention.

**Rule 14**  
**Filling casual vacancies**

1. When a casual vacancy within article 17, paragraph 7, of the Convention occurs in the Committee, the Secretary-General shall immediately request the State party that had nominated that member to appoint, within a period of two months, another expert from among its nationals to serve for the remainder of the predecessor's term.
2. The name and curriculum vitae of the expert so appointed shall be transmitted by the Secretary-General to the Committee for approval. Upon approval of the expert by the Committee, the Secretary-General shall notify the States parties of the name of the member of the Committee filling the casual vacancy.

**Rule 15**  
**Solemn declaration**

Upon assuming their duties, members of the Committee shall make the following solemn declaration in open Committee:

"I solemnly declare that I shall perform my duties and exercise powers as a member of the Committee on the Elimination of Discrimination against Women honourably, faithfully, impartially and conscientiously."

## **IV. Officers**

### **Rule 16**

#### **Election of officers of the Committee**

The Committee shall elect from among its members a Chairperson, three Vice-Chairpersons and a Rapporteur with due regard to equitable geographical representation.

### **Rule 17**

#### **Term of office**

The officers of the Committee shall be elected for a term of two years and be eligible for re-election provided that the principle of rotation is upheld. None of them, however, may hold office if she or he ceases to be a member of the Committee.

### **Rule 18**

#### **Functions of the Chairperson**

1. The Chairperson shall perform the functions conferred upon her or him by these rules of procedure and the decisions of the Committee.
2. In the exercise of those functions the Chairperson shall remain under the authority of the Committee.
3. The Chairperson shall represent the Committee at United Nations meetings in which the Committee is officially invited to participate. If the Chairperson is unable to represent the Committee at such a meeting, she or he may designate another officer of the Committee or, if no officer is available, another member of the Committee, to attend on her or his behalf.

### **Rule 19**

#### **Absence of the Chairperson at meetings of the Committee**

1. If the Chairperson is unable to be present at a meeting or any part thereof, she or he shall designate one of the Vice-Chairpersons to act in her or his place.
2. In the absence of such a designation, the Vice-Chairperson to preside shall be chosen according to the names of the Vice-Chairpersons as they appear in English alphabetical order.
3. A Vice-Chairperson acting as a Chairperson shall have the same powers and duties as the Chairperson.

### **Rule 20**

#### **Replacement of officers**

If any of the officers of the Committee ceases to serve or declares her or his inability to continue serving as a member of the Committee or for any reason is no longer able to act as an officer, a new officer from the same region shall be elected for the unexpired term of her or his predecessor.

## **V. Secretariat**

### **Rule 21**

#### **Duties of the Secretary-General**

1. At the request or by decision of the Committee and approval by the General Assembly:
  - (a) The secretariat of the Committee and of such subsidiary bodies established by the Committee ("the Secretariat") shall be provided by the Secretary-General;

- (b) The Secretary-General shall provide the Committee with the necessary staff and facilities for the effective performance of its functions under the Convention;
  - (c) The Secretary-General shall be responsible for all necessary arrangements for meetings of the Committee and its subsidiary bodies.
2. The Secretary-General shall be responsible for informing the members of the Committee without delay of any questions that may be brought before it for consideration or of any other developments that may be of relevance to the Committee.

**Rule 22**  
**Statements**

The Secretary-General or her or his representative shall be present at all meetings of the Committee and may make oral or written statements at such meetings or at meetings of its subsidiary bodies.

**Rule 23**  
**Financial implications**

Before any proposal that involves expenditure is approved by the Committee or by any of its subsidiary bodies, the Secretary-General shall prepare and circulate to the members of the Committee or subsidiary body as early as possible, an estimate of the cost involved in the proposal. It shall be the duty of the Chairperson to draw the attention of members to this estimate and to invite discussion on it when the proposal is considered by the Committee or subsidiary body.

**VI. Languages**

**Rule 24**  
**Official languages**

Arabic, Chinese, English, French, Russian and Spanish shall be the official languages of the Committee.

**Rule 25**  
**Interpretation**

1. Statements made in an official language shall be interpreted into the other official languages.
2. Any speaker addressing the Committee in a language other than one of the official languages shall normally provide for interpretation into one of the official languages. Interpretation into the other official languages by interpreters of the Secretariat shall be based upon the interpretation given in the first official language.

**Rule 26**  
**Language of documents**

1. All official documents of the Committee shall be issued in the official languages of the United Nations.
2. All formal decisions of the Committee shall be made available in the official languages of the United Nations.

## **VII. Records**

### **Rule 27**

#### **Records**

1. The Secretary-General shall provide the Committee with summary records of its proceedings, which shall be made available to the members.
2. Summary records are subject to correction, to be submitted to the Secretariat by participants in the meetings in the language in which the summary record is issued. Corrections to the records of the meetings shall be consolidated in a single corrigendum to be issued after the conclusion of the relevant session.
3. The summary records of public meetings shall be documents for general distribution unless in exceptional circumstances the Committee decides otherwise.
4. Sound recordings of meetings of the Committee shall be made and kept in accordance with the usual practice of the United Nations.

## **VIII. Conduct of business**

### **Rule 28**

#### **Public and private meetings**

1. The meetings of the Committee and its subsidiary bodies shall be held in public unless the Committee decides otherwise.
2. Meetings at which concluding comments on reports of States parties are discussed, as well as meetings of the pre-sessional working group and other working groups, shall be closed unless the Committee decides otherwise.
3. No person or body shall, without the permission of the Committee, film or otherwise record the proceedings of the Committee. The Committee shall, if necessary, and before giving such permission, seek the consent of any State party reporting to the Committee under article 18 of the Convention to the filming or other recording of the proceedings in which it is engaged.

### **Rule 29**

#### **Quorum**

Twelve members of the Committee shall constitute a quorum.

### **Rule 30**

#### **Powers of the Chairperson**

1. The Chairperson shall declare the opening and closing of each meeting of the Committee, direct the discussion, ensure observance of the present rules, accord the right to speak, put questions to the vote and announce decisions.
2. The Chairperson, subject to the present rules, shall have control over the proceedings of the Committee and over the maintenance of order at its meetings.
3. The Chairperson may, in the course of the discussion of an item, including the examination of reports submitted under article 18 of the Convention, propose to the Committee the limitation of the time to be allowed to speakers, the limitation of the number of times each speaker may speak on any question and the closure of the list of speakers.
4. The Chairperson shall rule on points of order. She or he shall also have the power to pro-

pose adjournment or closure of the debate or adjournment or suspension of a meeting. Debate shall be confined to the question before the Committee, and the Chairperson may call a speaker to order if her or his remarks are not relevant to the subject under discussion.

5. During the course of the debate, the Chairperson may announce the list of speakers and, with the consent of the Committee, declare the list closed.

## **IX. Voting**

### **Rule 31**

#### **Adoption of decisions**

1. The Committee shall endeavour to reach its decisions by consensus.
2. If and when all efforts to reach consensus have been exhausted, decisions of the Committee shall be taken by a simple majority of the members present and voting.

### **Rule 32**

#### **Voting rights**

1. Each member of the Committee shall have one vote.
2. For the purpose of these rules, “members present and voting” means members casting an affirmative or negative vote. Members who abstain from voting are considered as not voting.

### **Rule 33**

#### **Equally divided votes**

If a vote is equally divided on a matter other than an election, the proposal shall be regarded as having been rejected.

### **Rule 34**

#### **Method of voting**

1. Subject to rule 39 of the present rules, the Committee shall normally vote by show of hands, except that any member may request a roll-call, which shall then be taken in the English alphabetical order of the names of the members of the Committee, beginning with the member whose name is drawn by lot by the Chairperson.
2. The vote of each member participating in a roll-call shall be inserted in the record.

### **Rule 35**

#### **Conduct during voting and explanation of vote**

After voting has commenced, it shall not be interrupted unless a member raises a point of order in connection with the actual conduct of the voting. Brief statements by members consisting solely of explanations of vote may be permitted by the Chairperson before the voting has commenced or after the voting has been completed.

### **Rule 36**

#### **Division of proposals**

Parts of a proposal shall be voted on separately if a member requests that the proposal be divided. Those parts of the proposal that have been approved shall then be put to the vote as a whole; if all operative parts of a proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

### **Rule 37**

#### **Order of voting on amendments**

1. When an amendment to a proposal is moved, the amendment shall be voted on first. When two or more amendments to a proposal are moved, the Committee shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all amendments have been put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.
2. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of the proposal.

### **Rule 38**

#### **Order of voting on proposals**

1. If two or more proposals relate to the same question, the Committee shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.
2. The Committee may, after each vote on a proposal, decide whether to vote on the next proposal.
3. Any motions requiring that no decision be taken on the substance of such proposals shall, however, be considered as previous questions and shall be put to the vote before those proposals.

### **Rule 39**

#### **Method of election**

An election shall be held by secret ballot, unless the Committee decides otherwise in the case of an election to fill a place for which there is only one candidate.

### **Rule 40**

#### **Conduct of elections for filling one elective place**

1. When only one elective place is to be filled and no candidate obtains in the first ballot the majority required, a second ballot shall be taken, which shall be restricted to the two candidates who obtained the largest number of votes.
2. If in the second ballot the votes are equally divided, and a majority is required, the Chairperson shall decide between the candidates by drawing lots. If a two-thirds majority is required, the balloting shall be continued until one candidate secures two thirds of the votes cast provided that, after the third inconclusive ballot, votes may be cast for any eligible member.
3. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the two candidates who obtained the greatest number of votes in the third of the unrestricted ballots, and the following three ballots thereafter shall be unrestricted, and so on until a member is elected.

## **X. Subsidiary bodies**

### **Rule 41**

#### **Subsidiary bodies**

1. The Committee may set up ad hoc subsidiary bodies and will define their composition and mandates.

2. Each subsidiary body shall elect its own officers and will, *mutatis mutandis*, apply the present rules of procedure.

## **XI. Annual report of the Committee**

### **Rule 42**

#### **Annual report of the Committee**

1. As provided in article 21, paragraph 1, of the Convention, the Committee shall submit to the General Assembly, through the Economic and Social Council, an annual report on its activities which shall contain, *inter alia*, the concluding comments of the Committee relating to the report of each State party, and information relating to its mandate under the Optional Protocol to the Convention.
2. The Committee shall also include in its report suggestions and general recommendations, together with any comments received from States parties.

## **XII. Distribution of reports and other official documents**

### **Rule 43**

#### **Distribution of reports and other official documents**

1. Reports, formal decisions, pre-sessional documents and all other official documents of the Committee and its subsidiary bodies shall be documents for general distribution unless the Committee decides otherwise.
2. Reports and additional information submitted by States parties under article 18 of the Convention shall be documents for general distribution.

## **XIII. Participation of specialized agencies and bodies of the United Nations and of intergovernmental and non-governmental organizations**

### **Rule 44**

#### **Participation of specialized agencies and bodies of the United Nations and of intergovernmental and non-governmental organizations**

The Secretary-General shall notify each specialized agency and United Nations body as early as possible of the opening date, duration, place and agenda of each session of the Committee and of the pre-sessional working group.

### **Rule 45**

#### **Specialized agencies**

1. In accordance with article 22 of the Convention, the Committee may invite specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities. Any such reports shall be issued as pre-sessional documents.
2. Specialized agencies shall be entitled to be represented at meetings of the Committee or of the pre-sessional working group when the implementation of such provisions of the Convention as fall within the scope of their activities is being considered. The Committee may permit representatives of the specialized agencies to make oral or written statements to the Committee or to the pre-sessional working group, and to provide information appropriate and relevant to the Committee's activities under the Convention.

**Rule 46**

**Intergovernmental organizations and United Nations bodies**

Representatives of intergovernmental organizations and United Nations bodies may be invited by the Committee to make oral or written statements and provide information or documentation in areas relevant to the Committee's activities under the Convention, to meetings of the Committee or to its pre-sessional working group.

**Rule 47**

**Non-governmental organizations**

Representatives of non-governmental organizations may be invited by the Committee to make oral or written statements and to provide information or documentation relevant to the Committee's activities under the Convention to meetings of the Committee or to its pre-sessional working group.

**PART TWO**

**Rules relating to the functions of the Committee**

**XIV. Reports of States parties under article 18 of the Convention**

**Rule 48**

**Submission of reports under article 18 of the Convention**

1. The Committee shall examine the progress made in the implementation of the Convention through the consideration of reports of States parties submitted to the Secretary-General on legislative, judicial, administrative and other measures.
2. In order to assist States parties in their reporting tasks, the Committee shall issue general guidelines for the preparation of initial reports and of periodic reports, taking into account the consolidated guidelines, common to all the human rights treaty bodies, for the first part of initial and periodic reports of States parties.
3. Taking into account the consolidated guidelines relating to the reports required under United Nations human rights treaties, the Committee may formulate general guidelines as to the form and content of the initial and periodic reports of States parties required under article 18 of the Convention and shall, through the Secretary-General, inform the States parties of the Committee's wishes regarding the form and content of such reports.
4. A State party reporting at a session of the Committee may provide additional information prior to the consideration of the report by the Committee, provided that such information reaches the Secretary-General no later than four months prior to the opening date of the session at which the report of the State party is to be considered.
5. The Committee may request a State party to submit a report on an exceptional basis. Such reports shall be limited to those areas on which the State party has been requested to focus its attention. Except when the Committee requests otherwise, such reports shall not be submitted in substitution for an initial or periodic report. The Committee shall determine the session at which an exceptional report shall be considered.

### **Rule 49**

#### **Failure to submit or late submission of reports**

1. At each session of the Committee, the Secretary-General shall notify the Committee of all cases of non-submission of reports and additional information under rules 48 and 50 of the present rules. In such cases, the Committee may transmit to the State party concerned, through the Secretary-General, a reminder concerning the submission of the report or the additional information.
2. If, after the reminder referred to in paragraph 1 of the present rule, the State party does not submit the report or the additional information sought, the Committee may include a reference to this effect in its annual report to the General Assembly.
3. The Committee may allow States parties to submit a combined report comprising no more than two overdue reports.

### **Rule 50**

#### **Request for additional information**

1. When considering reports submitted by a State party under article 18 of the Convention, the Committee, and in particular its pre-session working group, shall first satisfy itself that, in accordance with the Committee's guidelines, the report provides sufficient information.
2. If, in the opinion of the Committee, or of the pre-session working group, a report of a State party does not contain sufficient information, it may request the State concerned to furnish such additional information as required, indicating the time limit within which the information should be submitted.
3. The questions or comments forwarded by the pre-session working group to the State party whose report is under consideration and the response of the State party thereto shall, in accordance with the present rule, be circulated to members of the Committee prior to the session at which the report is to be examined.

### **Rule 51**

#### **Examination of reports**

1. At each session, the Committee, based on the list of reports awaiting consideration, shall decide which reports of States parties it will consider at its subsequent session, bearing in mind the duration of the subsequent session and the criteria of date of submission and geographical balance.
2. The Committee, through the Secretary-General, shall notify the States parties as early as possible of the opening date, duration and place of the session at which their respective reports will be examined. The States parties shall be requested to confirm in writing, within a specified time, their willingness to have their reports examined.
3. The Committee at each session shall also establish and circulate to the States parties concerned a reserve list of reports for consideration at its subsequent session in the event that a State party invited in accordance with the present rule is unable to present its report. In such case, the State party chosen from the reserve list shall be invited by the Committee, through the Secretary-General, to present its report without delay.
4. Representatives of the States parties shall be invited to attend the meetings of the Committee at which their reports are to be examined.
5. If a State party fails to respond to an invitation to have a representative attend the meeting of the Committee at which its report is being examined, consideration of the report shall

be rescheduled for another session. If, at such a subsequent session, the State party, after due notification, fails to have a representative present, the Committee may proceed with the examination of the report in the absence of the representative of the State party.

#### **Rule 52**

##### **Suggestions and general recommendations**

1. In accordance with article 21, paragraph 1, of the Convention, and on the basis of its examination of reports and information received from States parties, the Committee may make general recommendations addressed to States parties.
2. The Committee may make suggestions addressed to bodies other than States parties arising out of its consideration of reports of States parties.

#### **Rule 53**

##### **Concluding comments**

1. The Committee may, after consideration of the report of a State party, make concluding comments on the report with a view to assisting the State party in implementing its obligations under the Convention. The Committee may include guidance on the issues on which the next periodic report of the State party should be focused.
2. The Committee shall adopt the concluding comments before the closure of the session at which the report of the State party was considered.

#### **Rule 54**

##### **Working methods for examining reports**

The Committee shall establish working groups to consider and suggest ways and means of expediting its work and of implementing its obligations under article 21 of the Convention.

### **XV. General discussion**

#### **Rule 55**

##### **General discussion**

In order to enhance understanding of the content and implications of the articles of the Convention or to assist in the elaboration of general recommendations, the Committee may devote one or more meetings of its regular sessions to a general discussion of specific articles of or themes relating to the Convention.

## **PART THREE**

### **Rules of procedure for the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**

#### **XVI. Procedures for the consideration of communications received under the Optional Protocol**

##### **Rule 56**

##### **Transmission of communications to the Committee**

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, communications that are, or appear to be, submitted for consideration by the Committee under article 2 of the Optional Protocol.
2. The Secretary-General may request clarification from the author or authors of a communication as to whether she, he or they wish to have the communication submitted to the Committee for consideration under the Optional Protocol. Where there is doubt as to the wish of the author or authors, the Secretary-General will bring the communication to the attention of the Committee.
3. No communication shall be received by the Committee if it:
  - (a) Concerns a State that is not a party to the Protocol;
  - (b) Is not in writing;
  - (c) Is anonymous.

##### **Rule 57**

##### **List and register of communications**

1. The Secretary-General shall maintain a permanent register of all communications submitted for consideration by the Committee under article 2 of the Optional Protocol.
2. The Secretary-General shall prepare lists of the communications submitted to the Committee, together with a brief summary of their contents.

##### **Rule 58**

##### **Request for clarification or additional information**

1. The Secretary-General may request clarification from the author of a communication, including:
  - (a) The name, address, date of birth and occupation of the victim and verification of the victim's identity;
  - (b) The name of the State party against which the communication is directed;
  - (c) The objective of the communication;
  - (d) The facts of the claim;
  - (e) Steps taken by the author and/or victim to exhaust domestic remedies;
  - (f) The extent to which the same matter is being or has been examined under another procedure of international investigation or settlement;
  - (g) The provision or provisions of the Convention alleged to have been violated.

2. When requesting clarification or information, the Secretary-General shall indicate to the author or authors of the communication a time limit within which such information is to be submitted.
3. The Committee may approve a questionnaire to facilitate requests for clarification or information from the victim and/or author of a communication.
4. A request for clarification or information shall not preclude the inclusion of the communication in the list provided for in rule 57 above.
5. The Secretary-General shall inform the author of a communication of the procedure that will be followed and in particular that, provided that the individual or individuals consent to the disclosure of her identity to the State party concerned, the communication will be brought confidentially to the attention of that State party.

#### **Rule 59**

##### **Summary of information**

1. A summary of the relevant information obtained with respect to each registered communication shall be prepared and circulated to the members of the Committee by the Secretary-General at the next regular session of the Committee.
2. The full text of any communication brought to the attention of the Committee shall be made available to any member of the Committee upon that member's request.

#### **Rule 60**

##### **Inability of a member to take part in the examination of a communication**

1. A member of the Committee may not take part in the examination of a communication if:
  - (a) The member has a personal interest in the case;
  - (b) The member has participated in the making of any decision on the case covered by the communication in any capacity other than under the procedures applicable to this Optional Protocol;
  - (c) The member is a national of the State party concerned.
2. Any question that may arise under paragraph 1 above shall be decided by the Committee without the participation of the member concerned.

#### **Rule 61**

##### **Withdrawal of a member**

If, for any reason, a member considers that she or he should not take part or continue to take part in the examination of a communication, the member shall inform the Chairperson of her or his withdrawal.

#### **Rule 62**

##### **Establishment of working groups and designation of rapporteurs**

1. The Committee may establish one or more working groups, each comprising no more than five of its members, and may designate one or more rapporteurs to make recommendations to the Committee and to assist it in any manner in which the Committee may decide.
2. In the present part of the rules, reference to a working group or rapporteur is a reference to a working group or rapporteur established under the present rules.
3. The rules of procedure of the Committee shall apply as far as possible to the meetings of its working groups.

### **Rule 63**

#### **Interim measures**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.
2. A working group or rapporteur may also request the State party concerned to take such interim measures as the working group or rapporteur considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.
3. When a request for interim measures is made by a working group or rapporteur under the present rule, the working group or rapporteur shall forthwith thereafter inform the Committee members of the nature of the request and the communication to which the request relates.
4. Where the Committee, a working group or a rapporteur requests interim measures under this rule, the request shall state that it does not imply a determination of the merits of the communication.

### **Rule 64**

#### **Method of dealing with communications**

1. The Committee shall, by a simple majority and in accordance with the following rules, decide whether the communication is admissible or inadmissible under the Optional Protocol.
2. A working group may also declare that a communication is admissible under the Optional Protocol, provided that it is composed of five members and all of the members so decide.

### **Rule 65**

#### **Order of communications**

1. Communications shall be dealt with in the order in which they are received by the Secretariat, unless the Committee or a working group decides otherwise.
2. The Committee may decide to consider two or more communications jointly.

### **Rule 66**

#### **Separate consideration of admissibility and merits**

The Committee may decide to consider the question of admissibility of a communication and the merits of a communication separately.

### **Rule 67**

#### **Conditions of admissibility of communications**

With a view to reaching a decision on the admissibility of a communication, the Committee, or a working group, shall apply the criteria set forth in articles 2, 3 and 4 of the Optional Protocol.

### **Rule 68**

#### **Authors of communications**

1. Communications may be submitted by individuals or groups of individuals who claim to be victims of violations of the rights set forth in the Convention, or by their designated representatives, or by others on behalf of an alleged victim where the alleged victim consents.

2. In cases where the author can justify such action, communications may be submitted on behalf of an alleged victim without her consent.
3. Where an author seeks to submit a communication in accordance with paragraph 2 of the present rule, she or he shall provide written reasons justifying such action.

#### **Rule 69**

##### **Procedures with regard to communications received**

1. As soon as possible after the communication has been received, and provided that the individual or group of individuals consent to the disclosure of their identity to the State party concerned, the Committee, working group or rapporteur shall bring the communication confidentially to the attention of the State party and shall request that State party to submit a written reply to the communication.
2. Any request made in accordance with paragraph 1 of the present rule shall include a statement indicating that such a request does not imply that any decision has been reached on the question of admissibility of the communication.
3. Within six months after receipt of the Committee's request under the present rule, the State party shall submit to the Committee a written explanation or statement that relates to the admissibility of the communication and its merits, as well as to any remedy that may have been provided in the matter.
4. The Committee, working group or rapporteur may request a written explanation or statement that relates only to the admissibility of a communication but, in such cases, the State party may nonetheless submit a written explanation or statement that relates to both the admissibility and the merits of a communication, provided that such written explanation or statement is submitted within six months of the Committee's request.
5. A State party that has received a request for a written reply in accordance with paragraph 1 of the present rule may submit a request in writing that the communication be rejected as inadmissible, setting out the grounds for such inadmissibility, provided that such a request is submitted to the Committee within two months of the request made under paragraph 1.
6. If the State party concerned disputes the contention of the author or authors, in accordance with article 4, paragraph 1, of the Optional Protocol, that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims in the particular circumstances of the case.
7. Submission by the State party of a request in accordance with paragraph 5 of the present rule shall not affect the period of six months given to the State party to submit its written explanation or statement unless the Committee, working group or rapporteur decides to extend the time for submission for such a period as the Committee considers appropriate.
8. The Committee, working group or rapporteur may request the State party or the author of the communication to submit, within fixed time limits, additional written explanations or statements relevant to the issues of the admissibility or merits of a communication.
9. The Committee, working group or rapporteur shall transmit to each party the submissions made by the other party pursuant to the present rule and shall afford each party an opportunity to comment on those submissions within fixed time limits.

#### **Rule 70**

##### **Inadmissible communications**

1. Where the Committee decides that a communication is inadmissible, it shall, as soon as possible, communicate its decision and the reasons for that decision through the Secretary-General to the author of the communication and to the State party concerned.

2. A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request submitted by or on behalf of the author or authors of the communication, containing information indicating that the reasons for inadmissibility no longer apply.
3. Any member of the Committee who has participated in the decision regarding admissibility may request that a summary of her or his individual opinion be appended to the Committee's decision declaring a communication inadmissible.

#### **Rule 71**

##### **Additional procedures whereby admissibility may be considered separately from the merits**

1. Where the issue of admissibility is decided by the Committee or a working group before the State party's written explanations or statements on the merits of the communication are received, that decision and all other relevant information shall be submitted through the Secretary-General to the State party concerned. The author of the communication shall, through the Secretary-General, be informed of the decision.
2. The Committee may revoke its decision that a communication is admissible in the light of any explanation or statements submitted by the State party.

#### **Rule 72**

##### **Views of the Committee on admissible communications**

1. Where the parties have submitted information relating both to the admissibility and to the merits of a communication, or where a decision on admissibility has already been taken and the parties have submitted information on the merits of that communication, the Committee shall consider and shall formulate its views on the communication in the light of all written information made available to it by the author or authors of the communication and the State party concerned, provided that this information has been transmitted to the other party concerned.
2. The Committee or the working group set up by it to consider a communication may, at any time in the course of the examination, obtain through the Secretary-General any documentation from organizations in the United Nations system or other bodies that may assist in the disposal of the communication, provided that the Committee shall afford each party an opportunity to comment on such documentation or information within fixed time limits.
3. The Committee may refer any communication to a working group to make recommendations to the Committee on the merits of the communication.
4. The Committee shall not decide on the merits of the communication without having considered the applicability of all of the admissibility grounds referred to in articles 2, 3 and 4 of the Optional Protocol.
5. The Secretary-General shall transmit the views of the Committee, determined by a simple majority, together with any recommendations, to the author or authors of the communication and to the State party concerned.
6. Any member of the Committee who has participated in the decision may request that a summary of her or his individual opinion be appended to the Committee's views.

#### **Rule 73**

##### **Follow-up to the views of the Committee**

1. Within six months of the Committee's issuing its views on a communication, the State party concerned shall submit to the Committee a written response, including any information on any action taken in the light of the views and recommendations of the Committee.

2. After the six-month period referred to in paragraph 1 of the present rule, the Committee may invite the State party concerned to submit further information about any measures the State party has taken in response to its views or recommendations.
3. The Committee may request the State party to include information on any action taken in response to its views or recommendations in its subsequent reports under article 18 of the Convention.
4. The Committee shall designate for follow-up on views adopted under article 7 of the Optional Protocol a rapporteur or working group to ascertain the measures taken by States parties to give effect to the Committee's views and recommendations.
5. The rapporteur or working group may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary.
6. The rapporteur or working group shall report to the Committee on follow-up activities on a regular basis.
7. The Committee shall include information on any follow-up activities in its annual report under article 21 of the Convention.

**Rule 74**  
**Confidentiality of communications**

1. Communications submitted under the Optional Protocol shall be examined by the Committee, working group or rapporteur in closed meetings.
2. All working documents prepared by the Secretariat for the Committee, working group or rapporteur, including summaries of communications prepared prior to registration and the list of summaries of communications, shall be confidential unless the Committee decides otherwise.
3. The Committee, working group or rapporteur shall not make public any communication, submissions or information relating to a communication prior to the date on which its views are issued.
4. The author or authors of a communication or the individuals who are alleged to be the victim or victims of a violation of the rights set forth in the Convention may request that the names and identifying details of the alleged victim or victims (or any of them) not be published.
5. If the Committee, working group or rapporteur so decides, the name or names and identifying details of the author or authors of a communication or the individuals who are alleged to be the victim or victims of a violation of rights set forth in the Convention shall not be made public by the Committee, the author or the State party concerned.
6. The Committee, working group or rapporteur may request the author of a communication or the State party concerned to keep confidential the whole or part of any submission or information relating to the proceedings.
7. Subject to paragraphs 5 and 6 of the present rule, nothing in this rule shall affect the right of the author or authors or the State party concerned to make public any submission or information bearing on the proceedings.
8. Subject to paragraphs 5 and 6 of the present rule, the Committee's decisions on admissibility, merits and discontinuance shall be made public.
9. The Secretariat shall be responsible for the distribution of the Committee's final decisions to the author or authors and the State party concerned.

10. The Committee shall include in its annual report under article 21 of the Convention a summary of the communications examined and, where appropriate, a summary of the explanations and statements of the States parties concerned, and of its own suggestions and recommendations.
11. Unless the Committee decides otherwise, information furnished by the parties in follow-up to the Committee's views and recommendations under paragraphs 4 and 5 of article 7 of the Optional Protocol shall not be confidential. Unless the Committee decides otherwise, decisions of the Committee with regard to follow-up activities shall not be confidential.

**Rule 75**  
**Communiqués**

The Committee may issue communiqués regarding its activities under articles 1 to 7 of the Optional Protocol, through the Secretary-General, for the use of the information media and the general public.

**XVII. Proceedings under the inquiry procedure of the Optional Protocol**

**Rule 76**  
**Applicability**

Rules 77 to 90 of the present rules shall not be applied to a State party that, in accordance with article 10, paragraph 1, of the Optional Protocol, declared at the time of ratification or accession to the Optional Protocol that it does not recognize the competence of the Committee as provided for in article 8 thereof, unless that State party has subsequently withdrawn its declaration in accordance with article 10, paragraph 2, of the Optional Protocol.

**Rule 77**  
**Transmission of information to the Committee**

In accordance with the present rules, the Secretary-General shall bring to the attention of the Committee information that is or appears to be submitted for the Committee's consideration under article 8, paragraph 1, of the Optional Protocol.

**Rule 78**  
**Register of information**

The Secretary-General shall maintain a permanent register of information brought to the attention of the Committee in accordance with rule 77 of the present rules and shall make the information available to any member of the Committee upon request.

**Rule 79**  
**Summary of information**

The Secretary-General, when necessary, shall prepare and circulate to members of the Committee a brief summary of the information submitted in accordance with rule 77 of the present rules.

**Rule 80**  
**Confidentiality**

1. Except in compliance with the obligations of the Committee under article 12 of the Optional Protocol, all documents and proceedings of the Committee relating to the conduct of the inquiry under article 8 of the Optional Protocol shall be confidential.

2. Before including a summary of the activities undertaken under articles 8 or 9 of the Optional Protocol in the annual report prepared in accordance with article 21 of the Convention and article 12 of the Optional Protocol, the Committee may consult with the State party concerned with respect to the summary.

#### **Rule 81**

##### **Meetings related to proceedings under article 8**

Meetings of the Committee during which inquiries under article 8 of the Optional Protocol are considered shall be closed.

#### **Rule 82**

##### **Preliminary consideration of information by the Committee**

1. The Committee may, through the Secretary-General, ascertain the reliability of the information and/or the sources of the information brought to its attention under article 8 of the Optional Protocol and may obtain additional relevant information substantiating the facts of the situation.
2. The Committee shall determine whether the information received contains reliable information indicating grave or systematic violations of rights set forth in the Convention by the State party concerned.
3. The Committee may request a working group to assist it in carrying out its duties under the present rule.

#### **Rule 83**

##### **Examination of information**

1. If the Committee is satisfied that the information received is reliable and indicates grave or systematic violations of rights set forth in the Convention by the State party concerned, the Committee shall invite the State party, through the Secretary-General, to submit observations with regard to that information within fixed time limits.
2. The Committee shall take into account any observations that may have been submitted by the State party concerned, as well as any other relevant information.
3. The Committee may decide to obtain additional information from the following:
  - (a) Representatives of the State party concerned;
  - (b) Governmental organizations;
  - (c) Non-governmental organizations;
  - (d) Individuals.
4. The Committee shall decide the form and manner in which such additional information will be obtained.
5. The Committee may, through the Secretary-General, request any relevant documentation from the United Nations system.

#### **Rule 84**

##### **Establishment of an inquiry**

1. Taking into account any observations that may have been submitted by the State party concerned, as well as other reliable information, the Committee may designate one or more of its members to conduct an inquiry and to make a report within a fixed time limit.

2. An inquiry shall be conducted confidentially and in accordance with any modalities determined by the Committee.
3. Taking into account the Convention, the Optional Protocol and the present rules of procedure, the members designated by the Committee to conduct the inquiry shall determine their own methods of work.
4. During the period of the inquiry, the Committee may defer the consideration of any report that the State party concerned may have submitted pursuant to article 18 of the Convention.

**Rule 85**  
**Cooperation of the State party concerned**

1. The Committee shall seek the cooperation of the State party concerned at all stages of an inquiry.
2. The Committee may request the State party concerned to nominate a representative to meet with the member or members designated by the Committee.
3. The Committee may request the State party concerned to provide the member or members designated by the Committee with any information that they or the State party may consider relates to the inquiry.

**Rule 86**  
**Visits**

1. Where the Committee deems it warranted, the inquiry may include a visit to the territory of the State party concerned.
2. Where the Committee decides, as a part of its inquiry, that there should be a visit to the State party concerned, it shall, through the Secretary-General, request the consent of the State party to such a visit.
3. The Committee shall inform the State party concerned of its wishes regarding the timing of the visit and the facilities required to allow those members designated by the Committee to conduct the inquiry to carry out their task.

**Rule 87**  
**Hearings**

1. With the consent of the State party concerned, visits may include hearings to enable the designated members of the Committee to determine facts or issues relevant to the inquiry.
2. The conditions and guarantees concerning any hearings held in accordance with paragraph 1 of the present rule shall be established by the designated members of the Committee visiting the State party in connection with an inquiry, and the State party concerned.
3. Any person appearing before the designated members of the Committee for the purpose of giving testimony shall make a solemn declaration as to the veracity of her or his testimony and the confidentiality of the procedure.
4. The Committee shall inform the State party that it shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill-treatment or intimidation as a consequence of participating in any hearings in connection with an inquiry or with meeting the designated members of the Committee conducting the inquiry.

### **Rule 88**

#### **Assistance during an inquiry**

1. In addition to the staff and facilities that shall be provided by the Secretary-General in connection with an inquiry, including during a visit to the State party concerned, the designated members of the Committee may, through the Secretary-General, invite interpreters and/or such persons with special competence in the fields covered by the Convention as are deemed necessary by the Committee to provide assistance at all stages of the inquiry.
2. Where such interpreters or other persons of special competence are not bound by the oath of allegiance to the United Nations, they shall be required to declare solemnly that they will perform their duties honestly, faithfully and impartially, and that they will respect the confidentiality of the proceedings.

### **Rule 89**

#### **Transmission of findings, comments or suggestions**

1. After examining the findings of the designated members submitted in accordance within rule 84 of the present rules, the Committee shall transmit the findings, through the Secretary-General, to the State party concerned, together with any comments and recommendations.
2. The State party concerned shall submit its observations on the findings, comments and recommendations to the Committee, through the Secretary-General, within six months of their receipt.

### **Rule 90**

#### **Follow-up action by the State party**

1. The Committee may, through the Secretary-General, invite a State party that has been the subject of an inquiry to include, in its report under article 18 of the Convention, details of any measures taken in response to the Committee's findings, comments and recommendations.
2. The Committee may, after the end of the period of six months referred to in paragraph 2 of rule 89 above, invite the State party concerned, through the Secretary-General, to inform it of any measures taken in response to an inquiry.

### **Rule 91**

#### **Obligations under article 11 of the Optional Protocol**

1. The Committee shall bring to the attention of the States parties concerned their obligation under article 11 of the Optional Protocol to take appropriate steps to ensure that individuals under their jurisdiction are not subjected to ill-treatment or intimidation as a consequence of communicating with the Committee under the Optional Protocol.
2. Where the Committee receives reliable information that a State party has breached its obligations under article 11, it may invite the State party concerned to submit written explanations or statements clarifying the matter and describing any action it is taking to ensure that its obligations under article 11 are fulfilled.

## **PART FOUR**

### **Interpretative rules**

#### **XVIII. Interpretation and amendments**

##### **Rule 92** **Headings**

For the purpose of the interpretation of the present rules, the headings, which were inserted for reference purposes only, shall be disregarded.

##### **Rule 93** **Amendments**

The present rules may be amended by a decision of the Committee taken by a two-thirds majority of the members present and voting, and at least twenty-four (24) hours after the proposal for the amendment has been circulated, provided that the amendment is not inconsistent with the provisions of the Convention.

##### **Rule 94** **Suspension**

Any of the present rules may be suspended by a decision of the Committee taken by a two-thirds majority of the members present and voting, provided such suspension is not inconsistent with the provisions of the Convention and is restricted to the circumstances of the particular situation requiring the suspension.

## **UN 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 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**

### **Preliminary Observations**

1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.
2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.
3. On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.
4.
  - (1) Part I of the rules covers the general management of institutions, and is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge.
  - (2) Part II contains rules applicable only to the special categories dealt with in each section. Nevertheless, the rules under section A, applicable to prisoners under sentence, shall be equally applicable to categories of prisoners dealt with in sections B, C and D, provided they do not conflict with the rules governing those categories and are for their benefit.
5.
  - (1) The rules do not seek to regulate the management of institutions set aside for young persons such as Borstal institutions or correctional schools, but in general part I would be equally applicable in such institutions.

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\* Source: [www.ohchr.org](http://www.ohchr.org)

- (2) The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment.

## **PART I**

### **RULES OF GENERAL APPLICATION**

#### **Basic principle**

6.
  - (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
  - (2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

#### **Register**

7.
  - (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
    - (a) Information concerning his identity;
    - (b) The reasons for his commitment and the authority therefor;
    - (c) The day and hour of his admission and release.
  - (2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.

#### **Separation of categories**

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,
  - (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;
  - (b) Untried prisoners shall be kept separate from convicted prisoners;
  - (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;
  - (d) Young prisoners shall be kept separate from adults.

#### **Accommodation**

9.
  - (1) 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.

- (2) 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.
10. 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.
11. In all places where prisoners are required to live or work,
  - (a) 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;
  - (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
12. 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.
13. 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.
14. All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.

### **Personal hygiene**

15. 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.
16. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.

### **Clothing and bedding**

17.
  - (1) 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.
  - (2) 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.
  - (3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.
18. 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.
19. 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.

### **Food**

20.

- (1) 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.
- (2) Drinking water shall be available to every prisoner whenever he needs it.

### **Exercise and sport**

21.

- (1) 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.
- (2) 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.

### **Medical services**

22.

- (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
- (2) Sick prisoners who require specialist treatment shall be transferred to specialized 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.
- (3) The services of a qualified dental officer shall be available to every prisoner.

23.

- (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
  - (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.
24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25.

- (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
- (2) The medical officer shall report to the director whenever he 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.

26.

- (1) The medical officer shall regularly inspect and advise the director upon:
  - (a) The quantity, quality, preparation and service of food;
  - (b) The hygiene and cleanliness of the institution and the prisoners;
  - (c) The sanitation, heating, lighting and ventilation of the institution;
  - (d) The suitability and cleanliness of the prisoners' clothing and bedding;
  - (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.
- (2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

### **Discipline and punishment**

27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.

28.

- (1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.
- (2) This rule shall not, however, impede the proper functioning of systems based on self-government, under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment.

29. The following shall always be determined by the law or by the regulation of the competent administrative authority:

- (a) Conduct constituting a disciplinary offence;
- (b) The types and duration of punishment which may be inflicted;
- (c) The authority competent to impose such punishment.

30.

- (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.
- (2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.

- (3) Where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.
31. 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.
32.
  - (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.
  - (2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.
  - (3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.

#### **Instruments of restraint**

33. Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
  - (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
  - (b) On medical grounds by direction of the medical officer;
  - (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.
34. The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

#### **Information to and complaints by prisoners**

35.
  - (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.
  - (2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.
36.
  - (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.
  - (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.

- (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.
- (4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

#### **Contact with the outside world**

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.
38.
  - (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.
  - (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.
39. Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.

#### **Books**

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

#### **Religion**

41.
  - (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.
  - (2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.
  - (3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.
42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

#### **Retention of prisoners' property**

43.
  - (1) All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the insti-

tution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition.

- (2) On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him.
- (3) Any money or effects received for a prisoner from outside shall be treated in the same way.
- (4) If a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.

#### **Notification of death, illness, transfer, etc.**

44.

- (1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.
- (2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.
- (3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.

#### **Removal of prisoners**

45.

- (1) When the prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.
- (2) The transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited.
- (3) The transport of prisoners shall be carried out at the expense of the administration and equal conditions shall obtain for all of them.

#### **Institutional personnel**

46.

- (1) The prison administration shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.
- (2) The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and of the public the conviction that this work is a social service of great importance, and to this end all appropriate means of informing the public should be used.
- (3) To secure the foregoing ends, personnel shall be appointed on a full-time basis as professional prison officers and have civil service status with security of tenure subject only to good conduct, efficiency and physical fitness. Salaries shall be adequate to attract and

retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.

47.

- (1) The personnel shall possess an adequate standard of education and intelligence.
- (2) Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests.
- (3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.

48. All members of the personnel shall at all times so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.

49.

- (1) So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors.
- (2) The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers.

50.

- (1) The director of an institution should be adequately qualified for his task by character, administrative ability, suitable training and experience.
- (2) He shall devote his entire time to his official duties and shall not be appointed on a part-time basis.
- (3) He shall reside on the premises of the institution or in its immediate vicinity.
- (4) When two or more institutions are under the authority of one director, he shall visit each of them at frequent intervals. A responsible resident official shall be in charge of each of these institutions.

51.

- (1) The director, his deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.
- (2) Whenever necessary, the services of an interpreter shall be used.

52.

- (1) In institutions which are large enough to require the services of one or more full-time medical officers, at least one of them shall reside on the premises of the institution or in its immediate vicinity.
- (2) In other institutions the medical officer shall visit daily and shall reside near enough to be able to attend without delay in cases of urgency.

53.

- (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

- (2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.
  - (3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.
- 54.
- (1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.
  - (2) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.
  - (3) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

### **Inspection**

55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

## **PART II RULES APPLICABLE TO SPECIAL CATEGORIES**

### **A. Prisoners under sentence**

#### **Guiding principles**

56. The guiding principles hereafter are intended to show the spirit in which penal institutions should be administered and the purposes at which they should aim, in accordance with the declaration made under Preliminary Observation 1 of the present text.
57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.
- 60.
- (1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.
  - (2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.
61. 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. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.
62. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.
- 63.
- (1) The fulfilment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; it is therefore desirable that such groups should be distributed in separate institutions suitable for the treatment of each group.
  - (2) These institutions need not provide the same degree of security for every group. It 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.
  - (3) It is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered. In some countries it is considered that the population of such institutions should not exceed five hundred. In open institutions the population should be as small as possible.
  - (4) On the other hand, it is undesirable to maintain prisons which are so small that proper facilities cannot be provided.
64. The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

### **Treatment**

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead

law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

66.

- (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, 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 social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.
- (2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner.
- (3) The reports and other relevant documents shall be placed in an individual file. This file shall be kept up to date and classified in such a way that it can be consulted by the responsible personnel whenever the need arises.

#### **Classification and individualization**

67. The purposes of classification shall be:

- (a) To separate from others those prisoners who, by reason of their criminal records or bad characters, are likely to exercise a bad influence;
  - (b) To divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.
68. So far as possible separate institutions or separate sections of an institution shall be used for the treatment of the different classes of prisoners.
69. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him in the light of the knowledge obtained about his individual needs, his capacities and dispositions.

#### **Privileges**

70. Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every institution, in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment.

#### **Work**

71.

- (1) Prison labour must not be of an afflictive nature.
- (2) All prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.
- (3) Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.

- (4) So far as possible the work provided shall be such as will maintain or increase the prisoners, ability to earn an honest living after release.
- (5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.
- (6) Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.

72.

- (1) The organization and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.
- (2) The interests of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making a financial profit from an industry in the institution.

73.

- (1) Preferably institutional industries and farms should be operated directly by the administration and not by private contractors.
- (2) Where prisoners are employed in work not controlled by the administration, they shall always be under the supervision of the institution's personnel. Unless the work is for other departments of the government the full normal wages for such work shall be paid to the administration by the persons to whom the labour is supplied, account being taken of the output of the prisoners.

74.

- (1) The precautions laid down to protect the safety and health of free workmen shall be equally observed in institutions.
- (2) Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workmen.

75.

- (1) The maximum daily and weekly working hours of the prisoners shall be fixed by law or by administrative regulation, taking into account local rules or custom in regard to the employment of free workmen.
- (2) The hours so fixed shall leave one rest day a week and sufficient time for education and other activities required as part of the treatment and rehabilitation of the prisoners.

76.

- (1) There shall be a system of equitable remuneration of the work of prisoners.
- (2) Under the system prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.
- (3) The system should also provide that a part of the earnings should be set aside by the administration so as to constitute a savings fund to be handed over to the prisoner on his release.

### **Education and recreation**

77.

- (1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The educa-

tion of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.

- (2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.
78. Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners.

#### **Social relations and after-care**

79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.
80. From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.
81.
  - (1) Services and agencies, governmental or otherwise, which assist released prisoners to re-establish themselves in society shall ensure, so far as is possible and necessary, that released prisoners be provided with appropriate documents and identification papers, have suitable homes and work to go to, are suitably and adequately clothed having regard to the climate and season, and have sufficient means to reach their destination and maintain themselves in the period immediately following their release.
  - (2) The approved representatives of such agencies shall have all necessary access to the institution and to prisoners and shall be taken into consultation as to the future of a prisoner from the beginning of his sentence.
  - (3) It is desirable that the activities of such agencies shall be centralized or co-ordinated as far as possible in order to secure the best use of their efforts.

#### **B. Insane and mentally abnormal prisoners**

82.
  - (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
  - (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.
  - (3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.
  - (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

#### **C. Prisoners under arrest or awaiting trial**

84.
  - (1) Persons arrested or imprisoned by reason of a criminal charge against them, who are

detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, will be referred to as "untried prisoners" hereinafter in these rules.

- (2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.
- (3) Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit by a special regime which is described in the following rules in its essential requirements only.

85.

- (1) Untried prisoners shall be kept separate from convicted prisoners.
- (2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

87. Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.

88.

- (1) An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.
- (2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.

89. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.

90. An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.

91. An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.

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

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

#### **D. Civil prisoners**

94. In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any

greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work.

**E. Persons arrested or detained without charge**

95. Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C. Relevant provisions of part II, section A, shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.

**Basic Principles on the Use of Force and Firearms by Law Enforcement Officials\***

**Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990**

Whereas the work of law enforcement officials<sup>1</sup> is a social service of great importance and there is, therefore, a need to maintain and, whenever necessary, to improve the working conditions and status of these officials,

Whereas a threat to the life and safety of law enforcement officials must be seen as a threat to the stability of society as a whole,

Whereas law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights,

Whereas the Standard Minimum Rules for the Treatment of Prisoners provide for the circumstances in which prison officials may use force in the course of their duties,

Whereas article 3 of the Code of Conduct for Law Enforcement Officials provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,

Whereas the preparatory meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Varenna, Italy, agreed on elements to be considered in the course of further work on restraints on the use of force and firearms by law enforcement officials,

Whereas the Seventh Congress, in its resolution 14, *inter alia*, emphasizes that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights,

Whereas the Economic and Social Council, in its resolution 1986/10, section IX, of 21 May 1986, invited Member States to pay particular attention in the implementation of the Code to the use of force and firearms by law enforcement officials, and the General Assembly, in its resolution 41/149 of 4 December 1986, *inter alia*, welcomed this recommendation made by the Council,

Whereas it is appropriate that, with due regard to their personal safety, consideration be given to the role of law enforcement officials in relation to the administration of justice, to the protection of the right to life, liberty and security of the person, to their responsibility to maintain public safety and social peace and to the importance of their qualifications, training and conduct,

The basic principles set forth below, which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.

**General provisions**

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.
2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow

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\* Source: [www.ohchr.org](http://www.ohchr.org)

for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.
4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
  - ( a ) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
  - ( b ) Minimize damage and injury, and respect and preserve human life;
  - ( c ) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
  - ( d ) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.
7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.
8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

#### **Special provisions**

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.
10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.
11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:
  - ( a ) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;

- ( b ) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- ( c ) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
- ( d ) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- ( e ) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
- ( f ) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

#### **Policing unlawful assemblies**

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.

#### **Policing persons in custody or detention**

15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

#### **Qualifications, training and counselling**

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the

understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

#### **Reporting and review procedures**

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 ( f ). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

<sup>1/</sup> In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

IN THE EUROPEAN COURT OF HUMAN RIGHTS

**Application No. 25424/05**

**Ramzy** Applicant

v.

**The Netherlands** Respondent

**WRITTEN COMMENTS**

**BY**

**AMNESTY INTERNATIONAL LTD., THE ASSOCIATION FOR THE  
PREVENTION OF TORTURE, HUMAN RIGHTS WATCH,  
INTERIGHTS, THE INTERNATIONAL COMMISSION OF JURISTS,  
OPEN SOCIETY JUSTICE INITIATIVE AND REDRESS**

**PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION  
ON HUMAN RIGHTS AND RULE 44 § 2 OF THE RULES OF THE  
EUROPEAN COURT OF HUMAN RIGHTS**

**22 November 2005**

## I. INTRODUCTION

1. These written comments are respectfully submitted on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, INTERIGHTS, the International Commission of Jurists, Open Society Justice Initiative and REDRESS (“the Intervenors”) pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.<sup>1</sup>
2. Brief details of each of the Intervenors are set out in Annex 1 to this letter. Together they have extensive experience of working against the use of torture and other forms of ill-treatment around the world. They have contributed to the elaboration of international legal standards, and intervened in human rights litigation in national and international fora, including before this Court, on the prohibition of torture and ill-treatment. Together the intervenors possess an extensive body of knowledge and experience of relevant international legal standards and jurisprudence and their application in practice.

## II. OVERVIEW

3. This case concerns the deportation to Algeria of a person suspected of involvement in an Islamic extremist group in the Netherlands. He complains that his removal to Algeria by the Dutch authorities will expose him to a “real risk” of torture or ill-treatment in violation of Article 3 of the European Convention on Human Rights (the “Convention”). This case, and the interventions of various governments, raise issues of fundamental importance concerning the effectiveness of the protection against torture and other ill-treatment, including in the context of the fight against terrorism. At a time when torture and ill-treatment – and transfer to states renowned for such practices – are arising with increasing frequency, and the absolute nature of the torture prohibition itself is increasingly subject to question, the Court’s determination in this case is of potentially profound import beyond the case and indeed the region.
4. These comments address the following specific matters: (i) the absolute nature of the prohibition of torture and other forms of ill-treatment under international law; (ii) the prohibition of transfer to States where there is a substantial risk of torture or ill-treatment (“*non-refoulement*”)<sup>2</sup> as an essential aspect of that prohibition; (iii) the absolute nature of the *non-refoulement* prohibition under Article 3, and the approach of other international courts and human rights bodies; (iv) the nature of the risk required to trigger this prohibition; (v) factors relevant to its assessment; and (vi) the standard and burden of proof on the applicant to establish such risk.
5. While these comments take as their starting point the jurisprudence of this Court, the focus is on international and comparative standards, including those enshrined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”), the International Covenant on Civil and Political Rights (“ICCPR”), as well as applicable rules of customary international law, all of which have emphasised the absolute, non-derogable and preemptory nature of the prohibition of tor-

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<sup>1</sup> Letter dated 11 October 2005 from Vincent Berger, Section Registrar to Helen Duffy, Legal Director, INTERIGHTS. The World Organization Against Torture (OMCT) and the Medical Foundation for the Care of the Victims of Torture provided input into and support with this brief.

<sup>2</sup> “Other ill-treatment” refers to inhuman or degrading treatment or punishment under Article 3 of the Convention and to similar or equivalent formulations under other international instruments. “*Non-refoulement*” is used to refer to the specific legal principles concerning the prohibition of transfer from a Contracting State to another State where there is a risk of such ill-treatment, developed under human rights law in relation to Article 3 of the Convention and similar provisions. Although the term was originally borrowed from refugee law, as noted below its scope and significance in that context is distinct. The term “transfer” is used to refer to all forms of removal, expulsion or deportation.

ture and ill-treatment and, through jurisprudence, developed standards to give it meaningful effect. This Court has a long history of invoking other human rights instruments to assist in the proper interpretation of the Convention itself, including most significantly for present purposes, the UNCAT.<sup>3</sup> Conversely, the lead that this Court has taken in the development of human rights standards in respect of *non-refoulement*, notably through the *Chahal v. the United Kingdom* (1996) case, has been followed extensively by other international courts and bodies, and now reflects an accepted international standard.<sup>4</sup>

### III. THE ‘ABSOLUTE’ PROHIBITION OF TORTURE AND ILL-TREATMENT

6. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments.<sup>5</sup> All international instruments that contain the prohibition of torture and ill-treatment recognise its absolute, non-derogable character.<sup>6</sup> This non-derogability has consistently been reiterated by human rights courts, monitoring bodies and international criminal tribunals, including this Court, the UN Human Rights Committee (“HRC”), the UN Committee against Torture (“CAT”), the Inter-American Commission and Court, and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>7</sup>
7. The prohibition of torture and other forms of ill-treatment does not therefore yield to the threat posed by terrorism. This Court, the HRC, the CAT, the Special Rapporteur on Torture, the UN Security Council and General Assembly, and the Committee of Ministers of the Council of Europe, among others, have all recognised the undoubted difficulties States face in countering terrorism, yet made clear that all anti-terrorism measures must be implemented in accordance with international human rights and humanitarian law, including the prohibition of torture and other ill-treatment.<sup>8</sup> A recent United Nations World Summit Outcome Document (adopted with the consensus of all States) in para. 85 reiterated the point.

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<sup>3</sup> *Aydin v. Turkey* (1997); *Soering v. the United Kingdom* (1989); *Selmouni v. France* (1999); and *Mahmut Kaya v. Turkey* (2000). For full reference to these and other authorities cited in the brief see Annex 2 Table of Authorities.

<sup>4</sup> See e.g. CAT Communication *T.P.S. v. Canada* (2000); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* (2000); UN Special Rapporteur on Torture, *Reports to General Assembly* (2005, §§ 38-39; 2004, § 28; and 2002, § 32).

<sup>5</sup> Universal Declaration of Human Rights (Article 5); ICCPR (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples’ Rights (Article 5); Arab Charter on Human Rights (Article 13); UNCAT and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The prohibition against torture is also reflected throughout international humanitarian law, in e.g. the Regulations annexed to the Hague Convention IV of 1907, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

<sup>6</sup> The prohibition of torture and ill-treatment is specifically excluded from derogation provisions: see Article 4(2) of the ICCPR; Articles 2(2) and 15 of the UNCAT; Article 27(2) of the American Convention on Human Rights; Article 4(c) Arab Charter of Human Rights; Article 5 of the Inter-American Convention to Prevent and Punish Torture; Articles 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>7</sup> See HRC General Comment No. 29 (2001); CAT’s Concluding observations on the Reports of: the Russian Federation (2001, § 90), Egypt (2002, § 40), and Spain (2002, § 59); Inter-American cases, e.g. *Castillo-Petrucci et al. v. Peru* (1999, § 197); *Cantoral Benavides v. Peru* (2000, § 96); *Maritza Urrutia v. Guatemala*, (2003, § 89); this Court’s cases, e.g. *Tomasi v. France*, (1992); *Aksoy v. Turkey*, (1996); and *Chahal v. the United Kingdom*, (1996); ICTY cases, e.g. *Prosecutor v. Furundzija* (1998).

<sup>8</sup> This Court, see e.g. *Klass and Others v. Germany* (1978); *Leander v. Sweden* (1987) and *Rotaru v. Romania* (2000); HRC, General Comment No. 29 (2001, § 7), and Concluding observations on Egypt’s Report, (2002, § 4); CAT Concluding observations on Israel’s Report (1997, §§ 2-3 and 24); Report to the General Assembly (2004, § 17) and *Statement in connection with the events of 11 September 2001* (2001, § 17); General Assembly Resolutions 57/27(2002), 57/219 (2002) and 59/191 (2004); Security Council Resolution 1456 (2003, Annex, § 6); Council of Europe Guidelines on Human Rights and the Fight Against Terrorism (2002); Special Rapporteur on Torture, *Statement to the Third Committee of the GA* (2001). Other bodies pronouncing on the issue include, for example, Human Rights Chamber for Bosnia and Herzegovina (see e.g. *Boudellaa and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 2003, §§ 264 to 267).

8. The absolute nature of the prohibition of torture under treaty law is reinforced by its higher, *jus cogens* status under customary international law. *Jus cogens* status connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, “intransgressible.”<sup>9</sup> There is ample international authority recognising the prohibition of torture as having *jus cogens* status.<sup>10</sup> The prohibition of torture also imposes obligations *erga omnes*, and every State has a legal interest in the performance of such obligations which are owed to the international community as a whole.<sup>11</sup>
9. The principal consequence of its higher rank as a *jus cogens* norm is that the principle or rule cannot be derogated from by States through any laws or agreements not endowed with the same normative force.<sup>12</sup> Thus, no treaty can be made nor law enacted that conflicts with a *jus cogens* norm, and no practice or act committed in contravention of a *jus cogens* norm may be “legitimated by means of consent, acquiescence or recognition”; any norm conflicting with such a provision is therefore void.<sup>13</sup> It follows that no interpretation of treaty obligations that is inconsistent with the absolute prohibition of torture is valid in international law.
10. The fact that the prohibition of torture is *jus cogens* and gives rise to obligations *erga omnes* also has important consequences under basic principles of State responsibility, which provide for the interest and in certain circumstances the obligation of all States to prevent torture and other forms of ill-treatment, to bring it to an end, and not to endorse, adopt or recognise acts that breach the prohibition.<sup>14</sup> Any interpretation of the Convention must be consistent with these obligations under broader international law.

#### IV. THE PRINCIPLE OF *NON-REFOULEMENT*

11. The expulsion (or ‘*refoulement*’) of an individual where there is a real risk of torture or other ill-treatment is prohibited under both international conventional and customary law. A number of States, human rights experts and legal commentators have specifically noted the customary nature of *non-refoulement*<sup>15</sup> and asserted that the prohibition against *non-refoulement* under customary international law shares its *jus cogens* and *erga omnes* character. As the prohibition of all forms of ill-treatment (torture, inhuman or degrading treatment or punishment) is absolute, peremptory and non-derogable, the principle of *non-refoulement* applies without distinction.<sup>16</sup> Indicative of the expansive approach to the

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<sup>9</sup> Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, (2004, § 157). See also Article 5,3 Vienna Convention on the Law of Treaties (1969) which introduces and defines the concept of “peremptory norm.”

<sup>10</sup> See e.g. the first report of the Special Rapporteur on Torture to the UNHCR (1997, § 3); ICTY judgments *Prosecutor v. Delalic and others* (1998), *Prosecutor v. Kunarac* (2001, § 466), and *Prosecutor v. Furundzija* (1998); and comments of this Court in *Al-Adsani v. the United Kingdom* (2001).

<sup>11</sup> See ICJ Reports: *Barcelona Traction, Light and Power Company, Limited, Second Phase* (1970, § 33); *Case Concerning East Timor* (1995, § 29); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1996, § 31). See also Articles 40-41 of the International Law Commission’s Draft Articles on State Responsibility (“ILC Draft Articles”) and the commentary to the Draft Articles. See ICTY case *Prosecutor v. Furundzija*, (1998, § 151); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2000, § 155); and HRC General Comment 31(2004, § 2).

<sup>12</sup> See Article 53 of the Vienna Convention on the Law of Treaties 1969; also ICTY *Furundzija* (1998, §§ 153-54).

<sup>13</sup> Jennings and Watts, *Oppenheim’s International Law* (Vol. 1, Ninth ed.) 8 (1996). See also Article 53, Vienna Convention.

<sup>14</sup> See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes*); see also Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, (2004, § 159). In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see Comment 31 (2004, § 2).

<sup>15</sup> See E. Lauterpacht and D. Bethlehem (2001, §§ 196-216).

<sup>16</sup> See e.g. HRC General Comment No. 20 (1992, § 9).

- protection, both CAT and HRC are of the opinion that *non-refoulement* prohibits return to countries where the individual would not be directly at risk but from where he or she is in danger of being expelled to another country or territory where there would be such a risk.<sup>17</sup>
12. The prohibition of *refoulement* is explicit in conventions dedicated specifically to torture and ill-treatment. Article 3 of UNCAT prohibits States from deporting an individual to a State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 13(4) of the Inter-American Convention to Prevent and Punish Torture provides, more broadly, that deportation is prohibited on the basis that the individual “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.”
  13. The principle of *non-refoulement* is also explicitly included in a number of other international instruments focusing on human rights, including the EU Charter of Fundamental Rights and Inter-American Convention on Human Rights (“I-ACHR”).<sup>18</sup> In addition, it is reflected in other international instruments addressing international cooperation, including extradition treaties, and specific forms of terrorism.<sup>19</sup> Although somewhat different in its scope and characteristics, the principle is also reflected in refugee law.<sup>20</sup>
  14. This principle is also implicit in the prohibition of torture and other ill-treatment in general human rights conventions, as made clear by consistent authoritative interpretations of these provisions. In *Soering* and in subsequent cases, this Court identified *non-refoulement* as an ‘inherent obligation’ under Article 3 of the Convention in cases where there is a “real risk of exposure to inhuman or degrading treatment or punishment.” Other bodies have followed suit, with the HRC, in its general comments and individual communications, interpreting Article 7 of the ICCPR as implicitly prohibiting *refoulement*.<sup>21</sup> The African Commission on Human Rights and the Inter-American Commission on Human Rights have also recognised that deportation can, in certain circumstances, constitute such ill-treatment.<sup>22</sup>
  15. The jurisprudence therefore makes clear that the prohibition on *refoulement*, whether explicit or implicit, is an inherent and indivisible part of the prohibition on torture or other ill-treatment. It constitutes an essential way of giving effect to the Article 3 prohibition, which not only imposes on states the duty not to torture themselves, but also requires them to “prevent such acts by not bringing persons under the control of other States if there are

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<sup>17</sup> CAT General Comment No. 1(1996, § 2); *Avedes Hamayak Korban v. Sweden* (1997); and HRC General Comment 31(2004).

<sup>18</sup> Article 19 EU Charter of Fundamental Rights; Article 22(8) I-ACHR; Article 3(1) Declaration on Territorial Asylum, Article 8 Declaration on the Protection of All Persons from Enforced Disappearances, Principle 5 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, and Council of Europe Guidelines.

<sup>19</sup> Article 9 International Convention against the Taking of Hostages, Article 3 European Convention on Extradition, Article 5 European Convention on the Suppression of Terrorism, and Article 4(5) Inter-American Convention on Extradition contain a general clause on *non-refoulement*. See also Article 3 Model Treaty on Extraditions.

<sup>20</sup> The principle of *non-refoulement* applicable to torture and other ill-treatment under human rights law is complementary to the broader rule of *non-refoulement* applicable where there is a well founded fear of ‘persecution’ under refugee law, which excludes those who pose a danger to the security of the host State. However, there are no exceptions to *non-refoulement*, whether of a refugee or any other person, when freedom from torture and other ill-treatment is at stake. See Articles 32 and 33 of the Convention Relating to the Status of Refugees, 1951, *Chahal* case (1996, § 80), the New Zealand case of *Zaoui v. Attorney General* (2005); and Lauterpacht and Bethlehem (2001, §§ 244 and 250).

<sup>21</sup> See HRC General Comments No. 20 (1990, at § 9), and No. 31 (2004, §12). For individual communications, see e.g. *Chitat Ng v. Canada*, (1994, § 14.1); *Cox v. Canada* (1994); *G.T. v. Australia* (1997).

<sup>22</sup> See African Commission on Human Rights, *Modise v. Botswana*, and I-A Comm. HR *Report on Terrorism and Human Rights* (2004).

substantial grounds for believing that they would be in danger of being subjected to torture.”<sup>23</sup> This is consistent with the approach to fundamental rights adopted by this Court, and increasingly by other bodies, regarding the positive duties incumbent on the state.<sup>24</sup> Any other interpretation, enabling states to circumvent their obligations on the basis that they themselves did not carry out the ill-treatment would, as this Court noted when it first considered the matter, ‘plainly be contrary to the spirit and intention of [Article 3].’<sup>25</sup>

### **The Absolute Nature of the Prohibition on *Refoulement***

16. The foregoing demonstrates that the prohibition on *refoulement* is inherent in the prohibition of torture and other forms of ill-treatment. UN resolutions, declarations, international conventions, interpretative statements by treaty monitoring bodies, statements of the UN Special Rapporteur on Torture and judgments of international tribunals, including this Court, as described herein, have consistently supported this interpretation. It follows from its nature as inherent to it, that the *non-refoulement* prohibition enjoys the same status and essential characteristics as the prohibition on torture and ill-treatment itself, and that it may not be subject to any limitations or exceptions.
17. The jurisprudence of international bodies has, moreover, explicitly given voice to the absolute nature of the principle of *non-refoulement*. In its case law, this Court has firmly established and re-affirmed the absolute nature of the prohibition of *non-refoulement* under Article 3 of the Convention.<sup>26</sup> In paragraph 80 of the *Chahal* case, this Court made clear that the obligations of the State under Article 3 are “equally absolute in expulsion cases” once the ‘real risk’ of torture or ill-treatment is shown. The CAT has followed suit in confirming the absolute nature of the prohibition of *refoulement* under Article 3 in the context of particular cases.<sup>27</sup> Likewise, other regional bodies have also interpreted the prohibition on torture and ill-treatment as including an absolute prohibition of *refoulement*.<sup>28</sup>

### *Application of the non-refoulement principle to all persons*

18. It is a fundamental principle that *non-refoulement*, like the protection from torture or ill-treatment itself, applies to *all persons* without distinction. No characteristics or conduct, criminal activity or terrorist offence, alleged or proven, can affect the right not to be subject to torture and ill-treatment, including through *refoulement*. In the recent case of *N. v. Finland* (2005), this Court reiterated earlier findings that “[a]s the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, *the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration* (emphasis added).” The same principle is reiterated in other decisions of this Court and of other bodies.<sup>29</sup>

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<sup>23</sup> Report of the Special Rapporteur to the Third Committee of the GA (2001, § 28).

<sup>24</sup> See Special Rapporteur on Torture Report (1986, § 6) and Report (2004, § 27); HRC General Comments No. 7 (1982) and No. 20 (1992); Articles 40-42 and 48 of the ILC Draft Articles; ICTY *Furundzija* judgment (1998, § 148).

<sup>25</sup> *Soering v. UK* (1989, § 88).

<sup>26</sup> *Soering v. UK* (1989, § 88); *Ahmed v. Austria* (1996 § 41); *Chahal v. UK* (1996).

<sup>27</sup> See *CAT Tapia Paez v. Sweden*, (1997, at § 9.8) and *Pauline Muzonzo Paku Kisoki v. Sweden* (1996).

<sup>28</sup> See *Modise* case and *Report on Terrorism and Human Rights*.

<sup>29</sup> See *inter alia Ahmed v. Austria* (1996); and *CAT Tapia Paez v. Sweden* (1997, § 14.5); *M. B. B. v. Sweden* (1998, § 6.4).

*Application of the non-refoulement principle in the face of terrorism or national security threat*

19. The jurisprudence of other regional and international bodies, like that of this Court, rejects definitively the notion that threats to national security, or the challenge posed by international or domestic terrorism, affect the absolute nature of the prohibition on *non-refoulement*. In *Chahal*, this Court was emphatic that no derogation is permissible from the prohibition of torture and other forms of ill-treatment and the obligations arising from it (such as *non-refoulement*) in the context of terrorism. This line of reasoning has been followed in many other cases of this Court and other bodies including the recent case of *Agiza v. Sweden* in which CAT stated that “the Convention’s protections are absolute, even in the context of national security concerns.”<sup>30</sup>
20. Thus no exceptional circumstances, however grave or compelling, can justify the introduction of a “balancing test” when fundamental norms such as the prohibition on *non-refoulement* in case of torture or ill-treatment are at stake. This is evident from the concluding observations of both HRC and CAT on State reports under the ICCPR and UNCAT, respectively.<sup>31</sup> On the relatively few occasions when states have introduced a degree of balancing in domestic systems, they have been heavily criticised in concluding observations of CAT,<sup>32</sup> or the HRC.<sup>33</sup> This practice follows, and underscores, this Court’s own position in the *Chahal* case where it refused the United Kingdom’s request to perform a balancing test that would weigh the risk presented by permitting the individual to remain in the State against the risk to the individual of deportation.

***Non-Refoulement as Jus Cogens***

21. It follows also from the fact that the prohibition of *refoulement* is inherent in the prohibition of torture and other forms of ill-treatment, and necessary to give effect to it, that it enjoys the same customary law, and *jus cogens* status as the general prohibition. States and human rights legal experts have also specifically asserted that the prohibition against *non-refoulement* constitutes customary international law, and enjoys *jus cogens* status.<sup>34</sup> As noted, one consequence of *jus cogens* status is that no treaty obligation, or interpretation thereof, inconsistent with the absolute prohibition of *refoulement*, has validity under international law.
22. Certain consequences also flow from the *jus cogens* nature of the prohibition of torture itself (irrespective of the status of the *non-refoulement* principle), and the *erga omnes* obligations related thereto. The principle of *non-refoulement* is integral - and necessary to give effect - to the prohibition of torture. To deport an individual in circumstances where

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<sup>30</sup> See CAT *Agiza v. Sweden* (2005, § 13.8); *Amei v. Switzerland* (1997, § 9.8); *M.B.B. v. Sweden*, §6.4; *Arana v. France*, (2000, § 11.5).

<sup>31</sup> E.g. CAT’s Concluding Observations on Germany (2004), commending the reaffirmation of the absolute ban on exposure to torture, including through *refoulement*, even where there is a security risk.

<sup>32</sup> See CAT’s Concluding Observations on Sweden’s Report (2002, §14); and on Canada’s Report (2005, § 4(a)).

<sup>33</sup> See also HRC Concluding Observations on Canada’s Report (1999, §13) condemning the Canadian *Suresh* case, which upheld a degree of balancing under Article 3, based on national law, and *Mansour Ahani v. Canada*, (2002, § 10.10) where HRC also clearly rejected Canada’s balancing test in the context of deportation proceedings.

<sup>34</sup> See Lauterpacht and Bethlehem (2001, § 195); Bruin and Wouters (2003, § 4.6); Allain (2002); Report of Special Rapporteur on Torture to the GA (2004); IACHR Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (2000, § 154). There has also been considerable support among Latin American States for the broader prohibition of *non-refoulement* in refugee law as “imperative in regard to refugees and in the present state of international law [thus it] should be acknowledged and observed as a rule of *jus cogens*” (Cartagena Declaration of Refugees of 1984, Section III, § 5).

there is a real risk of torture is manifestly at odds with the positive obligations not to aid, assist or recognise such acts and the duty to act to ensure that they cease.<sup>35</sup>

## V. THE OPERATION OF THE RULE

### The General Test

23. When considering the obligations of States under Article 3 in transfer cases, this Court seeks to establish whether “*substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.*”<sup>36</sup> This test is very similar to those established by other bodies. Article 3 (1) of the UNCAT requires that the person not be transferred to a country where there are “*substantial grounds for believing that he would be in danger of being subjected to torture.*” The HRC has similarly affirmed that the obligation arises “*where there are substantial grounds for believing that there is a real risk of irreparable harm.*”<sup>37</sup> The Inter-American Commission for Human Rights has likewise referred to “*substantial grounds of a real risk of inhuman treatment.*”<sup>38</sup>
24. The legal questions relevant to the Court’s determination in transfer cases, assuming that the potential ill-treatment falls within the ambit of Article 3, are: first, the nature and degree of the risk that triggers the *non-refoulement* prohibition; second, the relevant considerations that constitute ‘substantial grounds’ for believing that the person faces such a risk; third, the standard by which the existence of these ‘substantial grounds’ is to be evaluated and proved. The comments below address these questions in turn.
25. A guiding principle in the analysis of each of these questions, apparent from the work of this Court and other bodies, is the need to ensure the effective operation of the *non-refoulement* rule. This implies interpreting the rule consistently with the human rights objective of the Convention; the positive obligations on States to prevent serious violations and the responsibility of the Court to guard against it; the absolute nature of the prohibition of torture and ill-treatment and the grave consequences of such a breach transpiring; and the practical reality in which the *non-refoulement* principle operates. As this Court has noted: “The object and purpose of the Convention as an instrument for the protection of individual human beings require that *its provisions be interpreted and applied so as to make its safeguards practical and effective.*”<sup>39</sup>

### Nature and Degree of the Risk

26. This Court, like the CAT, has required that the risk be “real”, “foreseeable”, and “personal”.<sup>40</sup> There is no precise definition in the Convention case law of what constitutes a “real” risk, although the Court has established that “mere possibility of ill-treatment is not enough”,<sup>41</sup> just as certainty that the ill-treatment will occur is not required.<sup>42</sup> For more pre-

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<sup>35</sup> ILC Draft Articles, Article 16.

<sup>36</sup> *N v. Finland* (2005).

<sup>37</sup> HRC General Comment 31 (2004).

<sup>38</sup> *Report on Terrorism and Human Rights* (2002), *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, (2000, § 154).

<sup>39</sup> *Soering v. the United Kingdom*, (1989, § 87), emphasis added.

<sup>40</sup> CAT General Comment 1 (1997); *Soering v. the United Kingdom* (1989, § 86); *Shamayev and 12 others v. Russia* (2005).

<sup>41</sup> See *Vilvarajah*, (1991, § 111).

<sup>42</sup> *Soering*, (1989, § 94).

cision as to the standard, reference can usefully be made to the jurisprudence of other international and regional bodies which also apply the ‘real and foreseeable’ test. Notably, the CAT has held that the risk “must be assessed on grounds that go beyond mere theory or suspicion”, but this does not mean that the risk has to be “highly probable”.<sup>43</sup>

27. The risk must also be “personal”. However, as noted in the following section, personal risk may be deduced from various factors, notably the treatment of similarly situated persons.

### **Factors Relevant to the Assessment of Risk**

28. This Court and other international human rights courts and bodies have repeatedly emphasised that the level of scrutiny to be given to a claim for *non-refoulement* must be “rigorous” in view of the absolute nature of the right this principle protects.<sup>44</sup> In doing so, the State must take into account “all the relevant considerations” for the substantiation of the risk.<sup>45</sup> This includes both the human rights situation in the country of return and the personal background and the circumstances of the individual.

#### *General Situation in the Country of Return*

29. The human rights situation in the state of return is a weighty factor in virtually all cases.<sup>46</sup> While this Court, like CAT,<sup>47</sup> has held that the situation in the state is not sufficient *per se* to prove risk, regard must be had to the extent of human rights repression in the State in assessing the extent to which personal circumstances must also be demonstrated.<sup>48</sup> Where the situation is particularly grave and ill-treatment widespread or generalised, the general risk of torture or ill-treatment may be high enough that little is required to demonstrate the personal risk to an individual returning to that State. The significant weight of this factor is underlined in Article 3(2) of UNCAT: “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.”

#### *Personal Background or Circumstances*

30. The critical assessment in *non-refoulement* cases usually turns on whether the applicant has demonstrated “specific circumstances” which make him or her personally vulnerable to torture or ill-treatment. These specific circumstances may be indicated by previous ill-treatment or evidence of current persecution (e.g. that the person is being pursued by the authorities), but neither is necessary to substantiate that the individual is ‘personally’ at risk.<sup>49</sup> A person may be found at risk by virtue of a characteristic that makes him or her particularly vulnerable to torture or other ill-treatment. The requisite ‘personal’ risk does

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<sup>43</sup> See e.g. *CAT X.Y.Z. v. Sweden* (1998); *A.L.N. v. Switzerland* (1998); *K.N. v. Switzerland*; and *A.R. v. The Netherlands* (2003).

<sup>44</sup> *Chahal v. the United Kingdom*, 91996, § 79); *Jabari v. Turkey* (2000, § 39).

<sup>45</sup> UNCAT Article 33 (2).

<sup>46</sup> As held by CAT, the absence of a pattern of human rights violations “does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.” See e.g. *Seid Mortesa Aemei v. Switzerland* (1997).

<sup>47</sup> CAT has explained that although a pattern of systematic abuses in the State concerned is highly relevant, it “does not as such constitute sufficient ground” for a situation to fall under Article 3 because the risk must be ‘personal’.

<sup>48</sup> *Vilvarajah* (1991, § 108).

<sup>49</sup> See eg. *Shamayev and 12 otehrs v. Russia* (2005, § 352); *Said v. the Netherlands* (2005, § 48-49).

not necessarily require information specifically about that person therefore, as opposed to information about the fate of persons in similar situations.

*Perceived Association with a Vulnerable Group as a Strong Indication of the Existence of Risk*

31. It is clearly established in the jurisprudence of the CAT that, in assessing the “specific circumstances” that render the individual personally at risk, particular attention will be paid to any evidence that the applicant belongs, or is *perceived* to belong,<sup>50</sup> to an identifiable group which has been targeted for torture or ill-treatment. It has held that regard must be had to the applicant’s political or social affiliations or activities, whether inside *or outside* the State of return, which may lead that State to identify the applicant with the targeted group.<sup>51</sup>
32. Organisational affiliation is a particularly important factor in cases where the individual belongs to a group which the State in question has designated as a “terrorist” or “separatist” group that threatens the security of the State, and which for this reason is targeted for particularly harsh forms of repression. In such cases, the CAT has found that the applicant’s claim comes within the purview of Article 3 even in the absence of other factors such as evidence that the applicant was ill-treated in the past,<sup>52</sup> and even when the general human rights situation in the country may have improved.<sup>53</sup>
33. In this connection, it is also unnecessary for the individual to show that he or she is, or ever was, personally sought by the authorities of the State of return. Instead, the CAT’s determination has focused on the assessment of a) how the State in question treats members of these groups, and b) whether sufficient evidence was provided that the State would believe the particular individual to be associated with the targeted group. Thus in cases involving suspected members of ETA, *Sendero Luminoso*, PKK, KAWA, the People’s Mujahadeen Organization and the Zapatista Movement, the CAT has found violations of Article 3 on account of a pattern of human rights violations against members of these organisations, where it was sufficiently established that the States concerned were likely to identify the individuals with the relevant organisations.<sup>54</sup>
34. In respect of proving this link between the individual and the targeted group, the CAT has found that the nature and profile of the individual’s activities in his country of origin *or abroad*<sup>55</sup> is relevant. In this respect, human rights bodies have indicated that a particularly important factor to be considered is the extent of publicity surrounding the individual’s case, which may have had the effect of drawing the negative attention of the State party to the individual. The importance of this factor has been recognized both by this Court and the CAT.<sup>56</sup>

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<sup>50</sup> It is not necessary that the individual *actually* is a member of the targeted group, if believed so to be and targeted for that reason. See CAT *A. v. The Netherlands* (1998).

<sup>51</sup> See CAT General Comment 1 (1997), § 8 (e)).

<sup>52</sup> *Gorki Ernesto Tapia Paez v. Sweden* (1997).

<sup>53</sup> See *Josu Arkauz Arana v. France* (2000), finding that gross, flagrant or mass violations were unnecessary in such circumstances.

<sup>54</sup> See *inter alia* CAT, *Cecilia Chipana v. Venezuela* (1998); *Ahmed Hussein Mustafa Kamil Agiza v. Sweden* (2005); *Kaveh Yaragh Tala v. Sweden* (1998); *Seid Mortesa Aemei v. Switzerland* (1996).

<sup>55</sup> See e.g. *Seid Mortesa Aemei v. Switzerland* (1997); *M.K.O. v. The Netherlands* (2001).

<sup>56</sup> *N v. Finland* (2005, § 165); *Venkadajalasarma v. the Netherlands* (2004); *Said v. the Netherlands* (2005, § 54); *Thampibillai v. the Netherlands* (2004, § 63). See also CAT *Sadiq Shek Elmi v. Australia* (1999, § 6.8).

### Standard and Burden of Proving the Risk

35. While the Court has not explicitly addressed the issue of standard and burden of proof in transfer cases, it has held that in view of the fundamental character of the prohibition under Article 3, the examination of risk “must necessarily be a thorough one”.<sup>57</sup> It has also imposed on States a positive obligation to conduct a ‘meaningful assessment’ of any claim of a risk of torture and other ill-treatment.<sup>58</sup> This approach is supported by CAT,<sup>59</sup> and reflects a general recognition by this and other tribunals that, because of the specific nature of torture and other ill-treatment, the burden of proof cannot rest alone with the person alleging it, particularly in the view of the fact that the person and the State do not always have equal access to the evidence.<sup>60</sup> Rather, in order to give meaningful effect to the Convention rights under Article 3 in transfer cases, the difficulties in obtaining evidence of a risk of torture or ill-treatment in another State - exacerbated by the inherently clandestine nature of such activity and the individual’s remoteness from the State concerned - should be reflected in setting a reasonable and appropriate standard and burden of proof and ensuring flexibility in its implementation.
36. The particular difficulties facing an individual seeking to substantiate an alleged risk of ill-treatment have been recognized by international tribunals, including this Court. These are reflected, for example, in the approach to the extent of the evidence which the individual has to adduce. The major difficulties individuals face in accessing materials in the context of transfer is reflected in the Court’s acknowledgment that substantiation only “to the greatest extent practically possible” can reasonably be required.<sup>61</sup> Moreover, CAT’s views have consistently emphasised that, given what is at stake for the individual, lingering doubts as to credibility or proof should be resolved in the individual’s favour: “even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, [the Committee] *must ensure that his security is not endangered*.”<sup>62</sup> In order to do this, it is not necessary that all the facts invoked by the author should be proved.”<sup>63</sup>
37. An onus undoubtedly rests on individuals to raise, and to seek to substantiate, their claims. It is sufficient however for the individual to substantiate an ‘arguable’ or ‘*prima facie*’ case of the risk of torture or other ill-treatment for the *refoulement* prohibition to be triggered. It is then for the State to dispel the fear that torture or ill-treatment would ensue if the person is transferred. This approach is supported by a number of international tribunals addressing questions of proof in transfer cases. For example, the CAT suggests that it is sufficient for the individual to present an ‘*arguable case*’ or to make a ‘*plausible allegation*’; then it is for the State to prove the lack of danger in case of return.<sup>64</sup> Similarly,

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<sup>57</sup> *Said v. the Netherlands* (2005, § 49), *N. v Finland* (2005); *Jabari v. Turkey* (2000, § 39).

<sup>58</sup> See *Jabari v. Turkey* (2000).

<sup>59</sup> E.g. CAT General Comment 1 (1997, § 9(b)).

<sup>60</sup> See e.g. HRC, *Albert Womah Mukong v. Cameroon* (1994); I-ACHR, *Velasquez Rodriguez v. Honduras* (1988, § 134 *et seq.*).

<sup>61</sup> E.g. *Said v. the Netherlands* (2005, § 49); *Bahaddar v. the Netherlands*, (1998, § 45).

<sup>62</sup> Emphasis added.

<sup>63</sup> *Seid Mortesa Aemei v. Switzerland* (1997).

<sup>64</sup> CAT General Comment 1 (1997, § 5): “*The burden of proving a danger of torture is upon the person alleging such danger to present an ‘arguable case’.* This means that there must be a factual basis for the author’s position sufficient to require a response from the State party.” In *Agiza v. Sweden* (2005, § 13.7) the burden was found to be on the State to conduct an “*effective, independent and impartial review*” once a ‘*plausible allegation*’ is made. Similarly, in *A.S. v. Sweden* (2000, § 8.6) it was held that if sufficient facts are adduced by the author, the burden shifts to the State “*to make sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture.*”

the HRC has held that the burden is on the individual to establish a ‘*prima facie*’ case of real risk, and then the State must refute the claim with ‘substantive grounds’.<sup>65</sup> Most recently, the UN Sub-Commission for the Promotion of Human Rights considered that once a general risk situation is established, there is a ‘presumption’ the person would face a real risk.<sup>66</sup>

38. Requiring the sending State to rebut an arguable case is consistent not only with the frequent reality attending individuals’ access to evidence, but also with the duties on the State to make a meaningful assessment and satisfy itself that any transfer would not expose the individual to a risk of the type of ill-treatment that the State has positive obligation to protect against.

### **An Existing Risk Cannot be Displaced by “Diplomatic Assurances”**

39. States may seek to rely on “diplomatic assurances” or “memoranda of understanding” as a mechanism to transfer individuals to countries where they are at risk of torture and other ill-treatment. In practice, the very fact that the sending State seeks such assurances amounts to an admission that the person would be at risk of torture or ill-treatment in the receiving State if returned. As acknowledged by this Court in *Chahal*, and by CAT in *Agiza*, assurances do not suffice to offset an existing risk of torture.<sup>67</sup> This view is shared by a growing number of international human rights bodies and experts, including the UN Special Rapporteur on Torture,<sup>68</sup> the Committee for Prevention of Torture,<sup>69</sup> the UN Sub-Commission,<sup>70</sup> the Council of Europe Commissioner on Human Rights,<sup>71</sup> and the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>72</sup> Most recently, the UN General Assembly, by consensus of all States, has affirmed “that diplomatic assurances, where used, do not release States from their obligations, under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*.”<sup>73</sup> Reliance on such assurances as sufficient to displace the risk of torture creates a dangerous loophole in the *non-refoulement* obligation, and ultimately erodes the prohibition of torture and other ill-treatment.
40. Moreover, assurances cannot legitimately be relied upon as a factor in the assessment of relevant risk. This is underscored by widespread and growing concerns about assurances as not only lacking legal effect but also as being, in practice, simply unreliable, with post-return monitoring mechanisms incapable of ensuring otherwise.<sup>74</sup> While effective system-wide monitoring is vital for the long-term prevention and eradication of torture and other ill-treatment, individual monitoring cannot ameliorate the risk to a particular detainee.

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<sup>65</sup> See HRC, *Jonny Rubin Byahuranga v Denmark*, (2004, §§ 11.2-3).

<sup>66</sup> UN Sub-Commission for the Promotion and Protection of Human Rights, Resolution 2005/12 on Transfer of Persons, (2005, § 4); see similarly, European Commission for Human Rights in the *Cruz Varas* case (1991).

<sup>67</sup> *Chahal v. the UK* (1996, § 105); *Agiza v. Sweden* (2005, § 13.4).

<sup>68</sup> See Report of Special Rapporteur on Torture to the General Assembly, (2004, § 40).

<sup>69</sup> See CPT 15<sup>th</sup> General Report, (2004-2005, §§ 39-40).

<sup>70</sup> See above note 70, at § 4.

<sup>71</sup> Report by Council of Europe Commissioner for Human Rights (2005, §§ 12-3).

<sup>72</sup> Report of the UN Independent Expert (2005, §§ 19-20).

<sup>73</sup> See UN Declaration (2005, § 8).

<sup>74</sup> Courts in Canada (*Mahjoub*), the Netherlands (*Kaplan*), and the United Kingdom (*Zakaev*) have blocked transfers because of the risk of torture despite the presence of diplomatic assurances. There is credible evidence that persons sent from Sweden to Egypt (*Agiza & Al-Zari*) and from the United States to Syria (*Arar*) have been subject to torture and ill-treatment despite assurances: for more information on practice, see Human Rights Watch, ‘Still at Risk’ (2005); Human Rights Watch, ‘Empty Promises’ (2004).

41. The critical question to be ascertained by the Court, by reference to all circumstances and the practical reality on the ground, remains whether there is a risk of torture or ill-treatment in accordance with the standards and principles set down above. If so, transfer is unlawful. No ‘compensating measures’ can affect the peremptory *jus cogens* nature of the prohibition against torture, and the obligations to prevent its occurrence, which are plainly unaffected by bilateral agreements.

## VI. CONCLUSION

42. The principle of *non-refoulement*, firmly established in international law and practice, is absolute. No exceptional circumstances concerning the individual potentially affected or the national security of the State in question can justify qualifying or compromising this principle. Given the inherent link between the two, and the positive nature of the obligation to protect against torture and ill-treatment, no legal distinction can be drawn under the Convention between the act of torture or ill-treatment and the act of transfer in face of a real risk thereof. Any unravelling of the *refoulement* prohibition would necessarily mean an unravelling of the absolute prohibition on torture itself, one of the most fundamental and incontrovertible of international norms.
43. International practice suggests that the determination of transfer cases should take account of the absolute nature of the *refoulement* prohibition under Article 3, and what is required to make the Convention’s protection effective. The risk must be real, foreseeable and personal. Great weight should attach to the person’s affiliation with a vulnerable group in determining risk. Evidentiary requirements in respect of such risk must be tailored to the reality of the circumstances of the case, including the capacity of the individual to access relevant facts and prove the risk of torture and ill-treatment, the gravity of the potential violation at stake and the positive obligations of states to prevent it. Once a *prima facie* or arguable case of risk of torture or other ill-treatment is established, it is for the State to satisfy the Court that there is in fact no real risk that the individual will be subject to torture or other ill-treatment.

*Communication to:*

*Place and date: Budapest, 12 February 2004*

**Committee on the Elimination of Discrimination against Women  
c/o Division for the Advancement of Women  
Department of Economic and Social Affairs  
United Nations Secretariat  
2 United Nations Plaza  
DC-2/12<sup>th</sup> Floor  
New York, NY 10017  
United States of America  
Fax: 001 212 963 3463**

*submitted for consideration under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.*

**I. Information concerning the victim/petitioner**

Family name: S.  
First name: A.  
Date and place of birth: 5 September 1973, Fehérgyarmat, Hungary  
Nationality: Hungarian  
Sex: Female  
Marital status/children: partner and 3 children  
Ethnic background: Roma  
Present address: Kossuth street 5, Tisztaberek, Hungary

**II. Information concerning the authors of the communication**

**European Roma Rights Center (ERRC)**, P.O. Box 906/93, 1386 Budapest 62, Hungary. The European Roma Rights Center is an international public interest law organisation that defends the legal rights of Roma across Europe. The ERRC has consultative status with the Economic and Social Council of the United Nations as well as the Council of Europe.

Telephone: 00 36 1 413 2200  
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E-mail: office@errc.org

**Legal Defence Bureau for National and Ethnic Minorities (NEKI)**, P.O. Box 453/269, 1537 Budapest 114, Hungary. NEKI provides legal help in cases of discrimination based on the victim's ethnic or national origin.

Telephone/Fax: 00 36 1 303 89 73  
Email: bbodrogi@yahoo.com

**This communication is being submitted jointly by the ERRC and NEKI as the appointed representatives of the victim.**

### III. Information on the state party concerned

- III.1. This communication is directed against Hungary as a State party to the Optional Protocol of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (“the Optional Protocol”).
- III.2. We note that the incident giving rise to this communication occurred on 2 January 2001, just over two months before Hungary acceded to the Optional Protocol on 22 March 2001. However, we respectfully submit that: a) Hungary ratified the Convention itself on 3 September 1981 and that it is legally bound by its provisions from that date on, b) the Optional Protocol is anyway a jurisdictional mechanism which results in the recognition by the state concerned of yet another way in which the Committee can seize competence and consider its compliance with the standards enshrined in the Convention<sup>1</sup>, and c) most importantly, the effects of the violations at issue in the instant case are of an ongoing (continuing) character.
- III.3. In particular, the Petitioner asserts that as a result of being sterilised on 2 January 2001 without her informed and full consent she can no longer give birth to any further children and that this amounts to a clear cut case of a continuing violation in accordance with Article 4(2)(e) of the Optional Protocol. Namely, the aim of a sterilisation is to end the patient’s ability to reproduce and from a legal as well as a medical perspective it is intended to be and in most cases is irreversible. (These issues are covered in greater detail in paragraphs VI.2 and VI.25 of this communication).
- III.4. In a well known Strasbourg case<sup>2</sup>, for example, a German national obtained a residence and work permit for Switzerland in 1961, married a Swiss national in 1965, lost his job in 1968, was served a deportation order in 1970, which was executed in 1972, and ultimately found himself separated from his wife. Although the facts of the case occurred prior to the European Convention entering into force with respect to Switzerland in 1974, the Commission considered that it should not declare that it lacked jurisdiction *ratione temporis* to examine the application since, subsequent to the date of entry into force, the applicant found himself in a continuing situation of not being able to enter Switzerland to visit his wife who resided there<sup>3</sup>.
- III.5. The UN Human Rights Committee, has likewise repeatedly held that it can consider an alleged violation occurring prior to the date of the entry into force of the Optional Protocol to the International Covenant on Civil and Political Rights if it continues or has effects which themselves constitute violations after that date<sup>4</sup>. For example, in a

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<sup>1</sup> In terms of the Optional Protocol to the Covenant on Civil and Political Rights, for example, Professor Manfred Nowak has stressed that this is a jurisdictional document with retroactive effect. In particular, state parties are obligated to respect the Covenant as of the very moment of ratification and regardless of whether or not they are also state parties to the Optional Protocol. The ratification of the Optional Protocol hence results merely in the opportunity for the victims to file individual communications with the Human Rights Committee. Such communications will be inadmissible *ratione temporis* only if they relate to events that have occurred prior to the date of entry into force of the Covenant itself. (See Nowak, Manfred, CCPR – Commentary, Kehl, 1993, 679-680.)

<sup>2</sup> Application No. 7031/75, D.R.6 p.126.

<sup>3</sup> As regards Strasbourg jurisprudence, for example, declarations made by state parties under former Article 25 of the European Convention on Human Rights, recognising the competence of the Commission to receive individual petitions, have consistently been ruled to have retroactive effect as of the moment of ratification of the Convention itself. Or in other words, the Commission deemed itself competent *ratione temporis* to examine incidents that have occurred between the date of ratification of the Convention by a given state and the date on which the state concerned has made its declaration in accordance with Article 25 of the Convention. (This approach was expressly confirmed in numerous cases. See e.g. Application No. 9587/81, D&R 29, pp. 238-239; Application No. 9559/81, D&R 33, pp.209-210, and Application No. 13057/87, D&R 60, pp. 247-248.)

<sup>4</sup> See, for example, HRC Communication No.1/1976, Communication No.24/1977, Communication No.196/1985, Communication No.310/1988, Communication No.457/1991.

case concerning Australia<sup>5</sup>, in which a lawyer who had been unwilling to pay his annual practising fee had continued to practise, was fined by the Supreme Court and struck off the list of practising lawyers, the Human Rights Committee held that although these events had been concluded before the Optional Protocol entered into force for Australia, the effects of the Supreme Court decision were still continuing and the case was found admissible.

- III.6. In view of the above, even though the incident here at issue predates Hungary's accession to the Optional Protocol, we submit that the Committee's competence remains absolute and undiminished – both in terms of declaring this communication admissible and with regard to ruling on the merits of the instant case.
- III.7. **Should the Committee deem further clarification necessary, we respectfully request that, as the authors of this communication, we be allowed an additional opportunity to address this question in greater detail.**

#### IV. Facts of the case

- IV.1. A.S. (“the Petitioner”) is a Hungarian citizen of Romani origin who was subjected to a coerced sterilisation without her full and informed consent at a Hungarian public hospital.
- IV.2. On 30 May 2000, the Petitioner was confirmed to be pregnant by a medical examination<sup>6</sup>. From that day until her expected date of hospital confinement, 20 December 2000, she attended all prescribed appointments with the district nurse, her gynaecologist, and hospital doctors. On 20 December 2000 she went to the hospital in Fehegyarmat. During an examination, the embryo was found to be 36-37 weeks old and she was told to return home and informed to come back to the hospital when birth pains start.
- IV.3. On 2 January 2001, the Petitioner felt pains and she lost her amniotic fluid, which was accompanied by heavy bleeding. She was taken to Fehegyarmat hospital by ambulance, a journey of one hour. She was admitted to the hospital, undressed, examined, and prepared for an operation. During the examination the attending physician, Dr Andras Kanyo, diagnosed that her embryo had died in her womb, her womb had contracted, and her placenta had broken off. Dr Kanyo informed the Petitioner that a caesarean section needed to be immediately performed to remove the dead embryo<sup>7</sup>. While on the operating table she was asked to sign a statement of consent to a caesarean section. This consent statement had an additional hand-written note at the bottom of the form that read:

*Having knowledge of the death of the embryo inside my womb I firmly request “my sterilisation”. I do not intend to give birth again, neither do I wish to become pregnant.*

The hand-written sections of this statement were completed by Dr Kanyo in barely readable script<sup>8</sup>. The doctor used the Latin equivalent of the word sterilisation on the form, a word unknown to the victim, rather than the common usage Hungarian language word for sterilisation “lekotes”, or the Hungarian legal term “muvi meddove

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<sup>5</sup> HRC Communication No.491/1992.

<sup>6</sup> See Exhibit 3, Decision of the Fehegyarmat Town Court

<sup>7</sup> See Exhibit 3, Decision of the Fehegyarmat Town Court

<sup>8</sup> Consent form at Exhibit 1.

tetel”. The plaintiff signed both the consent to a caesarean section and under the handwritten sentence consent to the sterilisation. The form itself was also signed twice by Dr Kanyo and by Mrs Laszlo Fejes, midwife. Finally, the Petitioner also signed consent statements for a blood transfusion, and for anaesthesia.

- IV.4. She did not receive information about the nature of sterilisation, its risks and consequences, or about other forms of contraception, at any time prior to the operation being carried out. This was later confirmed by the Court of Second Instance which found that **“the information given to the plaintiff concerning her sterilisation was not detailed. According to the witness statement of Dr Kanyo, the plaintiff was not informed of the exact method of the operation, of the risks of its performance, and of the possible alternative procedures and methods.”**<sup>9</sup> Her partner, Mr Lakatos, was also not informed about the sterilisation operation or other forms of contraception. He was not present at the hospital at the time of the operations.
- IV.5. The hospital records show that the Petitioner had lost a substantial amount of blood and was in a state of shock. The hospital records state that “She felt dizzy upon arrival, heavy uterinal bleeding, shock suffered during delivery and giving birth, due to the heavy blood loss we need to make a transfusion”<sup>10</sup>. She was operated on by Dr Andras Kanyo, assisted by Dr Anna Koperdak. The anaesthetist was Dr Maria Kriczki. The caesarean section was performed, the dead foetus and placenta were removed, and the Petitioner was sterilised by tying both fallopian tubes<sup>11</sup>.
- IV.6. The hospital’s records show that only 17 minutes passed from the ambulance arriving at the hospital until the completion of both operations<sup>12</sup>.
- IV.7. Before leaving the hospital, the Petitioner sought out Dr Kanyo and asked him for information on her state of health and when she could try to have another baby. It was only then that she learnt the meaning of the word sterilisation, and that she could not become pregnant again.
- IV.8. The sterilisation had a profound impact on the life of the petitioner. Since then both she and her partner have received medical treatment for depression. They both have strict religious beliefs that prohibit contraception of any kind, including sterilisation. Their religion is a local Hungarian branch of the Catholic Church. In Catholic teaching, sterilisation is a mutilation of the body which leads to the deprivation of a natural function and must be rejected<sup>13</sup>. They are both Roma and live in accordance with traditional Romani ethnic customs. In a study by the Hungarian Academy of Science about Roma women’s attitude to childbirth<sup>14</sup>, the researcher, Maria Nemenyi, stated that:

“Having children is a central element in the value system of Roma families. The fact that there are more children in Roma families than in those of the majority population is mainly not due to a coincidence, to the lack of family planning ... on the contrary, it is closely related to the very traditions which different Roma communities strive to maintain. I am convinced that the low level of acceptance of birth control methods among the Roma is not only due to the expensive nature of contraception, the high prices which some of these families cannot afford, but rather due to the absolute value of having children in these communities. Sterilisation would violate such a deeply

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<sup>9</sup> See Exhibit 5, Decision of the Szabolcs-Szatmar-Bereg Court

<sup>10</sup> Statement before the Court by the Petitioner’s Attorney, Exhibit 9

<sup>11</sup> See Exhibit 3, Decision of the Fehergyarmat Town Court

<sup>12</sup> See Exhibit 7, hospital records

<sup>13</sup> Taken from Dr J. Poole, “The Cross of Unknowing”, 1989.

<sup>14</sup> Maria Nemenyi: Roma Mothers in Health Care, <http://mek.oszk.hu/01100/01156>

rooted ... [belief] ... , which [many] women living in [traditional] Roma communities could not identify with and could not undertake without damaging their sexual identity and their role as a mother and a wife.”

## V. Steps taken to exhaust domestic remedies

- V.1. On 15 October 2001, one of the authors of this communication, Dr Bea Bodrogi, a staff lawyer at NEKI, filed a civil claim against the Szatmar-Bereg State hospital on behalf of the Petitioner<sup>15</sup>. The lawsuit, *inter alia*, requested that the Town Court of Fehegyarmat find the hospital in violation of the plaintiff’s civil rights and that the hospital had acted negligently in its professional duty of care with regard to the sterilisation carried out in the absence of the Petitioner’s full and informed consent. The claim sought pecuniary and non-pecuniary damages. The Town Court of Fehegyarmat in its decision on 22 November 2002<sup>16</sup>, held that the hospital doctors did not commit any professional failure even though it found that the legal conditions for the Petitioner’s sterilisation operation were not fully met. Namely, the Court itself held that “the negligence of the doctors can be detected in the fact that the plaintiff’s partner was not informed about the operation and that the birth certificates of the plaintiff’s live children were not obtained”<sup>17</sup>. In addition, we note that the medical witnesses relied on by the Court were in fact the same doctors who carried out the sterilisation operation on the Petitioner. Finally, the first instance court confirmed that in Hungary, sterilisation is recommended for any mother who has three children<sup>18</sup>.
- V.2. Dr Bodrogi filed an appeal against this decision, on behalf of the Petitioner, on 5 December 2002<sup>19</sup>. The appeal argued that the Court of first instance had not properly considered whether the conditions required by law for performing a sterilisation had been attained, and that the Court had neglected to consider the plaintiff’s evidence and argumentation, contained in her written as well as her oral pleadings. Instead, the Court relied totally on the defendant doctors’ testimonies. The appeal reiterated the plaintiff’s claim for damages with respect to the sterilisation (i.e. the pain and suffering caused by the illegal operation) and for the consequences of the sterilisation (i.e. that the Petitioner can no longer give birth to further children).
- V.3. The second instance court, the Szabolcs-Szatmar County Court, passed judgement on the appeal on 12 May 2003<sup>20</sup>. It found the hospital doctors negligent for not providing the Petitioner with full and detailed information about the sterilisation and held that “**in the present case the information given to the plaintiff concerning her sterilisation was not detailed**”. According to the “**witness statement of Dr. Andras Kanyo, the plaintiff was not informed of the exact method of the operation, of the risks of its performance, and of the possible alternative procedures and methods**”. Thus she “**was not informed of the possible complications and risks of inflammation, purulent inflammation, opening of the wounds, and she was not informed of further options for contraception as an alternative procedure either**”<sup>21</sup>. The Court further

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<sup>15</sup> Claim at Exhibit 2

<sup>16</sup> Fehegyarmat Town Court Decision 2.P.20.326/2001/22, Exhibit 3

<sup>17</sup> *idem*

<sup>18</sup> Hungarian Act on Healthcare, Article 187, para. 2

<sup>19</sup> Appeal at Exhibit 4

<sup>20</sup> Szabolcs-Szatmar-Bereg County Court decision No 4.Pf.22074/2002/7, Exhibit 5

<sup>21</sup> *idem*

stated that “the defendant acted negligently in failing to provide the plaintiff with detailed information” and that “although the information provided to the plaintiff did include the risks involved in the omission of the operation, she was not informed in detail about the operation and the alternative procedures (further options for birth control), or she was not, or was not appropriately, informed about the possibilities of a further pregnancy following performance of the planned operation”<sup>22</sup>. The Court then stressed that since the sterilisation was not a life-saving operation its performance should have been subject to informed consent. Finally, it held that “pursuant to Article 15 paragraph 3 of the Act on Healthcare, if the information given to the patient is not detailed, the prevalence of the legal conditions of performing an operation cannot be established”<sup>23</sup>.

- V.4. Ultimately, notwithstanding the above, the Court turned down the plaintiff’s appeal and ruled that there was no evidence that the Petitioner’s loss of her reproductive capacity had amounted to a lasting handicap. In the view of the Court (contrary to established medical opinion, as mentioned in VI.2. of this communication), “the performed sterilisation was not a lasting and irreversible operation ... [and] ... therefore the plaintiff did not lose her reproductive capacity ... [or suffer] ... a lasting handicap”<sup>24</sup>. The Court therefore clearly looked at the Petitioner’s moral damages relating to the consequences of the operation only while the issue of her obvious emotional distress as a result of being subjected to a serious surgical procedure, in the absence of her full and informed consent, remained absolutely unaddressed. The Judgement of the Court of Second Instance specifically states that no appeal against the decision is permitted.
- V.5. The Petitioner respectfully submits that she has therefore exhausted all effective domestic remedies and turns to the Committee to obtain just satisfaction and compensation.

## VI. Violations of the Convention

- VI.1. As the facts of this case disclose, in the coerced sterilisation of the Petitioner without her full and informed consent by medical staff at a Hungarian public hospital, there have been violations of a number of rights guaranteed by the Convention on the Elimination of Discrimination against Women (“the Convention”), in particular, Article 10.h, Article 12, and Article 16.1.e.
- VI.2. Before turning to the provisions in the Convention, the Petitioner would like to respectfully emphasise a few important points about sterilisation. The aim of sterilisation is to end the patient’s ability to reproduce. Standard medical practice maintains that sterilisation is **never** a life saving intervention that needs to be performed on an emergency basis and without the patient’s full and informed consent<sup>25</sup>. An important feature of the operation from the legal and ethical standpoint is that it is generally intended to be irreversible<sup>26</sup>; although it may be possible to repair the sterilisation operation, the reversal

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<sup>22</sup> *idem*

<sup>23</sup> *idem*

<sup>24</sup> *idem*

<sup>25</sup> Statements by Dr Wendy Johnson, Doctors for Global Health, Dr Douglas Laube, Vice President, American College of Obstetricians and Gynecologists, and Dr Joanna Cain, Chair, Committee for the Ethical Aspects of Human Reproduction and Women’s health, International Federation of Gynecology and Obstetrics.

<sup>26</sup> Taken from Law and Medical Ethics by J.K. Mason, Professor of Forensic Medicine at Edinburgh University and R.A. McCall Smith, Professor of Medical Law at Edinburgh University, page 89, published by Butterworths.

operation is a complex one with a low chance of success<sup>27</sup>. The World Health Organisation in its “Medical Eligibility Criteria for Contraceptive Use” states that sterilisation procedures are irreversible and permanent<sup>28</sup>.

VI.3. International and regional human rights organisations have repeatedly stressed that the practice of forced (non-consensual) sterilisation constitutes a serious violation of numerous human rights standards. For example, the Human Rights Committee has specifically noted that coerced sterilisation would be a practice that violates Article 7 of the International Covenant on Civil and Political Rights, covering torture or cruel, inhuman or degrading treatment and free consent to medical and scientific experimentation<sup>29</sup>. Coercion presents itself in various forms. The most direct form is to physically force a person to undergo sterilisation. A different form of coercion is pressure from and/or negligence by medical personnel as well as medical paternalism. In the instant case, the Petitioner was required to give her consent to the sterilisation while she was on the operating table, in a state of shock, without having had the chance to exercise her right to make an informed choice that would have led to informed consent or refusal.

#### **Violation of Article 10.h: no information on contraceptive measures and family planning was given to the Petitioner**

- VI.4. Article 10.h. of the Convention provides that “States parties shall take all appropriate measures ... in particular to ensure access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning”.
- VI.5. The Committee on the Elimination of Discrimination against Women, in its General Recommendation 21 on equality in marriage and family relations, reported on coerced sterilisation practices and stated that “in order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in Article 10.h. of the Convention<sup>30</sup>”.
- VI.6. The Hungarian Act on Healthcare Article 187 allows sterilisation for family planning purposes or for health reasons, on the basis of a written request by the woman or man concerned, as well as on the basis of an appropriate medical opinion. There should be a three-month period of grace between a woman submitting a request to be sterilised and the operation being carried out<sup>31</sup>. The Act further states that the doctor performing the operation must inform the person requesting the intervention and her/his spouse or partner about their further options of birth control, and about the nature, possible risks

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<sup>27</sup> In Robert Blank’s book “Fertility Control: new techniques, new policy issues” 1991, pp31-33, he states that the reversal operation is a complicated one, with a success rate of only 40-75%, and a significantly increased risk of ectopic pregnancy.

<sup>28</sup> WHO Medical Eligibility Criteria for Contraceptive Use, Second edition, at [http://who.int/reproductive-health/publications/RHR\\_00\\_2\\_medical\\_eligibility\\_criteria\\_second\\_edition/rhr\\_00\\_2\\_ster.html](http://who.int/reproductive-health/publications/RHR_00_2_medical_eligibility_criteria_second_edition/rhr_00_2_ster.html)

<sup>29</sup> Human Rights Committee, *General Comment 28: Equality of Rights Between Men and Women (Art. 3)* (68th Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, 11, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

<sup>30</sup> CEDAW General Recommendation 21, para 22.

<sup>31</sup> There are two exceptions to the three months between request and performance of the operation, when a gynaecological operation is planned before the specified time, and when a pregnancy could endanger the mother’s life or that there was a high probability of giving birth to an unhealthy child.

and consequences of the intervention prior to its performance, “in a way that is comprehensible to him/her, with due regard to his or her age, education, knowledge, state of mind and his/her expressed wish on the matter<sup>32</sup>”.

- VI.7. The Hungarian law-makers, in drafting the Act on Healthcare with its three month grace period, realised that sterilisation is not an operation of a life saving character (as the Second Instance Court agreed in the Petitioner’s case<sup>33</sup>) and that sufficient time needs to be given to the person requesting the sterilisation, in order to consider the implications arising out of the information given to her/him.
- VI.8. However, the practice of medical paternalism, which dictates the doctor-patient relationship, is still used by many doctors in Hungary. The doctrine of this practice is that doctors know more about the patient’s needs and interests than the patient does. For this reason, doctors often withhold information that could disrupt the “patient’s emotional stability”.

In her study, Maria Neményi from the Hungarian Academy of Science, points out the following:

“ ... The prerequisite of accepting advice, information, instruction or orders from a doctor is that the patient should understand the directions addressed to him or her. Medical staff should use the appropriate language and manner or showing the proper example (e.g. how to treat a baby), adapting themselves to the recipient is a strategy that most of the patients agree to. We know the conception that in the hierarchy of the health system the higher ranked medical person does not pass on his privileged knowledge and involves less the patient into the components of his decision. The Roma women questioned in the study concur with this statement ... The conversations with the Roma questioned during the study convinced us that their everyday experience is that medical staff judge the Romani people on the basis of general prejudices rather than the person’s actual manner or problem. We are of the opinion that these distortions of prejudice could affect the medical treatment as well.”<sup>34</sup>

- VI.9. This notion violates the patient’s right to information and freedom of action to choose a course of treatment. In the UK case of *Re T*<sup>35</sup>, a case regarding an adult who refused medical treatment, the judge stated that “an adult patient who suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it, or to choose one rather than another of the treatments being offered... This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent”.
- VI.10. As the facts of this case show, the Petitioner received no specific information about the sterilisation operation, the effects that the operation would have on her ability to reproduce, or advice on family planning and birth control, in the months or years before the operation was carried out (or immediately before the operation). She signed the consent to be sterilised while on the operating table, having just heard of the death of her unborn baby, having lost a considerable amount of blood and in severe pain, not understanding

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<sup>32</sup> Hungarian Act on Healthcare 154/1997, Article 13.8.

<sup>33</sup> See Exhibit 5, Decision of the Szabolcs-Szatmar-Bereg Court

<sup>34</sup> The findings of the research done by Neményi are supported by the following cases taken by NEKI. (János H-White Booklet 2002, p. 50-53, Margit B.-White Booklet 2002, p. 54-55, the case of Eva D and Miklos K – pending case – White Booklet 2003.)

<sup>35</sup> *Re T*, (1992) 9 BMLR 46/ UK

the word used for sterilisation, and about to undergo an emergency operation to remove the dead foetus and placenta. The Petitioner had not been given information about the nature of the operation and its risks and consequences in a way that was comprehensible to her, before she was asked to sign the consent form. This is confirmed by the Court of Second Instance that held that **“the defendant also acted negligently in failing to provide the plaintiff with detailed information. Although the information provided to the plaintiff did include the risks involved in the omission of the operation, she was not informed in detail about the operation and the alternative procedures (further options of birth control), or she was not, or was not appropriately, informed about the possibilities of a further pregnancy following performance of the planned operation”**<sup>36</sup>. The Petitioner therefore asserts that she was not given specific information on contraceptive measures and family planning before signing the consent to sterilisation, which is a clear violation of Article 10.h. of the Convention.

### **Violation of Article 12: the lack of informed consent was a violation of the right to appropriate health care services**

VI.11. Article 12 of the Convention provides that “1. States parties shall take all appropriate measures ... in the field of health care in order to ensure access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period ...”

VI.12. The Committee on the Elimination of Discrimination against Women in its General Recommendation 24 on Women and Health, explained that “Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available information.<sup>37</sup>” The Recommendation further states that “Acceptable [health care] services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilisation.<sup>38</sup>”

VI.13. International standards covering informed consent are also set out in other important documents. The World Health Organisation’s Declaration on Patients’ Rights requires informed consent as a prerequisite for any medical intervention and provides that the patient has a right to refuse or halt medical interventions. The Declaration states that “patients have the right to be fully informed about their health status, including the medical facts about their condition; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment, and about the diagnosis, prognosis and progress of treatment.<sup>39</sup>” It further states that “Information must be communicated to the patient in a way appropriate to the latter’s capacity for understanding, minimising the use of unfamiliar technical terminology. If the patient does not speak the common language, some form of interpreting should be available”<sup>40</sup>.

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<sup>36</sup> See Exhibit 5, Decision of the Szabolcs-Szatmar-Bereg County Court.

<sup>37</sup> CEDAW General Recommendation 24, para 20.

<sup>38</sup> CEDAW General Recommendation 24, para 22.

<sup>39</sup> WHO Declaration on Patients’ Rights, Article 2.2

<sup>40</sup> WHO Declaration on Patients’ Rights, Article 2.4

- VI.14. The European Convention on Human Rights and Biomedicine (ECHR) provides that “An intervention in the health field may only be carried out after the person has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks”<sup>41</sup>. This convention was signed by Hungary on 7 May 1999 and entered into force on 1 May 2002. The Explanatory Report to the Convention states that “In order for their consent to be valid the persons in question must have been informed about the relevant facts regarding the intervention being contemplated. This information must include the purpose, nature and consequences of the intervention and the risks involved. Information on the risks involved in the intervention or in alternative courses of action must cover not only the risks inherent in the type of intervention contemplated, but also any risks related to the individual characteristics of each patient, such as age or the existence of other pathologies.”<sup>42</sup> The Explanatory Report further states that “Moreover, this information must be sufficiently clear and suitably worded for the person who is to undergo the intervention. The person must be put in a position, through the use of terms he or she can understand, to weigh up the necessity or usefulness of the aim and methods of the intervention against its risks and the discomfort or pain it will cause.”<sup>43</sup>
- VI.15. International law and international medical guidelines are based on the principles of informed choice and informed consent. **Informed choice** is a fundamental principle of quality health care services and is recognised as a human right by the international community.<sup>44</sup> Moreover, it constitutes the basis of all sterilisation programmes.<sup>45</sup> The notion of informed choice in health care consists of an individual’s well-considered, voluntary decision based on method or treatment options, information and understanding, not limited by coercion, stress, or pressure. Factors that should be taken into consideration under the concept of informed choice include personal circumstances, beliefs, and preferences; and social, cultural and health factors. **Informed consent** is a patient’s agreement to receive medical treatment or to take part in a study after having made an informed choice. Written informed consent is universally required to authorise surgery, including sterilisation – although the signed informed consent form does not guarantee informed choice. The patient’s consent is considered to be free and informed when it is given on the basis of objective information from the responsible health care professionals. The patient shall be informed of the nature and potential consequences of the planned intervention and of its alternatives. Informed consent cannot be obtained by means of special inducement, force, fraud, deceit, duress, bias, or other forms of coercion or misrepresentation. Therefore, informed consent is based on the ability to reach an informed choice, hence informed choice precedes informed consent<sup>46</sup>.
- VI.16. The Hungarian Act on Healthcare, states that “the performance of any health care procedure shall be subject to the patient’s consent granted on the basis of appropriate information, free from deceit, threats and pressure”<sup>47</sup>.
- VI.17. The Hungarian Court of Second Instance, held that “**the defendant also acted negligently in failing to provide the plaintiff with detailed information. Although the**

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<sup>41</sup> ECHR, Article 5

<sup>42</sup> ECHR Explanatory Report, para. 35

<sup>43</sup> ECHR Explanatory Report, para. 36

<sup>44</sup> 1994 International Conference on Population and Development (ICPD) in Cairo.

<sup>45</sup> Engenderhealth, *Contraceptive Sterilization: Global Issues and Trends*, A V S C Intl; March 2002, p. 7.

<sup>46</sup> Engenderhealth, *Contraceptive Sterilization: Global Issues and Trends*, A V S C Intl; March 2002

<sup>47</sup> Hungarian Act on Healthcare 154/1997, Article 15.3.

**information provided to the plaintiff did include the risks involved in the omission of the operation, she was not informed in detail about the operation and the alternative procedures (further options of birth control), or she was not, or was not appropriately, informed about the possibilities of a further pregnancy following performance of the planned operation”<sup>48</sup>. The Court’s findings are substantiated by the fact that it is impossible in the 17 minutes from arriving at the hospital in the ambulance, through the medical examination, preparations for operating (including administering anaesthetic) and the completion of two operations, that the Petitioner received full information on the sterilisation operation, what it entailed, the consequences and risks as well as full information on alternative contraceptive measures. She was at the time in a state of shock from losing her unborn baby, severe pain and had lost a substantial amount of blood. She was lying on the operating table. She did not understand what the word “sterilisation” meant. This was not explained to her carefully and fully by the doctor. Instead the doctor merely told her to sign a barely-readable hand-written form of consent to the operation, that included the Latin rather than Hungarian word for sterilisation. That the doctor failed to give the Petitioner full information on the intervention in a form that was understandable to her is clearly in violation of provisions in the European Convention on Human Rights and Biomedicine and the WHO Declaration on Patients’ Rights. The UK Department of Health in its “Reference Guide to Consent for Examination or Treatment” states that “The validity of consent does not depend on the form in which it is given. Written consent merely serves as evidence of consent: if the elements of voluntariness, appropriate information and capacity have not been satisfied, a signature on a form will not make the consent valid”<sup>49</sup>. This publication also states that “Acquiescence where the person does not know what the intervention entails is not “consent””<sup>50</sup>.**

VI.18. The Petitioner would never have agreed to the sterilisation had she been fully informed about the operation, its risks, and other forms of contraception. She has strict Catholic religious beliefs that prohibit contraception of any kind, including sterilisation. The Hungarian Academy of Science study on Roma women’s attitude to childbirth stated that “Sterilisation would violate such a deeply rooted ... [belief] ..., which [many] women living in [traditional] Roma communities could not identify with and could not undertake without damaging their sexual identity and their role as a mother and a wife<sup>51</sup>”. These customs place an absolute value on the right to reproduce. The sterilisation operation had a profound and fundamental impact on the life of the Petitioner. Since then both she and her partner have received medical treatment for depression. She therefore asserts that there is a clear causal link between the failure of the doctors to fully inform her about the sterilisation operation and the injuries that sterilisation caused to her, both physical and emotional. *“We wanted a big family. I wanted to give birth again. But I simply can not...how to say...It bothers me that I can not even if I wanted and I even can not try... I would try even if it risked my life...”* - from the interview made with the Petitioner by NEKI on 13 February 2003<sup>52</sup>.

VI.19. Taking into account CEDAW’s standard for informed consent, as set out in paragraphs 20 and 22 of General Recommendation 24, the standards set out in the European Convention on Human Rights and Biomedicine and in the WHO Declaration on

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<sup>48</sup> See Exhibit 5, Decision of the Szabolcs-Szatmar-Bereg County Court.

<sup>49</sup> UK Dept of Health “Reference guide to consent for examination or treatment”, para. 11, <http://doh.gov.uk/consent>.

<sup>50</sup> *Idem* para.1.

<sup>51</sup> Maria Neményi: Roma Mothers in Health Care, <http://mek.oszk.hu/01100/01156>

<sup>52</sup> See Exhibit 6, interview with Petitioner

Patients' Rights (described above), and the Hungarian Healthcare Act, the facts of this case show that the Petitioner was unable to make an informed choice before signing the consent form. The elements of voluntariness, appropriate information and the Petitioner's capacity at the time of the intervention; all necessary for free and fully informed consent, were not satisfied. A signature on a consent form does not make the consent valid when the criteria for free and fully informed consent are not met. As the Human Rights Committee commented, the practice of non-consensual sterilisation constitutes torture or cruel, inhuman or degrading treatment<sup>53</sup>. A grave violation of human rights. The Petitioner asserts that the standard of health care service that she received from the hospital, in which she was not fully informed of the options to treatment before giving her consent to the sterilisation operation, was in violation of Article 12 of the Convention.

### **Violation of Article 16.1.e: the State limited the Petitioner's ability to reproduce**

VI.20. Article 16.1.e. of the Convention provides that "States parties shall take all appropriate measures...in all matters relating to marriage and family relations and in particular shall ensure....(e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."

VI.21. The Committee on the Elimination of Discrimination against Women in its Recommendation 21 on Equality in marriage and family relations, said "Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilisation. Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government.<sup>54</sup>" The Committee also noted in its General Recommendation 19 on violence against women, that "Compulsory sterilisation or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.<sup>55</sup>" It also made a specific recommendation that "States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, ...<sup>56</sup>"

VI.22. International case law is also clear on this issue. The European Court of Human Rights, in the case *Y.F. v. Turkey*<sup>57</sup> in which a woman was forcibly subjected to a gynaecological examination against her will, held that a person's body concerns the most intimate aspect of one's private life. Thus, a compulsory, forced or coerced medical intervention, even if it is of minor importance, constitutes an interference with a person's right to private life under Article 8 of the European Convention on Human Rights.

VI.23. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>58</sup>, a case brought against provisions in the Pennsylvania State Abortion Control Act, the U.S. Supreme Court explained that the right of individual privacy prevents governmental interference into certain of an individual's most critical decisions about family, including whether to

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<sup>53</sup> Human Rights Committee, *General Comment 28: Equality of Rights Between Men and Women (Art. 3)* (68th Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, 11, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

<sup>54</sup> CEDAW General Recommendation 21, para 22.

<sup>55</sup> CEDAW General Recommendation 19, para 22.

<sup>56</sup> CEDAW General Recommendation 19, para 24.

<sup>57</sup> *Y.F. v. Turkey*, European Court of Human Rights application no. 00024209/94

<sup>58</sup> *Planned parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)

marry or divorce, and whether to conceive and bear a child, which the Court held were the “most intimate and personal choices a person may make in a lifetime”.

VI.24. A case concerning forced sterilisation was taken in 1999 to the Inter-American Commission<sup>59</sup>. Maria Mamerita Mestanza Chavez was sterilised against her will, and subsequently died. There was a friendly settlement on 14 October 2002. Peru recognised its international responsibility and agreed to indemnify the victim’s family and to work for the improvement of policies concerning reproductive health and family planning in the country. The indemnification was fixed in US\$10,000 for moral damages to be paid to each of the victim’s 7 children and her husband, besides compensation for health care, education and housing. The government of Peru also assumed the commitment to conduct an extensive investigation to ascertain the responsible parties for Ms. Mestanza’s death. Finally, it also agreed to modify national legislation and policies that fail to recognise women as autonomous decision makers.

VI.25. The facts of this case show that the Petitioner was denied access to information, education and the means to exercise her right to decide on the number and spacing of children. The means to reproduction were taken away from her by Hungarian State actors, the doctors at the public hospital. Sterilisation is regarded in law and medical practice as an irreversible operation. Although an operation can be performed to reverse the operation, the chances of success are very low. The World Health Organisation in its Medical Eligibility Criteria for Contraceptive Use states that “Considering the irreversibility or permanence of sterilisation procedures, special care must be taken to assure a voluntary informed choice of the method by the client. All women should be counselled about the permanence of sterilisation and the availability of alternative, long-term, highly effective methods”<sup>60</sup>. In *Re F*<sup>61</sup> the U.K. House of Lords Judge Lord Brandon, in commenting on sterilisation, said that “first, the operation will in most cases be irreversible; second, by reason of the general irreversibility of the operation, the almost certain result of it will be to deprive the woman concerned of what is widely, as I think rightly, regarded as one of the fundamental rights of a woman, namely, to bear children.....” The eminent Hungarian medical expert, Laszlo Lampe, in his handbook on gynaecological surgery for medical practitioners<sup>62</sup> said that “Sterilisation has to be considered as an irreversible operation, and this has to be communicated to the patient”. The Petitioner asserts that agents of the Hungarian State, public medical doctors, in sterilising her without her fully informed consent, have limited her choice to decide freely and responsibly on the number and spacing of future children, in violation of Article 16.1.e. of the Convention.

## VII. Other international procedures

VII.1. This matter has not been and is not currently being examined under any other procedure of international investigation or settlement.

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<sup>59</sup> Inter-American Commission case No. 12,191.

<sup>60</sup> WHO Medical Eligibility Criteria for Contraceptive Use, Second edition, at [http://who.int/reproductive-health/publications/RHR\\_00\\_2\\_medical\\_eligibility\\_criteria\\_second\\_edition/rhr\\_00\\_2\\_ster.html](http://who.int/reproductive-health/publications/RHR_00_2_medical_eligibility_criteria_second_edition/rhr_00_2_ster.html)

<sup>61</sup> *Re F*, (1990) 2 AC 1

<sup>62</sup> See Exhibit 8, extract from Handbook on Gynaecological Surgery by Laszlo Lampe

### **Objective of the Communication**

VIII.1. The objective of this Communication is to find the Hungarian Government in breach of Articles 10.h, 12, and 16.1.e of the Convention and for the Petitioner to obtain just compensation.

### **List of documents attached**

- Exhibit 1 Consent form
- Exhibit 2 Civil claim, 15 October 2001
- Exhibit 3 Fehergyarmat Town Court Decision, 22 November 2002
- Exhibit 4 Appeal, 5 December 2002
- Exhibit 5 Szabolcs-Szatmar-Bereg County Court Decision, 12 May 2003
- Exhibit 6 Interview of A.S., 13 February 2003
- Exhibit 7 Hospital records
- Exhibit 8 Extract from Handbook on Gynaecological Surgery by Laszlo Lampe
- Exhibit 9 Statement before the Court by the Petitioner's Attorney

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