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**Promotion and protection of all human rights,
civil, political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,

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Addendum

**Study on the phenomena of torture, cruel, inhuman or degrading
treatment or punishment in the world, including an assessment of
conditions of detention**

* The present document is being circulated as received in the language of submission only as it greatly exceeds the page limitations currently imposed by the relevant General Assembly resolutions.

** Late submission.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. The mandate and State cooperation.....	1–29	3
A. Introduction	1–9	3
B. Country missions	10–18	5
C. Follow-up to country missions	19–21	9
D. Individual communications.....	22–25	10
E. Reports to the Human Rights Council and the General Assembly	26–29	11
II. Torture.....	30–185	12
A. What is torture?.....	30–57	12
B. Why is torture inflicted?	58–139	19
C. Fighting torture – What needs to be done?	140–166	36
D. Assisting victims of torture: remedy and reparation	167–185	43
III. Cruel, inhuman and degrading treatment and punishment	186–237	50
A. Definition.....	186–188	50
B. Excessive use of force by law enforcement bodies.....	189–194	51
C. Domestic violence	195–208	53
D. Corporal punishment	209–228	56
E. Conditions of detention.....	229–237	61
IV. Non-refoulement	238–249	64
A. Meaning and scope	238–239	64
B. Challenges in the “war against terror”	240–245	65
C. Challenges in the restriction of immigration.....	246–249	68
V. Conclusions and recommendations.....	250–259	69

I. The mandate and State cooperation

A. Introduction

1. As former Secretary General *Kofi Annan* has rightly emphasized in his report “In Larger Freedom”, security, development and human rights constitute the three main pillars of the United Nations. There will be no security without development, no development without security, and both depend on an effective system for the protection of human rights.¹ Within the United Nations, human rights have been promoted and protected since World War II by a more or less fruitful cooperation between four main types of actors: States, non-governmental organisations (NGOs), independent experts and the UN secretariat.

2. Formally speaking, *States* are the most important actors. Only States are members of the United Nations and its decision making bodies, such as the General Assembly, the Security Council, ECOSOC, the Human Rights Council and its predecessor, the Commission on Human Rights. States also bear the primary responsibility for implementing international human rights standards, be it by respecting human rights against interference by governmental actors, by fulfilling human rights through positive State action and by protecting human rights against interference by private actors. At the same time, States belong to the main perpetrators of human rights violations. No State is immune from violating human rights, and all Governments are keen to hide their human rights violations from the outside world. But as more democratic and transparent Governments are, as more open they are towards monitoring, fact-finding, justified criticism and accountability.

3. *NGOs and civil society* have been the driving force behind the UN human rights agenda since its very beginning in the 1940s. NGOs demanded the elaboration of binding international human rights treaties and the creation of independent monitoring bodies and effective measures for the implementation of human rights at the domestic level. At the same time, civil society, including NGOs, academia, independent media and investigative journalists, are among the main sources of information about the factual situation of human rights in all countries of the world. By allowing international NGOs to actively participate, speak and distribute written reports in the former Commission and present Human Rights Council, the United Nations have significantly enhanced the objectivity of the international human rights discourse.

4. *Independent experts* have played an increasingly active role within the human rights system of the United Nations since the late 1960s. On the basis of ECOSOC Res. 1235 (XLII) of 1967, the former Commission on Human Rights entrusted working groups and later individual experts to investigate the overall human rights situation in those States which were particularly criticized for gross and systematic violations of human rights (country-specific mandates). With the establishment of the UN Working Group on Enforced or Involuntary Disappearances in 1980, the Commission created the first *thematic mechanism* with a global mandate. The UN Special Rapporteur on Torture was established in 1985 with a mandate to investigate the phenomena of torture, cruel, inhuman or degrading treatment or punishment in all States and to provide annual reports and assessments to the United Nations. Independent experts have also been elected to UN human rights treaty bodies entrusted with the monitoring of States parties’ compliance with their respective treaty obligations.

¹ A/59/2005.

5. The *Secretary General* of the United Nations has been entrusted to provide the necessary services to both treaty bodies and Charter-based mechanisms. One of the main outcomes of the Vienna World Conference of Human Rights 1993 was the creation of the Office of the UN *High Commissioner for Human Rights* in Geneva, which integrated the former UN Human Rights Centre. But the High Commissioner is more than a simple secretariat for existing human rights bodies of the United Nations. He or she has the overall responsibility for ensuring that human rights as one of the three pillars of the United Nations are effectively promoted and receive the necessary support. The High Commissioner is expected to speak out when human rights are systematically violated, to take action vis-à-vis Governments and other powerful actors and to assist Governments in their endeavours to improve human rights. Independent bodies, such as treaty bodies and special procedures of the Human Rights Council, play an important role in providing the High Commissioner with objective information about the factual situation of human rights around the world.

6. Since 1 December 2004, I have been entrusted as the fourth mandate holder to carry out the tasks of the *UN Special Rapporteur on Torture* (SRT). These tasks have been laid down in various resolutions of the Commission on Human Rights, the General Assembly and the Human Rights Council and were developed over the years through the practice of my predecessors and myself. They are manifold and include the following: to receive and send on a daily basis individual communications (allegation letters and urgent appeals) to Governments and to study the respective replies from Governments; to carry out country missions, follow-up and other visits; to gather reliable information about torture and ill-treatment from various sources, including Governments, inter-governmental and non-governmental organisations, victims and witnesses; to conduct academic research into certain legal and factual aspects concerning torture; to cooperate with other universal, regional and national bodies active in the fight against torture; to respond to media requests and inform the public about torture-related matters; to participate in meetings and conferences relating to my mandate; to engage in torture-specific training, human rights education and awareness raising activities and, most importantly, to report regularly to the Human Rights Council and the General Assembly about my activities and my independent assessment of the situation of torture, cruel, inhuman or degrading treatment or punishment (CIDT) globally and in relation to specific States, specific groups of individuals (e.g. women, children, persons with disabilities, detainees, drug-users) or specific aspects of torture, such as its use in the global fight against terrorism.

7. In fact, this seems to be an *impossible task*. How shall one person, with a very small, although highly professional staff at the Office of the High Commissioner for Human Rights, be in a position to assess the legal and factual situation of torture in all countries and to provide respective assistance, cooperation and recommendations to Governments, civil society and the international community? As an independent UN expert, I am not employed by the United Nations and do not receive a salary or honorarium. In other words, I earn my living as full-time Professor of Human Rights at Vienna University and can only dedicate a certain amount of my time (de facto certainly more than half of my time) to my function as UN Special Rapporteur for a limited period of six years.

8. Despite all these shortcomings, I feel that after five years in this position, I am in a position to provide a fairly *comprehensive report about the phenomena of torture, cruel, inhuman or degrading treatment or punishment, including an assessment of conditions of detention*, in our contemporary world. This report is, however, the result of a truly *joint effort by many actors*. First of all, I would like to thank all Governments who invited me to carry out fact-finding missions on their territory and who provided me with the necessary information to assess the situation of torture and ill-treatment in their countries. The present report is based primarily on my experiences during these country missions and, therefore, makes extensive reference to my fact-finding reports. These country-specific references

should not be interpreted as “naming and shaming” those few countries which I was able to visit thanks to their generous invitation and cooperation, but as a mere illustration of a situation that seems to be representative for most countries. Secondly, I am grateful to the Office of the High Commissioner for Human Rights in Geneva for always supporting my mandate in a most effective manner and providing me with highly motivated and professional staff. Thirdly, without the effective support and cooperation of a considerable number of international and domestic NGOs as well as courageous human rights defenders in many countries, it would have been impossible to regularly send allegation letters and urgent appeals to Governments and to carry out highly difficult and complex fact-finding missions in all regions. Fourthly, I wish to thank the Governments of Austria, Switzerland, Liechtenstein and other donors who supported the creation of a remarkable team of highly professional and dedicated human rights experts at the Ludwig Boltzmann Institute of Human Rights at Vienna University. Finally, I am deeply impressed by the courage of so many victims and witnesses, both in detention and outside, who provided me with information about prison conditions and with detailed accounts about their own suffering at the hands of ruthless torturers and their superiors in too many countries. Unfortunately, many of these courageous women, men and children had to suffer reprisals for the mere fact of having been willing to speak to me and to provide me with the information necessary to carry out my mandate and to inform the United Nations about the reality of torture and ill-treatment around the world.

9. *This reality is alarming.* Despite the fact that torture constitutes one of the most brutal attacks on human dignity and one of the most serious human rights crimes, and notwithstanding the absolute prohibition of torture and ill-treatment even in the most exceptional circumstances, such as war, internal disturbances and terrorism, *torture and ill-treatment are widespread practices in the majority of the countries on our planet.* Almost no society is immune against torture, but in many societies torture is practiced systematically, both in fighting ordinary crime and in combating terrorism, extremism or similar politically motivated offences. In addition, *conditions of detention are appalling in the vast majority of countries* and must often be qualified as cruel, inhuman and degrading. *Detainees*, whether convicted criminals, persons accused of a crime in police custody and pre-trial detention, migrants in an irregular situation and asylum seekers in detention pending deportation, patients in psychiatric hospitals or children in closed institutions, are among the *most vulnerable and forgotten human beings* in our societies. As soon as people are locked up, whether for justified or less justified reasons, society loses interest in their fate. “If you are behind bars, you must have done something wrong”, is one of the oldest stereotypes of our societies. It totally overlooks the fact that the criminal justice systems in most countries are not functioning properly, and that detainees often have no effective access to any independent judicial review of their detention (habeas corpus) or similar complaints and control mechanisms. Prison walls and fences lock people up and society out. Because of punitive justice systems, detainees have very little contact with the outside world, and society has no interest in the fate of detainees. Prison conditions seem to be one of the last taboos, even in so-called “open societies”.

B. Country missions

10. During the last five years, I carried out *fact-finding missions* to the following countries: Georgia (including Abkhazia and South Ossetia), Mongolia, China (including the autonomous regions of Tibet and Qincang), Nepal, Jordan, Paraguay, Togo, Nigeria, Sri Lanka, Indonesia, Denmark (including Greenland), the Republic of Moldova (including Transnistria), Equatorial Guinea, Uruguay and Kazakhstan. Together with other Special Procedures, I prepared studies on the situation of detainees in the US detention centre at Guantánamo Bay (Cuba), on the human rights situation in Darfur (Sudan), and on the

global phenomenon of secret detention in the fight against terrorism. I also visited in my function as Special Rapporteur a considerable number of countries, including Belgium, Brazil, China (Hong Kong), Denmark, France, the Gambia, Germany, Italy, Jordan, the Republic of Moldova, Serbia, Sweden, Thailand, Turkey, Papua New Guinea, Poland, Portugal, South Africa, the United Kingdom, the United States of America and Zimbabwe, to hold meetings with Governments, NGOs, victims and witnesses, to advise Governments, give lectures and training seminars, and to cooperate with international and regional human rights bodies of the African Union, the Organisation of American States, the Organisation for Security and Cooperation in Europe, the Council of Europe and the European Union.

11. I am grateful to States with standing invitations to Special Procedures and to all Governments that responded positively to my requests for being invited to visit their countries. At the same time, I regret that certain Governments did not respond to my requests or denied me access to their territories. These countries include the following: Algeria, Afghanistan, Belarus, Bolivia, Côte d'Ivoire, Egypt, Eritrea, Ethiopia, Fiji, Gambia, India, Iran, Iraq, Israel, Liberia, Libyan Arab Jamahiriya, Saudi Arabia, Tunisia, Turkmenistan, Uzbekistan, and Yemen.

12. Some Governments issued an invitation but refused to comply with my terms of reference which meant that the mission had to be cancelled or postponed at the last minute. They include the United States of America (in respect of Guantánamo Bay) and the Russian Federation. Others invited me and then postponed the mission, including Equatorial Guinea, Sri Lanka and Cuba. Zimbabwe even postponed the mission after it had begun and denied me access to its territory despite the explicit wish of the Prime Minister to meet me. Postponements of missions at the last minute are a considerable waste of scarce resources. Much time and efforts of me and my staff had been invested to prepare the missions to the Russian Federation, Equatorial Guinea, Cuba and Zimbabwe to the best of our abilities. If such missions had been postponed at an earlier stage, I could have replaced them by a mission to another country. In the case of Zimbabwe, even considerable travel expenses (more than 15.000 €) were paid by the United Nations and the Ludwig Boltzmann Institute of Human Rights. The postponement of my first mission to Equatorial Guinea in February 2008 came at such a late stage that certain flights could no longer be cancelled and had to be paid out of our own budget. But the missions to Sri Lanka and Equatorial Guinea actually took place in late 2007 and 2008 respectively, whereas no new dates have ever been proposed by the Russian Federation. In the case of Cuba and Zimbabwe, there is a probability that these missions might be carried out in 2010, but only at the expense of other missions which I intended to conduct during my last year as Special Rapporteur on torture, and only if I receive convincing assurances that my terms of references will be complied with.

13. The *purpose of country missions* is very simple. I try to *assist Governments* in their efforts to eradicate torture and to improve prison conditions. Such assistance is only possible on the basis of a thorough and objective *fact-finding* and *assessment* of the respective needs for reform. In order to evaluate the legal and factual situation of torture and ill-treatment in the countries concerned, I must enjoy all diplomatic privileges and immunities of experts on mission as specified in the Convention on Privileges and Immunities of the United Nations, as well as freedom of inquiry in the territory of the respective countries, the right to speak with all stakeholders, including high Government officials, members of parliament, judges, prosecutors, police and prison officials, representatives of national human rights institutions, academia, non-governmental organisations and other civil society actors. Most important of course, are unrestricted and confidential interviews with victims and witnesses and full access to relevant documents. Since torture usually takes places behind closed doors, my *terms of reference* also include unannounced visits to all places of detention and confidential interviews with detainees and prison staff. Furthermore, I am accompanied on my missions by highly professional teams

of human rights experts, doctors (above all forensic experts), interpreters, security officers and other UN staff who must enjoy the same rights, diplomatic privileges and immunities. In order to document cases of torture and ill-treatment in accordance with the respective provisions of the Istanbul Protocol and professional rules of experts in the field of human rights and forensic science, we also use electronic devices, photo, audio and video equipment inside detention facilities. These terms of reference are common sense requirements of any effective and objective fact-finding efforts.

14. I like to compare an invitation by States to carry out a mission to their country with the invitation of an external auditor by a business enterprise. In both situations, the respective Governments or Boards of Governors are supposed to have a genuine interest in an objective external evaluation of the situation in their countries or companies aimed at identifying needs for reform and methods of improvement. While companies pay a substantial amount of money for a thorough external audit, States get the results and recommendations of my missions free of charge. Nevertheless, I was often confronted with substantial *efforts of Governments to obstruct my fact-finding activities* by subjecting me to extensive surveillance and bureaucratic hurdles, denying me access to certain detention facilities, preventing me from speaking in private with detainees, victims and witnesses, extensively preparing detention facilities and instructing detainees about the way they should or should not interact with me, etc.

15. In *Mongolia for example*, I was consistently denied access to prisoners on death row whose treatment, according to reliable sources (handcuffed and shackled in dark cells without adequate food and with the right to be visited only by one family member before execution), definitely amounted to torture. Even the President of the Republic assured me that all information surrounding capital punishment, including the number of death sentences and the treatment of prisoners on death row, constituted strict State secrets and that he would commit a criminal offence by making such information available to me.² In *China*, I was regularly followed and monitored by intelligence officers, our telephones were tapped, witnesses from Shanghai who were travelling to meet me in Beijing were physically prevented from doing so, witnesses in Beijing were forced to leave the city in order to prevent them from meeting me, a well-known human rights lawyer was physically attacked on his way to a meeting with me, the authorities of Tibet attempted to hide a new maximum security prison and even after its discovery only allowed a few individual interviews, etc.³ In *Jordan*, I was denied the right to conduct confidential interviews with detainees at the General Intelligence Directorate, and at the headquarters of the Criminal Investigation Police of Amman, victims of torture were removed from their cells and driven around in police cars during my inspection. Even after I had conducted an interview with a victim with serious torture injuries, which were corroborated through an examination by the forensic expert accompanying me, the victim was later removed and his presence in the detention facilities denied.⁴ I had similar experiences in *Sri Lanka*, where a considerable number of detainees at the Terrorist Investigation Department were removed and hidden from me during my visits to these facilities.⁵ Even in *Nigeria*, where the cooperation by the Federal Government was excellent, I was repeatedly denied access to the detention facilities of the State Security Services and had major problems obtaining access to the infamous “torture room” at the headquarters of the Criminal Investigation Police in Lagos.⁶ In *Equatorial Guinea*, I was denied access to any military facilities and was seriously

² E/CN.4/2006/6/Add.4.

³ E/CN.4/2006/6/Add.6.

⁴ A/HRC/4/33/Add.3.

⁵ A/HRC/7/3/Add.6.

⁶ A/HRC/7/3/Add.4.

threatened when I tried to obtain access to the military barracks in Malabo and when I attempted to visit the police headquarters in Bata a second time, in order to assess whether detainees had been subjected to reprisals after my first visit. All my movements throughout the country were constantly monitored, which was even openly admitted by the Government during my debriefing. The Minister of Interior frankly told me that intelligence sources had informed him about my meetings with the human rights officer of the (only legal) opposition party. The fact of having met members of the legal opposition was even used as the main argument why my report was rejected by the Government as biased.⁷

16. Various Governments obstructed my efforts of independent and objective fact-finding by extensively *preparing detention facilities and instructing detainees* about my visit. In order to better prepare my visits, Governments often demanded that I tell them in advance which facilities I wished to inspect. It was only after long and difficult negotiations that certain Governments such as China, Sri Lanka, Indonesia and Equatorial Guinea, accepted that my visits are, in principle, unannounced. Nevertheless, through extensive monitoring of my movements throughout the respective countries, these Governments could, at least to some extent, predict which detention facilities I intended to visit. This might even have been well-intended, i.e. the authorities responsible for the detention facilities wished to make as good an impression as possible. It also had the positive side-effect that prisons were renovated, cleaned and freshly painted, that the food, health services and recreation possibilities were improved during my missions, and that detainees were released from solitary confinement. Two examples of such well-intended preparations were Indonesia and Kazakhstan, where the prison directors were already waiting outside their facilities to warmly welcome me. In *Indonesia*, where I had to fly from island to island, I even met military intelligence officers who told me that their task was to inform their superiors whether and when all members of my team had left the respective island. In *Kazakhstan*, a police car was sent to escort me to the next city I intended to visit. All prisoners in areas that I could possibly visit were told about my mission and instructed to stage prison bands and parties in order to impress me. The paint on cell doors was so fresh that it had not even dried and we had to be careful not to touch it. Detainees told us exactly how they were instructed to interact with us, and we were later informed that prisoners in other facilities, which we could not visit for lack of time, were disappointed because their extensive preparations were in vain. In *China*, officials of the Ministry of Foreign Affairs had insisted to escort me throughout the mission. In some countries, notably China, Kazakhstan, Sri Lanka, Indonesia and Equatorial Guinea, these efforts of constantly putting me under surveillance and control were so persistent that I considered interrupting or terminating the mission.

17. Even if well-intended, i.e. to assist and protect me, these activities obstruct any efforts of objective fact-finding. My task is to independently assess, to the best of my abilities, conditions of detention and instances of torture as they are in reality. All efforts of the authorities aimed at creating a situation which is not genuine make my task of objective fact-finding much more difficult and may even be counter-productive as they naturally raise suspicions that the Government has something to hide. There is no country in the world without the risk of torture and ill-treatment and where prison conditions could not be improved. If Governments wish to use my findings and reports as a solid basis for a comprehensive needs assessment aimed at improving the situation, it is in their own interest to let me carry out my work as smoothly and effectively as possible. In practice, only relatively few countries enabled me to conduct my fact-finding without any notable interference or obstruction. I wish to particularly mention in this context the Governments of *Georgia, Paraguay, Togo, Denmark, Moldova and Uruguay*. In Uruguay, I was even

⁷ A/HRC/10/44/Add.1, A/HRC/13/39/Add.4.

encouraged by high Government officials to be as critical as possible despite the fact that the conditions in some prisons were truly appalling. My recommendations to shut down some of these facilities were immediately taken up by an order of the President of the Republic.

18. The *lessons* from these few examples and observations seem to be clear. The aim of assisting Governments in their efforts to improve the situation can only be achieved if Governments are genuinely interested in soliciting an objective assessment from an external expert, by engaging in an open and frank dialogue based on mutual trust and respect. Governments have no obligation to invite me. But it seems that several Governments invited me for other motives, such as earlier pledges and commitments to the Human Rights Council in order to be elected and a general political desire to show to the international community that they actively cooperate with special procedures. Sometimes, certain members of a Government (usually the Minister of Foreign Affairs) are genuinely interested in my mission, while others (often the law enforcement, intelligence, military and prison authorities) are not. These half-hearted invitations create a difficult situation for all the actors involved. The authorities of the country are under considerable pressure to hide the real situation, to monitor my activities with distrust and to make my fact-finding as difficult as possible. This leads to suspicions and distrust on my part, which may not always be justified. Often, I had the impression of getting involved in “cat and mouse games” without knowing who was the cat and who was the mouse. Sometimes, it needed considerable efforts from my side to break through a “wall of silence” or a “wall of lies” which had been erected by the authorities when instructing detainees about how they should interact with me. But even more frustrating were situations in which Governments withdrew or postponed earlier invitations at a stage when all substantive and logistical preparations for a mission had been finalized or the mission had already begun, as in *Zimbabwe*.

C. Follow-up to country missions

19. Since I have only limited capacities to carry out country missions, I usually do not find time for follow-up missions. Nevertheless, I have a particular interest in the development of the situation of torture and ill-treatment in countries, which I or my predecessors had visited before. In an ideal situation, Governments take my findings and recommendations seriously and develop a plan of action aimed at implementing these recommendations, either alone or with the assistance of the international community. If I have the impression that Governments have a genuine interest in improving the situation by implementing at least some of my key recommendations but lack the necessary financial means, I usually appeal to UNDP and other donors to assist them.

20. In order to be kept informed about more recent developments, I send Governments and other stakeholders a request to provide information on the activities undertaken to implement my recommendations and the results achieved. Governments have no obligation to implement any of my recommendations. They may pick and choose. But I am grateful to be informed about which recommendations they accept and endeavour to implement. Several Governments, including *Georgia, Moldova, Nepal, Togo, Nigeria, Paraguay and Uruguay* informed me about having accepted most of my findings and recommendations and their efforts of implementing them, and NGOs sometimes explicitly confirm this information. In several countries, such as *Uzbekistan*, where my predecessor Theo van Boven has found a systematic practice of torture, the information provided by the respective Governments is contradicted by information I received from NGOs and other reliable sources. But without conducting a follow-up mission, it is impossible for me to assess the real situation and the extent to which my recommendations have been implemented. My repeated requests to Uzbekistan, for example, to invite me for a follow-

up mission have not been accepted so far. The only country where I was invited shortly after my mission to conduct a training workshop for members of the National Preventive Mechanism established in accordance with OPCAT is *Moldova*. *Sri Lanka* invited me for a similar purpose but later withdrew this invitation.

21. I fully recognize that the follow-up to my country missions is one of the weak points in carrying out my mandate. Although keenly interested in recent developments in all countries visited my predecessors and by me, my teams in Geneva and Vienna and I simply do not have the capacity to independently assess the extent to which our missions were successful, in the sense that the real situation of torture and ill-treatment, including conditions of detention improved. One should, however, take into account that the follow-up to my country missions is not primarily my task but that of my parent bodies to which I report, i.e. the *Human Rights Council* and the *General Assembly*. Special procedures are independent experts appointed by the Human Rights Council with a mandate to objectively investigate the legal and factual situation of a particular human right or a related problem on a global level, and to report to the Council and the Assembly on their findings, including their assessment of the situation in a particular country as a result of a country mission and their recommendations. Strictly speaking, our task is fulfilled when we deliver our reports and present them during the inter-active dialogue in the respective political decision making bodies of the United Nations. These bodies have the mandate to urge the respective Governments to implement our recommendations and the political power for an effective follow-up. Unfortunately, apart from discussing our reports during the *inter-active dialogue* and using some of our recommendations in the *universal periodic review* (UPR), not much attention is paid by the political bodies of the United Nations to our mission reports, conclusions and recommendations. On the contrary, Governments often seem to be more interested in criticizing our fact-finding and insisting on our responsibilities as laid down in the Code of Conduct, than in a proper follow-up to our recommendations.

D. Individual communications

22. I send communications concerning individual allegations of torture and ill-treatment in relation to a considerable number of countries almost on a daily basis. These communications are sent by the alleged victims and their families or via domestic and international NGOs and other channels. We carefully check the reliability of the sources and the consistency of the information provided. If the allegations are credible and relate to past practices, I send an “*allegation letter*” to the respective Government. If the persons concerned might still be under a risk of torture or ill-treatment, I send an “*urgent appeal*” which until recently was transmitted directly to the respective Minister for Foreign Affairs. After the Code of Conduct for Special procedures was adopted by the Human Rights Council in 2007, even “*urgent appeals*” need to be communicated via the diplomatic Missions in Geneva or New York which, of course, delays this urgent procedure.

23. In these communications, I emphasize to Governments my inability to assess the accuracy of the allegations contained therein. Consequently, communications forwarded to any Government shall not be interpreted as an accusation from my side. But since I only forward allegations or risks of torture and ill-treatment which at first sight seem credible to me, I also stress the obligations of the respective Governments in accordance with article 13 CAT and article 7 ICCPR to independently carry out investigations, to immediately stop any practices of torture and ill-treatment, to provide victims with reparation and, should a case of torture be found, to bring the perpetrators to justice. In any case, I ask the Governments concerned to inform me of the type of investigations conducted and of their results.

24. During the five years I carried out the function of Special Rapporteur on torture, I sent a total of 429 allegation letters to 107 Governments and a total of 886 urgent appeals to a total of 104 Governments.⁸ While the majority of Governments replied in one way or another, serious investigations into the allegations of torture and ill-treatment which actually led to sanctions against the officials responsible were only conducted in exceptional cases. The majority of Governments acknowledged receipt of my communications and assured me of their willingness to investigate and take all necessary action without further informing me of the outcome of such investigations. Often, Governments simply explained the reasons for the arrest and detention of the alleged victims, i.e. they referred to the crimes which these individuals had committed or were suspected of having committed, but failed to respond to the allegations of torture and ill-treatment which these individuals may have been subjected to. 36 Governments never provided me with any information.⁹

25. Whereas it is difficult to assess the impact of the individual communication procedure, one should also not underestimate the effect of such communications. During my country missions, I often met former victims, whether still detained or at liberty, who assured me that individual communications sent on their behalf by me, my predecessors or other special procedures had a positive effect and had saved them from further torture or similar human rights violations.

E. Reports to the Human Rights Council and the General Assembly

26. In addition to my reports on country missions, I provided annual reports to the former Commission on Human Rights and the Human Rights Council in Geneva, which are usually presented and discussed in March, and interim reports to the General Assembly in New York, which are discussed in the Third Committee in October. In these reports, I refer to my activities and select one or two specific topics which seem particularly relevant to my mandate. Since I assumed this function in December 2004, I have reported on the following topics: the situation of trade in and production of equipment specifically designed to inflict torture (presentation of the last report of my predecessor to the Commission on Human Rights), the absolute and non-derogable prohibition of torture; corporal punishment; the principle of non-refoulement and diplomatic assurances; torture and the fight against terrorism; civil and political rights including torture and detention; the distinction between torture and CIDT; the principle of non-admissibility of evidence extracted by torture; the entry into force of the Optional Protocol to the Convention against Torture (OPCAT), the obligations of States parties to CAT to establish universal jurisdiction according to the principle *aut dedere aut iudicare*; cooperation with regional organisations; the right of victims of torture to a remedy and reparation; conditions of detention; women and torture (including domestic violence, traditional practices and trafficking in women); capital punishment; and on the impact of torture on victims and the situation of particularly vulnerable groups of detainees, such as persons with disabilities, drug users and children.

⁸ E/CN.4/2006/6/Add.1, A/HRC/4/33/Add.1, A/HRC/7/3/Add.1, A/HRC/10/44/Add.4.

⁹ Angola, Armenia, Brazil, Burkina Faso, Cambodia, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Fiji, Gambia, Guinea, Guinea Bisseau, Haiti, Hungary, Iraq, Kenya, Kuwait, Liberia, Madagascar, Mozambique, Namibia, Nicaragua, Niger, Papua New Guinea, Poland, Senegal, Swaziland, Tanzania, Tonga, Trinidad & Tobago, Turkmenistan and the Palestinian Authority.

27. Usually, the inter-active dialogue with Governments, NGOs and other stakeholders is interesting and sometimes leads to highly controversial discussions. I was particularly challenged in relation to my reports concerning corporal and capital punishment. Although my mandate explicitly covers other forms of “cruel, inhuman or degrading punishment”, I was told by a considerable number of States that I had exceeded my mandate since the administration of justice was a matter exclusive to domestic jurisdiction not subject to international human rights law. I simply do not understand these arguments. Are the provisions of international human rights law relating to detention, access to justice and a fair trial, such as articles 9, 10, 11, 14 and 15 ICCPR, not at the centre of the administration of justice by providing specific limits to domestic law and practice? If corporal and capital punishment are considered outside my mandate, which types of punishment are covered by the absolute prohibition of cruel, inhuman or degrading punishment in accordance with article 7 ICCPR and article 16 CAT? I fully respect that Governments disagree with some of my interpretations of international human rights law or with the case law of the relevant UN treaty monitoring bodies which I cite in my reports. In respect of capital punishment, I did not even arrive at definite conclusions but simply argued for the need for a fresh look. But why is it necessary to immediately accuse me of having exceeded my mandate and violated the Code of Conduct? Other controversial discussions were stimulated by reports on torture-related issues in the context of the fight against terrorism, such as the use of secret places of detention and “extraordinary renditions”, diplomatic assurances to circumvent the principle of non-refoulement or the use of evidence extracted by torture.

28. In the resolutions on the issue of torture and CIDT, some of my recommendations have been included or confirmed. However, country-specific conclusions and recommendations have never led to any specific resolutions or recommendations by the Human Rights Council or the General Assembly. Nevertheless, some of these recommendations have been taken up again in the context of the Universal Periodic Review (UPR). Still, I cannot avoid the impression that better use could be made of the extensive research and investigation by me, my teams and my distinguished predecessors for the ultimate goal of eradicating torture and ill-treatment, of improving conditions of detention and of ensuring the rights to human dignity and personal integrity of detainees and other vulnerable groups. The purpose of this global study is also to highlight once again, on the basis of my specific experiences during all my fact-finding missions, the measures that Governments need to take to achieve this noble aim.

29. My country missions, visits to various detention facilities, access to relevant documents and interviews with Government officials, representatives of civil society, victims and witnesses provided me with sufficient information to assess the legal and factual situation in the countries concerned. Although the total number of countries visited is less than 10% of all UN Member States, many problems found in different regions are similar and follow a pattern which allows me to draw *general conclusions*. In the following pages, I wish to draw a distinction between the phenomenon of torture in the narrow sense, as defined in article 1 CAT, conditions of detention, other forms of ill-treatment by State actors outside detention, as well as torture and ill-treatment by certain non-State actors.

II. Torture

A. What is torture?

1. Legal definition

30. The UN Convention against Torture defines in article 1 (1) torture as “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. [...].” At least four essential elements find their reflection in this definition. First, an act inflicting severe pain or suffering, whether physical or mental; second, the element of intent; thirdly, the specific purpose; and fourthly, the involvement of a State official, at least by acquiescence. Taken together, these elements contribute to a comprehensive concept of torture, as distinguished from other forms of CIDT.

(a) *Act*

31. The term “act” is not to be understood in any way as to exclude omissions. An examination of the *travaux préparatoires* of the Convention does not reveal any indication whatsoever that the drafters would have intended e.g. to exclude from the definition of torture the intentional deprivation of a detainee of his or her food for a certain purpose leading to severe pain. It is well established by numerous decisions by the UN Committee against Torture and other relevant monitoring bodies¹⁰ that torture can be committed by omission.

(b) *Severe pain or suffering*

32. Only acts which cause severe pain or suffering can qualify as torture, as stipulated in the UN Convention against Torture which draws on to the earlier wording of the UN Declaration against Torture. The intensity of the pain and suffering distinguishes torture from degrading treatment, as elaborated in an earlier report to the Council, but not from cruel and inhuman treatment. The severity does not have to be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or impairment of bodily functions or even death, as suggested in the “torture memos” under the Bush administration in the United States.¹¹

33. The term “torture” should not be used in an inflationary manner. It is reserved for one of the worst possible human rights violations and abuses human beings can inflict upon each other, and therefore carries a “special stigma”. At the same time this means that once it is established that torture has been inflicted, one is dealing with a very serious crime and an ill-treatment of human beings who will most likely suffer from its consequences for the rest of their lives, if not physically then mentally.

(c) *Intent*

34. The element of intent contained in the definition of torture in the Convention requires that severe pain or suffering be intentionally inflicted on the victim in order to achieve a certain purpose. From this follows that torture can never be inflicted by negligence. A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal, in accordance with article 1, would qualify as

¹⁰ ECHR, Greek Case, 12 YB 1, 1969.

¹¹ E/CN.4/2006/6. See also Manfred Nowak and Elizabeth McArthur, *The UN Convention against Torture – A Commentary*, OUP, 2008. See also Manfred Nowak, What Practices Constitute Torture: US and UN Standards, 28 *Human Rights Quarterly* 809, 2006.

torture. It is also important to underline that the intentional infliction of severe pain or suffering has to be committed for a specific purpose referred to in the Convention, such as the extraction of a confession or information. For example, severe pain, inflicted during a medical intervention, with the purpose of treating a patient, does not satisfy the element of intent.

(d) *Purpose*

35. Article 1 explicitly names several purposes for which torture can be inflicted: extraction of a confession; obtaining information from a victim or a third person; punishment, intimidation and coercion; and discrimination. However, there is a general acceptance that these stated purposes are only of an indicative nature and not exhaustive. At the same time, only purposes which have “something in common with the purposes expressly listed” are sufficient¹². Noteworthy of the examples included in article 1 is that most of these purposes are related to “the interests or policies of the State and its organs.”¹³ They are linked to the work of law enforcement authorities and similar State agents and implicitly refer to situations in which the victim finds itself “at least under the factual power or control of the person inflicting the pain or suffering.”¹⁴

36. Torture constitutes a particularly aggravated form of ill-treatment. It differs from cruel, inhuman or degrading treatment (CIDT), not necessarily by the intensity of the pain or suffering inflicted, but by the specific purpose of the act. This line of reasoning is in line with the earlier position of the European Commission on Human Rights since the Greek Case.¹⁵

(e) *Powerlessness of the victim*

37. Torture, as a most serious violation of the human right to personal integrity and dignity, is predominantly inflicted on persons deprived of their liberty. Persons held in captivity, be it in police custody, remand facility or prison, or deprived of their liberty in any other context, find themselves in a situation of complete dependency and are therefore particularly vulnerable to any abuse. It is against this background that the intentional infliction of severe pain or suffering for a specific purpose requires a particularly strong moral stigma and legal prohibition.

38. At the same time, this does not mean that the Convention outlaws the infliction of severe pain or suffering. A police officer who frees a hostage from its hostage-taker or who defends himself against a violent attack is entitled to inflict severe pain or suffering, with the pivotal qualification that the inflicted pain or suffering be proportional to the lawful goal of policing and that no less intrusive measure is available. The proportionality test, however, can never be applied when a person is powerless and at the mercy of its captors. The powerlessness of the victim was an essential criterion when the distinction between torture and cruel, inhuman and degrading treatment was introduced into the Convention.

¹² Burgers, Herman J. and Danelius, Hans. *United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other, Cruel, Inhuman, or Degrading Treatment or Punishment*. 1988, 188.

¹³ *Ibid.* 199. See also Ingelse, Chris. *The Role of the UN Committee Against Torture in the Development of the UN Convention Against Torture*. 2001, 211.

¹⁴ Burgers and Danelius, 120.

¹⁵ ECHR, Greek Case, 12 YB 1, 1969.

(f) Involvement of a public official/consent/acquiescence

39. The Convention requires the involvement of a public official in order to qualify the abuse as torture or CIDT. Article 1 states that severe pain or suffering has to 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”. The Convention goes beyond the traditional concept of State responsibility and includes acts which are not directly inflicted by the State officials, but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture. Female genital mutilation, domestic violence and trafficking in human beings may also be covered, as elaborated in my report to the Human Rights Council in 2008.¹⁶

2. Special position in international law

40. The particular severity of torture is reflected in the special position its prohibition takes in international law. The prohibition of torture is one of the few absolute and non-derogable human rights, a standing shared only with the prohibition of slavery, slave trade, servitude, and the retroactive application of criminal law. Article 2(2) CAT holds in unambiguous terms that “[n]o 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.” Its absolute nature is further embodied in article 7 CCPR.

(a) Absolute prohibition

41. The absolute nature of the prohibition of torture means that the right to personal integrity and dignity — the freedom from torture — cannot be balanced against any other right or concern. As such, the prohibition of torture goes further than the protection of the right to life which may be balanced, such as in the case of the lawful killing of a hostage-taker in order to rescue his hostages. Torture must not be balanced against national security interests or even the protection of other human rights. No limitations are permitted on the prohibition of torture.

(b) Non-derogable prohibition

42. Article 2(2) CAT stipulates that even under exceptional circumstances such as “war or a threat of war, internal political instability or any other public emergency”, the prohibition of torture remains untouchable.¹⁷ According to article 4 (2) CCPR, States parties are not permitted to derogate from their obligation to respect and ensure the absolute prohibition of torture even in the times of emergency or armed conflict. Furthermore, the order from a superior or public authority may only be invoked as a mitigating factor but never as a justification of torture in domestic criminal proceedings.

(c) Challenges

43. Without doubt, the special position of the prohibition of torture is among its most challenged features, including since the so called “war on terror” was proclaimed. “Ticking bomb scenarios”, no matter how likely or not, also appear to have become the guiding cognitive frame when it comes to upholding the protection of human dignity.

¹⁶ A/HRC/7/3.

¹⁷ The impermissibility of derogations is further included in regional human rights treaties such as article 15(1) ECHR and article 27 ACHR.

44. While I fully respect and understand the fundamental security challenges with which many States are confronted, and express my full support for their legitimate and lawful endeavours to protect their citizens, it is somewhat astounding and instructive to see how many alleged “exceptional circumstances”, “unique situations” etc. were presented to me in the course of the last five years. In many of my fact-finding missions, Government officials indicated that their country was currently confronted with an unrivalled and critical security challenge ranging from “global war on terror”, internal armed conflict and secessionist movements to high rates of violent crime and drug offences. Against this background, officials of all ranks at least implicitly put the absoluteness and non-derogability of the torture prohibition into question and on some occasions portrayed it as an academic or theoretical, if not naïve ideal which lacks applicability and a sense of realism.

45. I have the honour to be entrusted with the mandate of the UN Special Rapporteur on torture during a period of time in which the absolute and non-derogable nature of the prohibition of torture was put into question for the first time since the existence of the United Nations, even in democratic States. It is and remains my firm belief that it was for good philosophical and historical reasons that States agreed in the aftermath of the Nazi Holocaust that the prohibition of torture should be guaranteed under international human rights law as one of the few absolute and non-derogable rights. History, including the recent context of the global “war on terror” shows that putting the absolute prohibition of torture in question means opening Pandora’s Box. The present Administration of the United States of America has taken decisive steps to reverse this policy, but it will take many years until the global damage that was inflicted on the prohibition of torture as a rule of *jus cogens* is repaired.

(d) *Torture as a crime*

46. The gravity of torture finds a further consideration in the obligation, rare for a human rights treaty, to “ensure that all acts of torture are offences under its criminal law”. This provision in article 4 CAT requires the criminal responsibility of any person who directly or through “complicity or participation” inflicted or only attempted to inflict torture. States have to make these offences punishable by appropriate penalties which take into account their grave nature.

47. The formulation “complicity or participation” also includes the incitement, instigation, superior orders or instructions, consent, and acquiescence, in line with the definition of torture in article 1(1). A study of the travaux préparatoires of the Convention also makes it clear that concealment, such as hiding or destructing evidence of torture, has to be made an offence under criminal law. Superior officials shall be held accountable under criminal law for their complicity or acquiescence if they knew or should have known that torture was inflicted by personnel under their command.¹⁸

48. Domestic criminal law has to cover all possible cases falling under the definition of torture as stipulated in the Convention. While it remains at the discretion of each Government how it wishes to live up to this requirement, my experience during the last five years leads me to the conclusion that it is difficult, if not impossible, to cover all the different aspects included in article 1 without explicitly incorporating this definition into the domestic criminal code.¹⁹

49. Hand in hand with the obligation to criminalize torture goes the obligation to punish perpetrators with *sentences commensurate to the gravity of the crime*. Torture is not a

¹⁸ On the concept of acquiescence see also the case of *Hajrizi Dzemajl et al. v. Yugoslavia*, No. 161/2000, para. 9.2 and 10. See below, article 16, 2.2.

¹⁹ CAT/C/SR.268, para. 2.

misdemeanour and can never be punished with administrative or disciplinary sanctions alone. During my country missions, I was confronted time and again with high Government officials who assured me that in case torture ever occurred in their countries, the perpetrators would definitely be sanctioned with the most severe penalties, such as the reduction of their salaries or the postponement of their promotion for a certain period of time. This understanding of torture as a trivial offence is one of the main reasons for its worldwide practice. The sanction for torture has to be similar to “the most serious offences under the domestic legal system”;²⁰ a review of the CAT Committee’s practice suggests custodial sentences between six and twenty years.²¹ Unless there are very strong mitigating circumstances, more lenient punishment would be considered as an insult towards the victims’ suffering and be void of any deterring effect.²²

3. Methods of torture

50. In terms of torture methods, I encountered a disturbing variety of ways in which victims were made to suffer. While an exhaustive enumeration of the measures used would fail to express the horror which victims have to endure, and an analysis of each method would merit a separate in-depth study, I would like to emphasise the literally devastating brutality with which torture victims are overwhelmingly abused, and furthermore the repugnant creativity with which torture methods are developed. Certain methods were already used by the Inquisition during the Middle Ages and are widespread in different region of the world, such as “falanga” (beating the soles of the feet) or “strappado” (suspension in various positions).

51. In most cases of torture, victims suffer from brute and unrestrained violence. They were punched and kicked, usually until they passed out; beaten with sticks, truncheons, iron bars, rifle butts, or hammers; flogged with whips or chains; suffocated with plastic bags or gas masks over their head – sometimes chilli or similar irritants were added; their skin was burned with cigarettes or hot metal objects; sensitive parts of their bodies, e.g. genitals, were particularly severely beaten or electrocuted. Victims were trampled on their thighs and legs, and had needles forced under their fingernails. Sometimes even shot wounds were intentionally inflicted. The list could be easily extended. The victims are normally handcuffed to a chair or radiator, stripped naked or suspended from the ceiling. In no way is the victim able to protect him or herself.

52. More sophisticated torture methods are applied with such regularity that they acquired their own names, e.g. “flying to space”,²³ “grilled chicken”,²⁴ “telephone”,²⁵ “tiger bench”,²⁶ “exhausting an eagle”,²⁷ “reversing an airplane”²⁸. The euphemistic wording only adds to the humiliation and reflects the dehumanisation of the victim.

²⁰ Burgers and Danelius, 129.

²¹ Ingelse, 342.

²² *Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005.

²³ A person is made to stand on a chair which is eventually kicked away. See E/CN.4/2006/6/Add.4.

²⁴ A detainee is handcuffed behind the knees and hung upside-down from a pole passed behind the knees and subjected to beatings (also called “farruj”). A/HRC/4/33/Add.3.

²⁵ Beating with the flat hands on both ears, resulting in temporary or permanent damage to their hearing. A/HRC/7/3/Add.6.

²⁶ The victim is forced to sit motionless on a tiny stool a few centimeters off the ground for a long period of time. E/CN.4/2006/6/Add.6.

²⁷ The victim is forced to stand on a tall stool and subjected to beatings until exhaustion. E/CN.4/2006/6/Add.6.

²⁸ Person has to bend over while holding legs straight, feet close together and arms lifted high. E/CN.4/2006/6/Add.6.

53. A distinct category of torture which I also raised in one of my earlier reports to the Human Rights Council is sexual violence.²⁹ Rape and other sexual forms of abuse are intended to violate the dignity of the victim in a very specific manner. Beyond the actual physical pain, sexual violence results in severe psychological suffering and leaves most victims traumatized for very long periods of time. While the overwhelming majority of victims of sexual violence are undoubtedly women, I encountered cases where male detainees had been sexually abused in several countries. The fear of stigmatisation and feeling of shame makes both women and men reluctant to speak out about their ill-treatment.

54. Most of the torture methods I encountered leave clearly visible traces, which I also take as an indication that the actual perpetrators were entirely sure that they would not be held accountable and therefore did not make any effort to conceal the ill-treatment of their victim. At the same time, there is an increasing variety of torture methods applied with the intent not to leave any visible physical traces. These methods comprise inter alia the exposure to extreme temperatures, stress positions, beatings with sand-filled plastic bottles, shaking or submersion in water. The increased use of these methods calls for the strengthened and increased availability of forensic medical expertise in places of detention and in the overall efforts to combat torture. Forensic medical science allows torture allegations to be corroborated and is instrumental in countering the emerging loopholes facilitating impunity. The Istanbul Protocol (Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) of 1999 set an indispensable standard in this regard.³⁰

55. The establishment of psychological torture methods is a particular challenge. Mock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods. In most cases, victims of mental abuse are left dependant on counselling and other psychological or psychiatric support for long periods of time. Moreover, their suffering is very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations.

56. When it comes to the prevalence of certain specific torture methods, it appears noteworthy that certain methods were regularly applied all over a country or by specific units, such as anti-terrorism units. Such patterns suggested that some form of “torture training”, whether formal or informal, must have been provided. This, in turn, is a strong indication that torture is not limited to isolated cases but inflicted in a routine if not systematic manner.

57. Furthermore, the persistence of torture methods over time is an instructive criterion for evaluating the success or failure of attempted reforms of the criminal justice system and other sectors. A number of countries I visited had undergone a political transformation during recent years, moving from an autocratic regime to democracy. Nevertheless, in several cases, the same torture methods were applied as during the earlier regime, suggesting that reforms had not sufficiently penetrated the work of, for example, ordinary law enforcement agents.

²⁹ A/HRC/7/3.

³⁰ HR/P/PT/8/Rev.1

B. Why is torture inflicted?

1. Purpose of torture and reasons

58. Torture is always committed with a specific purpose. The pain and suffering inflicted is a means to achieve a certain aim as the examples in article 1 CAT indicate.

(a) Extraction of a confession

59. While I came across a variety of purposes for which persons had been tortured, the vast majority of cases were for the extraction of a confession. One detainee in Kazakhstan indicated that there were “people confessing to the killing of Kennedy”. Suspects are first intimidated and then threatened with ill-treatment in case of non-cooperation. Eventually, the person is tortured. The abuse can take place right after arrest or during transfer. In most cases however, it is inflicted at the police station; if not in the holding cells then in ordinary offices or locations notorious for its use for interrogations and ill-treatment.

60. In most countries visited, as well as in many other legal systems, the confession of a suspect holds a very prominent and very dangerous role when it comes to establishing criminal accountability. While the admission of guilt and the realization of having done something wrong is certainly significant to rehabilitate and reintegrate an offender, the ability to convict a suspect on the basis of a confession, without any further supporting evidence, is a major contribution to an environment conducive to torture.

61. While there are several factors to explain why torture is inflicted, it is important — partly in order to establish mechanisms preventing torture — to inquire into the motives of the individual perpetrator. The resort to torture becomes a tempting option for an individual police officer due to a fatal combination of various elements: 1) officers are under considerable pressure from their superiors, judges, prosecutors, politicians, the media and the general public to solve cases; 2) the lack of state of the art equipment or knowledge of modern investigation techniques (e.g. DNA evidence); and 3) the absence of safeguards, such as the de facto admissibility of evidence obtained under torture or non-representation by a lawyer during interrogation, make the extraction of a confession the most expeditious means of “solving” a case. Furthermore, in many countries I visited, perpetrators of torture were motivated by a profane mix of financial or professional self-interest. The advancement of one’s own job position and the promotion to a higher rank and salary is often dependent on the amount of cases solved. While in principle there may be some reasonable rationale behind such a link, this incentive makes the torturing of detainees a career-boosting exercise in a context which lacks any meaningful safeguards. Since anybody would say anything his or her tormentor wanted to hear in order to stop the pain, anybody can be convicted. In such a context, a confession is solely dependent upon the physical and mental strength of the victim, rather than an actual commission of the crime. As an indication of the prevalence of torture as a means to obtain a confession, in eleven of the fifteen countries I have visited, the police used torture in a widespread or even systematic manner against individuals in their custody.

(b) Extraction of information

62. The use of torture to extract information other than a confession from a detainee is also widespread in many countries. Often detainees, whether in prisons or in police stations, were severely beaten in order to release names of co-perpetrators of ordinary crimes, and most of these victims were convicted for small offenses. As an example, numerous

detainees I interviewed during my mission to Indonesia, often incarcerated for drug-related crimes, indicated to have been tortured to provide information on their drug suppliers.³¹

63. Torture is also inflicted on detainees with the aim of extracting intelligence from them, especially in the context of the fight against terrorism. Since 2006, I conducted numerous interviews with former detainees of the United States detention facility in Guantánamo Bay or so-called “black sites”. In many cases, torture was perpetrated by the CIA to gather intelligence on the Al-Qaida network and other terrorist groups. The purpose of using torture on most of the detainees was therefore to extract information on other terrorism suspects and potential plots.

(c) *Extraction of money and corruption*

64. Torture, or the mere threat of it, is very often used to extract money from victims, their families or friends. Such extortion can take place inside or outside a detention setting.

65. Low and irregularly paid salaries, a lack of safeguards against the abuse of power and a certain degree of greed are the main contributing factors which cause officials of the administration of justice to extract money from those whose well-being they should be responsible for. In many countries visited, corruption was an endemic practice and money extracted through the threat of torture was used to top-up the officials’ low wages. The recourse to extortion was perceived to be totally legitimate due to the State’s shortcomings. After all, according to broad opinion, it is because of their criminal activity that the administration of justice has to work.

66. This abuse of power goes so far, that for example in Togo, many detainees I interviewed indicated that they would not be provided with any drinking water unless they paid for it.³² In Indonesia, corruption was found to be “quasi institutionalized”³³ and detainees were offered to be “spared” from ill-treatment in return for money. In Paraguay, detainees even had to pay bribes for their “accommodation” in cells.³⁴

(d) *Punishment*

67. Torture as a form of punishment is mostly inflicted in the context of detention. Detainees who have violated prison rules or may have attempted to escape are often severely punished by physical as well as mental ill-treatment. This was openly acknowledged by the responsible authorities on several occasions such as in Togo, where officers-in-charge admitted to the occasional use of violence, especially when a detainee was suspected of having committed a grave crime or did not obey orders.³⁵ Torture as a punishment is also inflicted in cases in which the victim has been caught red-handed by the police; instead of waiting for a legal sentence by a judge, officers impose the “sentence” they deem appropriate.³⁶

(e) *Intimidation and suppression*

68. Torture is also inflicted for the purpose of intimidation or suppression in various contexts. Their commonality is that by inflicting torture, the victims and their peers, who

³¹ A/HRC/7/3/Add.7.

³² A/HRC/7/3/Add.5.

³³ A/HRC/7/3/Add.7, para. 37.

³⁴ A/HRC/7/3/Add.3, para. 68.

³⁵ A/HRC/7/3/Add.5.

³⁶ See also chapter III. D. on corporal punishment in this document.

are ultimately also victims, shall be forced to subordinate or revoke certain beliefs or convictions.

(i) “Welcome” treatment in prisons

69. A frequent example is the abuse of new arrivals in detention centres who are exposed to various forms of “welcome treatment” in order to make them complacent and submissive. Detainees who are perceived as “difficult” are at an especially high risk of receiving this kind of welcome treatment in order to intimidate and subordinate them to the authority or the prisoner hierarchy. This abuse is sometimes carried out by officers themselves or by other detainees with the officers’ consent. A particularly serious example of violence against new arrivals was reported in al-Jafr prison in Jordan, where detainees indicated that they were met by a “welcoming committee” of up to 20 officers who forced them to strip to their underwear in the courtyard outside their assigned barracks; and subjected them to heavy beatings with electrical cables and batons for long periods at a time. If they lost consciousness, they were revived with cold water and beaten again. This treatment lasted for days.³⁷ In other countries, abuse is focused upon physical violation and humiliation. In Kazakhstan, I received consistent descriptions of how the prison personnel, with the support of convicts cooperating with the management, beat newcomers and forcibly introduced a rubber tube in their anus, for alleged medical and hygiene purposes. There were also some reports of rapes and other treatments deliberately used to inflict suffering.³⁸ In addition to such direct violence, detention in very poor conditions in “welcome cells” is often aimed at “breaking” the new arrivals; the conditions of these cells are generally worse than elsewhere in the facility and are also used as punishment cells for other detainees. New arrivals may be kept either in complete isolation or in very overcrowded cells, and in some cases they are forced to endure weeks or even months of this “welcome” treatment.³⁹

(ii) Public torturing in detention

70. One frequent example of how torture is used for the purpose of intimidation is the public ill-treatment of a detainee. While the victims themselves may find the exposure of their suffering as additionally degrading, the ill-treatment is intended to induce fear among other detainees. The victims are normally taken out of their cells and subsequently ill-treated within ear- and eyeshot of other detainees, be it in front of the holding cells in a police station, in a room from where the cries are well audible to other detainees, or in the middle of a courtyard in a prison. The abuse is therefore not only directed towards the direct victim but to all other detainees. It is a demonstration of power and indicates what others who do not comply or voice any disapproval will face. In some instances, detainees have been selected for ill-treatment without following any particular logic or pattern. The arbitrariness with which one might end up being tortured further increases the feeling of vulnerability and fear. The ultimate demonstration of the captors’ control and the victims’ powerlessness are those cases in which detainees are forced to torture their fellow detainees.

³⁷ A/HRC/4/33/Add.3, Appendix, para 9.

³⁸ A/HRC/13/39/Add.3., para 20.

³⁹ Similar “welcome treatments” were also encountered during my missions to Indonesia (e.g. A/HRC/7/3/Add.7, Appendix I, para 45.) and Moldova (e.g. A/HRC/10/44/Add.3, Appendix II, para 71).

(iii) Suppression of political dissent

71. Perhaps most dangerously, some Governments seek to intimidate their population through the use of torture against persons who have or who are perceived of having convictions contrary to those held by the Government, or who criticise their policies or practices. The victims are often activists with different agendas, including members of the political opposition, religious or ethnic groups, or human rights defenders. Torture, often in combination with abduction and unaccounted detention, is used to silence their voices of dissent. Perpetrators originate from the ranks of the police, the military or affiliated non-state units. Following widely-reported demonstrations, credible allegations of such politically-motivated torture have been received over the last two years in a number of different countries, including, China, Iran and Zimbabwe. During my missions as Special Rapporteur, I have frequently found evidence of violent abuse or particularly harsh conditions applied to suspects of political crimes. In Equatorial Guinea, I found political prisoners held in solitary confinement for periods of up to four years, most of them in leg irons practically all the time. Furthermore, I have received very serious allegations of severe and prolonged torture of Equatoguinean citizens accused of involvement in attempts to overthrow the political system at unofficial places of detention. According to credible testimonies, this treatment was directly ordered by high-level officials of the Government.⁴⁰ China maintains the most institutionalised method of opposing political dissent that I have encountered. Political dissidents and human rights defenders, ethnic groups that are often suspected of separatism (particularly Tibetans and Uyghurs), as well as spiritual groups such as Falun Gong are often accused of political crimes such as endangering national security through undermining the unity of the country, subversion or unlawfully supplying State secrets to individuals outside the country. Such individuals are not only at a high risk of torture when arrested, but the Re-education Through Labour (RTL) regime that is often used as a sentence for political crimes employs measures of coercion, humiliation and punishment aimed at altering the personality of detainees up to the point of breaking their will,⁴¹ and can itself be considered as inhuman and degrading treatment or punishment, if not mental torture.⁴²

2. Context which allows torture to happen

72. In the course of the last decades an international framework of hard and soft law emerged with a considerable range of norms aimed at protecting the physical and mental integrity as well as the dignity of all human beings. In principle, these standards would be sufficient to prevent and to eradicate torture. However, their effective application is missing.

*(a) Deficient legal framework**(i) Lack of a specific crime of torture in accordance with the definition in article 1 CAT*

73. The vast majority of States visited during my fact-finding missions did not have a crime of torture in their criminal codes which reflects the definition of torture with article 1 of the UN Convention against Torture, although they are almost all States parties to the treaty. This finding, as surprising as it may appear, is most certainly not only valid for those 15 States I visited, but also holds true for a significant number of other States. I do not believe that this shortcoming indicates bad faith in any way, but it highlights the prevalence of fundamental misconceptions about the elements and the nature of torture and a lack of

⁴⁰ A/HRC/13/39/Add.4.

⁴¹ E/CN.4/2006/6/Add.6, para.62.

⁴² E/CN.4/2006/6/Add.6, para.64.

sensitivity for the overall issue. In my own country, Austria, despite repeated criticism by legal scholars and the CAT Committee⁴³, the Government has failed to implement article 4 CAT by inserting a special provision on torture into the Criminal Code, as defined in article 1 CAT. Instead, the Government relies on other provisions in the Criminal Code which, however, miss the specific elements of purpose and intent and which do not provide for sanctions that would take into account the particular gravity of the crime.

74. Very frequently, national criminal codes contain provisions outlawing several offences which are similar but nevertheless not equal to torture, such as the infliction of bodily injuries, battery, duress, or wilful violence, etc. While all these offences may form part of a type of torture, none of them is sufficient to cover all the elements contained in the definition of article 1 and therefore fall short of providing an equally comprehensive protection of physical and psychological integrity. The definition of torture often relates to the infliction of injuries.⁴⁴ Time and again, my counterparts were surprised when I emphasized that the definition of torture does not require any bodily injuries, let alone any lasting impairment. The particular evil of torture is the deliberate infliction of severe pain or suffering on a powerless person, and not the infliction of injuries. Injuries can be an aggravating factor,⁴⁵ but it is impermissible to reduce torture to such a concept. Many methods of torture, such as waterboarding or asphyxiation with plastic bags do not lead to any injuries.

75. Furthermore, the insistence on injuries is particularly worrying, since more and more of the torture methods applied are designed not to leave any traces. Survivors of such practices find it much more difficult to obtain recognition of their suffering and to initiate a criminal investigation. Modern forensic examinations which could corroborate the victims' reports and secure evidence are almost never available. As such, torture methods that leave no traces do constitute an additional challenge to hold perpetrators accountable.

76. A further misconception relates to the involvement of public officials. Despite the unambiguous wording of the Convention, I encountered a lack of awareness for the scope of the accountability of State agents on numerous occasions. Public officials or any other persons acting in their official capacities are under the obligation to intervene whenever severe pain or suffering is inflicted in the circumstances described in article 1. A non-intervention due to acquiescence into an inter-prisoner violence incident is not simply a breach of professional responsibilities but also amounts to an act of torture. It is important to emphasize that the definition contained in the Convention provides for a concept of torture which does not stop at raising the negative obligation towards the State to refrain from the use of torture. The inclusion of the element of acquiescence raises the positive obligation for the State to intervene, not only in prisons, but also in schools and even in the private sphere, for the purpose of combating domestic violence.

(ii) Lack of appropriate sanctions

77. One of the main reasons for the continuous practice of torture is its largely inadequate punishment. Despite the obligation to make torture a criminal offense under domestic law and to provide for sentences which would be commensurate to the gravity of the crime, it is disappointing to see that the few perpetrators that are held accountable are

⁴³ CAT/C/AUT/CO/3, para.6.

⁴⁴ Human Rights Committee, General Comment 20, para. 5.

⁴⁵ The Danish Criminal Code does not include a specific crime of torture, but qualifies torture as an aggravated circumstance of a serious or repeated breach of duty or carelessness. This follows the misconception that torture is an aggravating factor for e.g. injuries, and not conversely. See A/HRC/10/44/Add.2, para 15.

punished with sentences far below of what would be required. While the CAT Committee in its State reporting procedure has interpreted the obligation for an adequate punishment as a long-term prison sentence similar to other most serious crimes,⁴⁶ a review of the experiences of my fact-finding missions leads to the sobering conclusion that perpetrators were predominantly punished with disciplinary sanctions and light or suspended prison sentences. The forms of disciplinary punishment normally do not go beyond the demotion of rank, delay of promotion or freeze of pay raise. These sanctions are an affront towards the victims, lack any meaningful acknowledgment of their suffering, and are void of any deterrent effect, therefore putting further persons at risk.

78. The lack of appropriate sanctions finds one explanation in the wrong conceptualisation of torture in many criminal codes as earlier outlined. Instead of holding perpetrators accountable for the offence of torture, perpetrators are sentenced under related but not similarly grave offenses. These “weaker” paragraphs provide for more lenient sentencing, allow for the payment of a fine instead of mandatory imprisonment, or for a statute of limitations rendering the entire prosecution obsolete. Citing the Austrian example, since torture is not defined as a crime with appropriate penalties in the Austrian Criminal Code, many prosecutors and judges did not develop a proper awareness about the seriousness of this crime. When the Gambian citizen Bakary Jassej a few years ago was seriously tortured by four police officers as a reprisal for his refusal to be deported to his country of origin, the prosecutor and the judge in Vienna agreed that a suspended prison sentence of six and eight months, respectively, was sufficient. The four policemen were originally not even dismissed from the Vienna police force, and the victim so far has not received any adequate reparation for the harm suffered.⁴⁷

79. The prosecution of torture under weaker elements of a crime is not only the result of the lack of an adequate definition of torture. On numerous occasions, prosecutors without any factual necessity opted to prosecute torture under weaker elements of other crimes even when there was an adequate definition of torture available. More often than anticipated during my fact-finding missions, I encountered an alarmingly close relationship between prosecution services, judges and the police. While a strong cooperation between their institutions is essential for the overall effective prosecution of crimes, their *modus operandi* seemed to jeopardize the separation of powers, undermine the independence of the judiciary, and foster a culture of impunity. I received numerous credible allegations that prosecutors and judges, due to their close personal relations with police officers in their every day work, refrained from applying the law at all or to apply it with the rigor it would require.

80. The lack of appropriate sanctioning of torture means that there is no significant deterrence. In most of the countries I visited, and I strongly assume that this conclusion has a wider validity, torture offenders have a very good chance not to face any severe

⁴⁶ See Ingelse, 342, who, on the basis of the practice of the CAT Committee, refers to an average punishment of between 6 and 20 years of imprisonment.

⁴⁷ Letter of Inquiry by Member of Parliament Mag. Terezija Stoitsits, and colleagues to the Minister of Interior regarding the abuse of Bakary J., detainee pending deportation, XXII. GP.-NR. 4255/J, 17 May 2006; Ministry of Interior, XXII. GP.-NR. 4206/AB, 14 July 2006, http://www.parlinkom.gv.at/PG/DE/XXII/AB/AB_04206/imfname_067732.pdf; Empfehlungen des Menschenrechtsbeirates an die Frau Bundesminister für Inneres aufgrund der strafrechtlichen Verurteilung von vier Polizeibeamten nach § 312 StGB (Fall Bakary J.), September 2006 http://www.menschenrechtsbeirat.at/cms15/index.php?option=com_content&view=article&id=127:200609-straftrechtliche-verurteilung-von-vier-polizeibeamten-nach-s-312-stgb-fall-bakary-j-&catid=67:empfehlungen-2006-&Itemid=83. Only in early 2010 were the policemen dismissed on the basis of a judgment by the Supreme Administrative Court.

punishment for a crime which is generally considered to be one of the worst abuses a human being can inflict on another.

(b) *Lack of procedural safeguards*

81. Individuals suspected of having committed a crime are at a particularly high risk of being tortured during the very early stages of custody. In this regard, procedural safeguards were developed in order to counter this risk, and their implementation is the linchpin efforts to eradicate torture into practice.

(i) Notification and registration of arrest

82. One of the most basic safeguards but nonetheless a crucial measure to prevent torture is the notification and adequate registration of any arrest and detention. All persons who are arrested are entitled to have their family members or other close persons promptly notified of the deprivation of liberty and their whereabouts.⁴⁸ Delays of notification may be permissible when exceptional circumstances of a criminal investigation do require; however, the communication of detainees with their counsel or family, shall under no circumstances be denied for more than a matter of days.⁴⁹ Furthermore, the authorities are obliged to inform about the reasons and any charges against the person held at the time of arrest.⁵⁰

83. Authorities have to duly record the time of the arrest and when the arrested person is taken to a place of custody.⁵¹ The European Committee for the Prevention of Torture's (CPT) call for a single and comprehensive custody record for each individual detainee, covering all aspects of a person's custody, particularly including the exact time of the deprivation of liberty, when detainees are informed of their rights, any signs of injury or mental illnesses, the time of interrogation and provision of food, deserves full support. In addition, such records should be made accessible to the detainee's lawyer.⁵²

84. The rationale behind the notification and proper recording of arrest and custody is that the open knowledge about the arrest and the place of detention already provides some protection against abuse. By way of notification, it is established that the person is under the authority of the State, which assumes the duty to care for the detainee. Unaccounted places of detention are impermissible. Diligent and un-modifiable records are a crucial contribution to establish a chain of events in cases of abuse and are essential to establish accountability.

85. While in almost all places of detention I have visited at least some records were available, most of them lacked important details or were generally incomplete. In several instances I found detainees in cells which were not documented in the register. The usual explanation I received was that the person had just recently arrived and that the paperwork would still have to be done. This excuse was in most cases difficult to maintain given that the detainees concerned reported to me that they had been detained for several days. On the other hand, I detected persons who were entered in the register but not present in the cell. This of course raises the strong suspicion that detainees were taken away in order to hide them. The usual explanation provided was that the individuals in question were away for further questioning at the criminal investigation department or had an appointment at court.

⁴⁸ A/RES/43/173, Principle 16(1).

⁴⁹ *Ibid.*, Principles 15 and 16(4)

⁵⁰ ICCPR, article 9.

⁵¹ A/RES/43/173, Principle 12.

⁵² CPT, The CPT standards, para 40.

While I do not want to exclude that this has been the case per se, it further highlights the need for a chain of documentation without any gap.

86. With regard to informing family members and lawyers, I can conclude that the delay in notification is not limited to exceptional circumstances, as international standards would require, but de facto a standard practice in several countries. While solitary confinement and restricted visiting rights may be legitimate for the shortest possible amount of time to ensure an effective investigation during the early investigation phase, it is difficult to see any valid justification for the denial to inform family members and lawyer of the arrest, particularly in the case of non-serious crimes. When discussing with officials of police stations or pre-trial facilities I realized that the lack of notification of family members or lawyers was not for a security or investigation purpose, but simply due to a mix of negligence and disrespect for the rights of detainees. Much more often than I would have initially expected, detainees urged me to inform their wives or husbands, parents or employers that they were held in police custody.

87. As far as registration is concerned, authorities frequently registered detainees only from the point of time when the arrest was officially proclaimed, but not from the moment when the person was de facto deprived of his or her liberty. Such an approach evidently misses the nature of the safeguard and hides behind an ill-guided formalism which opens ample opportunities for abuse. Numerous detainees reported that they were earlier held under “retention”, “summoned for questioning”, or similar provisions for prolonged periods of time before the arrest was made official. In other cases, authorities provided the time of arrival at the police station as the moment of arrest, and not the moment in which the person was actually apprehended. In both cases, a significant amount of time during which the detainee is already under the control of the police remains officially unaccounted for. It is during these periods that persons were most often tortured, be it already at the premises of the police station or during transfer. Official arrest was only pronounced once a person had already been ill-treated and forced to confess. Finally, custody registers hardly ever contained any reference to the medical state of the detainee.

(ii) Length of police custody

88. As already emphasised previously, detainees are under a particularly high risk of being tortured when held in police custody. Suspects mostly find themselves in the hands of those officers who are also in charge of investigating the crime at stake and have therefore an interest in obtaining a confession or other information needed to solve the crime. In order to keep this critical phase as short as possible, international human rights law requires that any person arrested or detained on the suspicion of having committed a crime has to be brought “promptly” before a judge or another officer authorized by law to exercise judicial powers.⁵³ Subsequently, the person has to be released or, if arrest is sanctioned, transferred to a pre-trial detention facility which is ideally under a different authority than the police. While it is left to States to stipulate precise time limits for police detention, the Human Rights Committee has made clear that delays may not exceed “a few days”.⁵⁴

89. Summarizing my experiences, I have to conclude that suspects are held in police custody much longer than international human rights law would provide for. First, in many of the States visited, the domestic legal framework already provides for periods in police custody which in my opinion are not compatible with the limit of a maximum of a few days. This finding holds particularly true for regulations which provide for extended police custody in “exceptional circumstances” since their application tends to become a matter of

⁵³ ICCPR, article 9(3). Human Rights Committee, General Comment No. 8, 30 June 1982.

⁵⁴ Human Rights Committee General Comment No. 8, para. 2.

standard practice, including on ordinary suspects. Attempts to find an explanation for this development concern the wider functioning of the criminal justice cycle and the absence of an effective system of checks and balances. Prosecutors and judges often rubberstamp applications for extended police custody, without looking into the merits of the individual request. The motives may vary, but individual prosecutors often seem to lack the “professional distance” from police authorities and rather engage in a joint effort to fight crime, while neglecting their fundamental rights obligations.

90. This leads to suspects being exposed to their interrogators for weeks and months and finding themselves in a situation which is generally dominated by a feeling of vulnerability and fear. In many of the police stations I visited, there was a palpable level of fear which manifested itself *inter alia* by the strong reluctance of detainees to speak with me. Once detainees were transferred from the police station to a remand facility, I received numerous credible allegations from detainees who did not dare to raise them earlier due to fear of reprisals.

91. Prolonged detention in police cells raises further serious concern regarding the conditions of detentions. Police cells are by design not suitable for extended periods of custody and lack the necessary space and other facilities needed in order to ensure adequate conditions of detention. Often, detainees in police custody are not even provided food or water. Furthermore, the practice of excessive length of police custody contributes to overcrowding which in turn sets the ground for numerous other problems including hygiene, health, bedding and privacy.

92. Another consequence of long periods of police custody is that torture traces may have already disappeared once a detainee is transferred to a remand prison. Against this background, an investigative officer may be more tempted to coerce a confession since no external authority will be able to see any traces. The possibility of securing any medical evidence is more difficult, and the establishment of accountability further unlikely.

(iii) Inadmissibility of evidence obtained under torture

93. The inadmissibility of evidence obtained under torture is one of the most crucial safeguards against abuse in the criminal justice system. Its purpose is twofold: first, given that the vast majority of torture is inflicted in the course of criminal investigations with the purpose to extract a confession, the safeguard intends to remove a prime incentive for torture. Second, evidence obtained under torture is highly unreliable concerning the veracity of the statements obtained. Declaring the evidence inadmissible helps ensure that no innocent person is convicted.

94. The inadmissibility of evidence obtained under torture finds its strongest expression in article 15 CAT which stipulates that 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”. Similarly, article 14 (3) (g) ICCPR provides that everyone has the right “not to be compelled to testify against himself or to confess guilt” and includes also testimonies obtained by the infliction of CIDT as inadmissible. The Human Rights Committee expands on the resulting obligations for States and holds that “It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.⁵⁵

95. On the legal level, most States I visited seemed to have complied with this provision by and large. However there were significant deviations which tended to undermine the

⁵⁵ CAT/C/CR/33/3, 2004, para. 5 (d).

essence of the prohibition. In China, for example, in which the admission of guilt receives particularly high attention, the Criminal Procedure Law explicitly prohibits the extortion of confessions by torture and the collection of evidence by threat, enticement, deceit or other unlawful means.⁵⁶ However, this provision has not been matched with a prohibition of using illegally obtained confessions during court proceedings. The Supreme Court in this regard held that confessions under torture cannot become the basis for a criminal charge or conviction, but it did not exclude their overall admissibility. Prohibiting the extraction of a confession by torture but allowing it to form part of the proceedings falls short of the protection the safeguard is meant to have.

96. Another example of a deficient incorporation of the prohibition is Sri Lanka. During my mission, Sri Lanka's ordinary laws provided that confessions made in police custody were inadmissible before the court and any confessions extracted through torture were excluded.⁵⁷ However, while these provisions appeared to go relatively far, there was no such safeguard under the Emergency Regulations. Against this background, it appears particularly worrying but again not that surprising that I found a routine practice of torture in the context of counter-terrorism operations which were conducted under the Emergency Regulations and thus not subjected to the safeguard.

97. In terms of the actual implementation of the safeguard I have to conclude that confessions and other evidence obtained under torture are more frequently admitted at court than not. In most of the countries I have visited I received a very high number of related allegations which were convincingly corroborated by representatives of the civil society, lawyers, local human rights experts and others. While I was evidently not in the position to verify each individual case, it was without doubt that the competent courts which are under the obligation to take up any allegation of torture and at least enquire into their veracity overwhelmingly failed to do so and sweepingly rejected any allegations of torture.

98. There are several elements which seem to explain this structural malfunctioning of the judiciary. In most countries, suspects are confronted with an almost insurmountable credibility deficit. In sharp contrast to the presumption of innocence, they are *a priori* believed to be guilty and to raise torture allegations only in order to evade justice. There is a predominant societal perception that anybody who has been arrested and accused must be in some way criminal. The almost customary dismissal of torture allegations without any investigations suggests that also the judiciary is not immune from this mentality. A second element is that there is no shift in the burden of proof. It is not enough for suspects to indicate that their confession was obtained under torture; they have to establish the ill-treatment. Since torture almost always takes place behind closed doors, lacks any witnesses except its perpetrators, and any independent forensic expertise to document traces of abuse is beyond the survivor's reach, this requirement is the most difficult to satisfy and appears almost taunting. In order for the safeguard against the admissibility of evidence obtained under torture to have any realistic prospect of unfolding, a shift of the burden of proof regarding torture allegations has to take place. This is also reflected in the jurisprudence of domestic courts and international monitoring bodies. As Lord Bingham so eloquently stated in a well-known dissenting opinion, "it is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet".⁵⁸ A third element concerns many judges and the judiciary in general, who are confronted with an overburdening caseload, chronic understaffing and an overall lack of resources. In such a context, the follow-up of torture allegations from a perceived criminal

⁵⁶ Article 43 CPL; E/CN.4/2006/6/Add. 6, para 37.

⁵⁷ Articles 24–27 Evidence Ordinance.

⁵⁸ *A and others v Secretary of State for the Home Department* [2005] UKHL 71. See also Gary Slapper and David Kelly, *The English Legal System*, 10th edition, Routledge-Cavendish, 2009.

does not seem particularly appealing. This of course raises not only wider questions regarding the independence and professionalism of judges, but also regarding prosecutors and lawyers who are all under the obligation to act on any allegation of torture. While this issue would certainly require further study, it seems that the institutional separation of judges, prosecutors, police and defence lawyers is often undermined by informal power structures and relationships which are detrimental to the rights of the suspect.

99. The widespread use of evidence obtained under torture includes cases for which suspects have been convicted to death. In Pasir Putih Maximum Security Prison in Indonesia, for example, the vast majority of detainees on death row reported with compelling detail how they were tortured, including by death threats, beatings with hammers, and severe beatings for prolonged period, until they had signed a confession which was later presented at court.⁵⁹

100. This situation and the fact that under many national criminal laws a confession alone is sufficient to convict a person, one comes to the alarming conclusion that a considerable number of persons are currently unrightfully imprisoned, either because they have not committed the crime they have been accused of or because they are convicted solely on the basis of a confession obtained under torture.

101. In order to rectify this worrying situation several proposals have been made. As a first but important step, criminal procedure codes should be amended and only accept confessions which are made in the presence of a competent and truly independent lawyer and further confirmed before the judge. Furthermore, confessions alone should never be sufficient for a conviction, but should always require further supportive evidence. The video or audio recording of interrogations has also been a long standing demand by many anti-torture bodies. In light of their increasingly low priced availability it is difficult to see why such technical safeguards cannot be implemented.

(iv) Access to a lawyer and legal assistance

102. Access to a lawyer and legal assistance is provided by several international and regional norms, *inter alia* article 14 ICCPR. While one prime aspect of access to a lawyer and legal aid is the assurance of the right to a fair trial, it is furthermore crucial in terms of preventing abuse. Access to lawyers is a minimum requirement in order to open up places of detention and a contribution to a basic level of transparency. Lawyers are for many detainees the only contact with the outside world. Their absence during extended detention would leave persons deprived of their liberty completely at the mercy of the detaining authority and prone to abuse. With good reason the Inter-American Commission on Human Rights held that in order to uphold the right of an accused not to be compelled to confess guilt and freedom from torture, a person should be only interrogated in the presence of a lawyer or judge.⁶⁰

103. Given that most cases of abuse take place at the very early stages of detention, immediate access is crucial, a necessity which is also emphasized by the Human Rights Committee. General Comment No. 20 states that the protection of the detainee requires prompt and regular access.⁶¹ The CPT further holds that the right to a lawyer is applicable from the very moment a person is obliged to remain with the police.

⁵⁹ UN Doc. A/HRC/7/3/Add.7.

⁶⁰ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983, 100.

⁶¹ CCPR/C/79/Add.74, 9 April 1997, para. 28.dd.74, para. 28: "all persons arrested must have immediate access to counsel."

104. In reality, the enjoyment of the right to a lawyer and legal assistance is strongly compromised. In many countries detainees are arrested, interrogated and indicted without having ever been able to access counsel. The access to a lawyer during the very early stages of arrest is hardly ever granted. Lawyers are mostly allowed to meet the detainee once the first interrogations have already been conducted and often after a confession or other incriminating evidence has been obtained. Even then, access to a lawyer remains a hypothetical option for most of the detainees since they lack the financial resources to pay for it. Given that persons of poorer social strata are overrepresented among detainees; the inability to effectively access legal aid affects the vast majority of persons deprived of their liberty.

105. The lack of legal counsel is in sharp contrast to the basic principles of equality before the law and fairness, resulting in a lack of equality of arms between the accused and the prosecutor. Detainees are often not aware of their rights, even when it comes to which treatment is actually permissible during interrogations.

106. In several States I visited, free legal aid was offered to detainees. While the authorities have to be commended for this measure, most of the legal aid schemes existed only on a procedural level and fell short of providing substantial protection of detainees' rights. Very often free legal aid was de facto not free. Many detainees reported that State-appointed lawyers requested the payment of further bribes since the remuneration paid by the State was below what a private client would pay. Unless the detainee paid a substantial amount to bridge this gap, the lawyer would not work seriously on the detainee's case.

107. In other instances, detainees had severe doubts regarding the independence of their State appointed lawyers and whether their interests were indeed properly represented. Many appointed lawyers depended on the State salary, regardless of its modesty. In order to secure reappointments, lawyers were often reported to be caught in a conflict of interest between on the one hand, the protection of the interests of their clients and challenging the authorities, and, on the other, to foster amicable relationships with the authorities and compromising the detainee's rights. Many detainees reported that their lawyer did not seriously defend their rights in order to ensure reappointment. Raising torture allegations and insisting on investigations into the crimes of those who, at least indirectly sign the pay check, is not an alternative for which many lawyers opt.

108. In order to rectify such a situation and ensure effective legal representation, it is necessary to institutionally separate contractual affairs related to the appointment of legal aid lawyers from those authorities who potentially violate detainees' rights. State lawyers have to be competent, motivated, and sufficiently remunerated. Furthermore, it is worth considering, whether detainees should have a say in evaluating the professional performance of their legal representatives.

(v) Complaints mechanism

109. Victims of torture must have a right to complain and to have their suffering heard so that their ordeal end, that those who are responsible can be held accountable and that adequate reparation can be provided. This most evident norm finds its expression in article 13 CAT. The right to complain is not limited to torture but also includes CIDT.⁶²

110. In order for a victim to be able to voice his or her allegations and also be heard, the threshold for a complaint must be as low as possible, particularly in the context of detention. Accordingly, the CAT Committee established in its jurisprudence that a formal submission or express statement of the complainant is not required, and that bringing an

⁶² CAT articles 13 and 16(1).

allegation in a non-bureaucratic manner, either verbally or in writing, to the attention of a State official suffices.⁶³ The latter can be any ordinary staff member of a penitentiary facility, but also doctors, social workers, prison chaplains, prosecutors, or, if existent, members of a monitoring body. It remains within the discretion of detainees where and to whom they wish to complain.

111. Once an allegation has been made it must be promptly followed up by an impartial examination by a competent body which is independent from the alleged perpetrator, equipped with full investigative powers in order to secure evidence and establish the facts, and ultimately be in the position to forward the matter to those authorities that can initiate criminal proceedings. As a minimum, the complainant shall be heard by the authority conducting the examination and meet with a doctor for a forensic examination.⁶⁴

112. For the right to complain to be meaningful, complainants must be able to rely on the fact that their complaints will not result in any reprisals. States are therefore obliged to take effective measures to protect those who dare to speak out against any form of intimidation and other adverse consequences.⁶⁵ Measures in this regard can be the transfer of the complainant or the implicated personnel to a different detention facility or the suspension from duty of the latter for as long as the results of the examination are pending. The protection from reprisals is so crucial that it actually has to be considered as a part of the right to complain. What is at stake is not only the actual case, but the general credibility and therefore functioning of the complaints mechanism, since reprisals always also exert a deterrent effect on others who may consider raising allegations in the future. States therefore have to inquire into all reported cases of intimidation and set up a program that protects complainants, witnesses and those who might be further endangered.⁶⁶

113. In retrospect, I can hardly think of any other safeguard where the legally required protection and the actual reality differ in such a glaring and devastating way. One of the most vivid, indicative and telling situations I encountered was during my mission to Nigeria. In one of the Criminal Investigation Departments in Lagos, I found more than 70 detainees crammed into one cell which was too small, badly lit, and filthy. The detainees had been held in the cell for up to more than two years, and none of them had left the cell since their arrival. They had not seen a lawyer or been visited by family members, who in many cases were not even aware of their whereabouts. In their interviews, the detainees reported how they were ill-treated by the police during arrest and interrogation at the Criminal Investigation Department. Many of them had shot wounds which were deliberately inflicted as a means to demobilize them after arrest or to extort a confession. All of them carried clearly visible traces of beatings and other forms of ill-treatment on their skin. None of them had received any medical treatment. This situation presented itself just a few meters behind a Human Rights Desk, which was set up with the purpose of receiving complaints by detainees. At the desk were a few officers on duty, and their workplace was adorned with a complaints box and posters on the rights of detainees. They had never received any complaint by a detainee.

⁶³ CAT Committee, *Parot v. Spain*, Comm. No 6/1990, para. 10.4; *Blanco Abad v. Spain*, Comm. No. 59/1996, para. 8.6; Comm. No. 59/1996; *Imed Abdelli v. Tunisia*, Decision of the Committee against Torture of 20 November 2003, Comm. No. 188/2001, para. 10.6; *Bouabdallah Ltaief v. Tunisia*, Decision of the Committee against Torture of 20 November 2003, Comm. No. 189/2001, para. 10.6; *Jovica Dimitrov v. Serbia and Montenegro*, Decision of the Committee against Torture of 23 May 2005, Comm. No. 171/2000, para. 7.2; Ingelse, 367.

⁶⁴ Ingelse, 367 and CAT/C/SR.203, para. 38.

⁶⁵ A/56/44/, para. 53(e).

⁶⁶ CAT/C/LKA/CO/2, para. 15.

114. The Human Rights Desks in Nigeria are only one example of numerous complaints mechanisms which are utterly ineffective and remind one of Potemkin villages. Whenever I received information from officials that torture is not an issue in the country because no complaint has ever been filed, in practice it has been a clear signal that the opposite is the case; that torture is routine practice and that detainees are actually too afraid to complain. This was also confirmed during my visit to the CID Lagos where I received, in the course of one afternoon, more highly credible complaints than the National Human Rights Commission had received during an entire year.

115. The effectiveness of complaints bodies is severely undermined by the de facto inaccessibility and the lack of prompt, independent and effective examinations of the allegations. I have ample grounds to believe that the vast majority of violations are never brought forward by detainees. One explanation is that detainees are simply not aware of their right to complain and that a complaints mechanism tasked with receiving allegations might exist. In a context of detention characterized by violence and other abuse, it seems beyond imagination for many detainees that they may have a right to complain and that somebody can seriously be tasked to listen to their allegations. In Indonesia, when I asked a death row detainee who reported that he was tortured during his interrogation, and whose confession was admissible during trial, if he had lodged a complaint answered “complain, to whom shall I complain, to the animals?”.

116. If detainees know about their right to complain and the existence of a complaints mechanism, the fear of reprisals and lack of confidence in the overall function of the system silences them. There is no independent complaints body which would be sufficiently detached from the authority that is holding the detainee. Most often detainees only have the option to complain to the colleagues or superiors of those who ill-treated them. Without any possibility to submit a confidential, let alone anonymous complaint, they have every reason to believe that those responsible for the abuse will hear about their complaint and may turn against them.

117. I was able to observe during the numerous visits to places of detention how strong the level of fear can be. In China, many detainees were simply too scared to engage in any conversation with me, even if it was of a rather general nature and did not refer to any compromising issues. The mere fact that they could possibly be perceived to have complained to the UN Special Rapporteur was a risk which many legitimately did not want to take on them. Other, more daring detainees agreed to talk to me only after I assured them confidentiality and not to include their accounts in the appendix on individual cases in my report. The possibility of reprisals against those who I interviewed strongly influenced the conduct of my fact-finding. Irrespective of a Government’s invitation and its acceptance of the terms of reference, which include private interviews with detainees, I could never entirely rule out that those officials who were incriminated would turn against my interlocutors once I would have left the place of detention. My work was therefore shaped both by the need to obtain a first hand account of detainees in order to assess the situation, and the paramount “do no harm” principle.

118. The fear of reprisals and the feeling of vulnerability sometimes go so far that detainees presented stories which were in sharp contrast with their physical or mental state, and which were intended to avoid to be perceived as having denounced their tormentors. During my mission to Paraguay, I encountered a man who had severe bruises all over his body in the punishment cell of a military barrack, which according to the officer in charge was not used. When inquiring into the origins of his injuries, he claimed that he just recently had an accident with his motorbike. The forensic medical examination could not

corroborate this account and indicated the infliction of force as the most likely explanation.⁶⁷

119. An even more glaring example refers to my mission to Indonesia, where I found a young man with severe swellings and injuries on his face and upper body sitting in an office and giving a statement to one of the interrogators. The person reported to be only a visitor; a claim which was hardly convincing since he was handcuffed to the chair.⁶⁸

120. The forms of reprisals are as manifold as the methods of torture and CIDT. In some cases detainees are verbally threatened, including threats against their family members who are outside of detention. Physical abuse in reaction to complaints is in most cases particularly severe since its perpetrators are driven by personal revenge and are used not only to punish those who dared to complain, but also to intimidate others. With this in mind, reprisals often take place within ear and eyesight of other detainees, so that they know what to expect in case they complained.

121. A frequent explanation I received for pre-trial detainees' reluctance to complain about their treatment is the fear that any objections will negatively influence the result of their trial. Raising a torture allegation or other human rights violations will be interpreted as being "uncooperative" and may result in longer prison sentences.

122. In general, I conclude that most complaints mechanisms are marred by an "impenetrable wall of conflicting interests" and lack of independence. Those who torture are closely linked with those who receive complaints and are tasked to follow up on them. In such a context, it seems only too reasonable to abstain from voicing discontent. This situation becomes further reflected in the fact that in general, I receive many more complaints about torture in police custody by detainees who are either already in pre-trial detention, and rely on the fact that they will not be transferred back to the police station, or convicted detainees. These individuals are beyond the reach of the police and have nothing to lose.

(c) *Lack of forensic examinations*

123. One of the major challenges when it comes to proving cases of torture and CIDT is the establishment of evidence. Since such abuses are mainly inflicted behind closed doors, victims very often have to fight an uphill struggle to make their cases heard and have their complaints properly investigated. This is particularly true for persons who are accused of having committed a crime and carry a stigma of being not credible.⁶⁹

124. Forensic medical science is a crucial tool in alleviating this burden. Experts can evaluate to which degree medical findings correlate with the allegations brought forward and forensic medical science therefore plays an important role in providing the evidentiary basis on which prosecutions can successfully be brought against those responsible.⁷⁰ Forensic medical science can demonstrate that diagnosed injuries or behaviour patterns of the victim are consistent with the abuse described. Furthermore, modern medical examinations enable the detection of injuries which are otherwise not visible, such as soft tissue or nerve trauma - an important ability in light of the ever increasing sophistication of torture methods.

125. In order to use the abilities of this science, I was accompanied by forensic experts on almost all fact-finding missions. Their expertise allowed me to arrive at better qualifications

⁶⁷ A/HRC/7/3/Add.3, Appendix I, para 29.

⁶⁸ A/HRC/7/3/Add.7, Appendix I, para 141–146.

⁶⁹ See also A/62/221, para 50.

⁷⁰ See also E/CN.4/RES/2005/26.

of the allegations received as well as of the explanations of detainees' traumata provided by authorities. In an impressive high number of cases, it was possible for a medical layperson to conclusively demonstrate that the officials' account was incompatible with the victim's injuries. In some cases, it was even possible to establish that a specific instrument, for example a wooden stick in the office of a warden, was used for the abuse since the injuries matched the instrument's shape and form. This ability to secure evidence and ultimately use it in criminal proceedings is a crucial empowerment for the victims and the overall strive to fight impunity.

126. In addition to its evidence-establishing role for purposes of prosecution, forensic medicine can also potentially play a transforming role in terms of prevention. As already requested in the Body of Principles and later further expanded in the standard-setting Istanbul Protocol, routine forensic medical examinations of detainees after admission to every place of detention would create a system of "checkpoints" which would minimize the number of unaccounted cases of torture and render a shifting of blame and accountability among the various detention facilities and authorities impossible.

127. However, while much progress has undoubtedly been made in this field in the last few years, both in terms of medical standards and legal norm-setting, the impact of forensic medical science seems to be undermined by a lack of rigorous implementation, sufficient training and institutional dependencies. While almost all large detention facilities employ medical staff, they often lack the required expertise in order to conduct proper forensic examinations. In many cases, the physicians have an almost exclusively therapeutic role or only have a basic medical training as paramedics;⁷¹ their focus is on curing sick detainees and examining new arrivals for contagious diseases or obvious wounds. Since traumata caused by torture are not necessarily visible, their examinations are likely to miss a considerable number of torture cases.

128. When it comes to reporting traces of torture, physicians often find themselves caught in a conflict between their loyalty (and economic dependency) towards their employer and their actual professional obligation to report. Most of the medical staff is employed by the authority which is also in charge of holding detainees and whose officials are responsible for the ill-treatment. By raising cases of ill-treatment, medical staff may run the risk of jeopardizing their employment. In order to rectify such a lack of independence, doctors should be employed by the Ministry of Health and not by the Ministries tasked with holding detainees.

129. Examinations must be a routine practice after every transfer and every allegation or suspicion of torture. It is essential that the detainee meets the forensic expert in a setting which is free of any surveillance or pressure and that the examination takes place in full confidentiality. Unfortunately, this is almost never the case. During my mission to Georgia, for example, I was informed that transfers of detainees to non-resident medical experts were conducted by the police. Since a number of allegations concerned the police, this may raise possibilities for undue influence. In other cases, such as in Togo, detainees had to request the authorization for the examination from the prosecutor, who at the same time led the investigation against the suspected criminal and torture victim. Since the establishment of any torture could weaken their case, prosecutors may be tempted to disapprove any request for medical examinations.

130. Medical examinations completely miss their point if they are not carried out with a view to protect the victim and initiate proceedings to hold the perpetrators accountable. In Moldova and Indonesia, I was told that in some cases detainees were returned to the police

⁷¹ A/HRC/10/44/Add.3.

if the examination upon arrival in a pre-trial facility established that a detainee had been tortured. The explanation I received was that the authorities of the pre-trial facility would be afraid to be made responsible for the condition of the detainee and did not want to bear the costs needed to treat the victim while in detention, since the injuries were inflicted by the police. Admitting the victim and initiating an inquiry into the police's accountability was apparently not an option.⁷²

131. In general, there is a pressing need to step up the overall involvement of forensic medical science across the various sectors of the criminal justice cycle, and also to places where persons are at particular risk, including administrative detention and psychiatric institutions. If police officers, prison wardens, prosecutors, and judges be under the obligation to request proper forensic medical examinations as a standard procedure whenever there are suspicions or allegations of ill-treatment, victims of torture would be in a considerable stronger position to obtain acknowledgement of their suffering, to hold perpetrators accountable and to prevent torture in general.

(d) *Impunity*

132. When looking for an explanation for the scope and persistence of torture, one has to acknowledge that impunity is one of the main reasons why torture is so strongly entrenched. As much as impunity is a widespread phenomenon for past crimes of torture, today's impunity is one of the root causes for the continuation of torture in the future.

133. The magnitude of impunity has been for me one of the most disappointing findings of my tenure as Special Rapporteur on Torture. In most States I visited, impunity was close to total, despite an undeniable, sometimes routine, widespread or even systematic practice of torture. In a few countries, the Government was not able to provide me with one single case in which a perpetrator of torture had been held accountable under criminal law and punished with adequate sanctions.

134. Combating impunity is the most important objective of the UN Convention against Torture of 1984. Under articles 4 to 9 CAT all 146 States parties have far reaching obligations to criminalize torture, to establish a variety of jurisdictions in relation to the crime of torture, including universal jurisdiction, and to take a number of effective measures aimed at bringing suspected perpetrators of torture to justice.. Any individual case of impunity consequently constitutes a violation of States parties' international human rights obligations. Furthermore, impunity for acts of torture clearly constitutes a violation of the obligation of States Parties under article 2(1) to take effective judicial measures to prevent acts of torture.

135. In order to successfully proceed from an initial investigation to an eventual conviction and punishment of the perpetrator reflecting the gravity of the crime, several obstacles to the pursuit of justice have to be overcome. As outlined earlier, victims are in most cases not in the position to file a complaint without putting themselves into further danger and risk suffering reprisals. In order to counterbalance the vulnerability of the victim and the de facto inaccessibility of complaints mechanisms, particularly in the context of detention, article 12 CAT shifts the responsibility to initiate an investigation from the victim to the State authority most directly involved.⁷³ Accordingly, "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."

⁷² A/HRC/7/3/Add.7, Appendix I, para. 14. A/HRC/10/44/Add.3, Appendix II, para 20.

⁷³ Nowak and McArthur, Article 12, para 52.

136. The decision on whether to conduct an investigation is not discretionary, but rather is an obligation irrespective of the filing of a complaint.⁷⁴ Whenever there are reasonable grounds, an investigation must be instigated regardless of the origin of suspicion.⁷⁵

137. The “promptness” of the investigation is crucial in two aspects. First, it has to be ensured that the victim is protected and no further abuse can be inflicted. Second, unless the torture resulted in permanent traumata, injuries will soon disappear and undermine the evidentiary basis. As soon as there is a suspicion, an investigation shall be initiated immediately or without any delay, within the next hours or days.⁷⁶ It therefore has to be ensured that all public officials, in particular prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, report this *ex officio* to the relevant authorities for proper investigation in accordance with article 12.⁷⁷

138. The requirement to initiate an investigation *ex officio* would be a very strong means to combat impunity and prevent torture. Unfortunately, most officials I encountered are apparently not aware that they are under any international human rights obligation to be active on their own initiative, including whenever they come across detainees with suspicious injuries or hear rumours about a colleague abusing detainees. In fact, in some countries, domestic law does not include any *ex officio* obligation for law enforcement officials.⁷⁸

139. Instead they follow a “don’t ask, don’t tell” approach and turn a blind eye. For example, at Ciudad del Este Prison in Paraguay, I interviewed a detainee who had recently been subjected to torture and ill-treatment by the police, which had left visible marks. He had subsequently been interviewed by the prosecutor, taken before the court and transferred to the prison. However, none of the officials who saw him asked whether he had been subjected to torture or ill-treatment. In another case, also in Ciudad del Este, I interviewed a detainee with visible signs of torture and ill-treatment at a local police station. In response to my questions about the injuries, the police guards on duty simply informed me that the detainee arrived from another police station with the injuries. However, they had not taken any steps to carry out a medical examination, initiate an investigation or provide medical treatment.⁷⁹ Similarly, the head of Jordan’s main pre-trial detention facility clearly told me that initiating investigations into traces of torture of new arrivals would not be his responsibility.⁸⁰

C. Fighting torture – What needs to be done?

1. Combating impunity

(a) Aligning the legal framework

140. Impunity for the perpetrators of torture is one of the root causes for its widespread practice worldwide. To fight impunity it is important that States establish a legal framework

⁷⁴ See e.g. CAT/C/SR.145, para. 10 and SR.168, para. 40; CAT/C/FRA/CO/3, para. 20.

⁷⁵ Blanco Abad v. Spain, No. 59/1996, para. 8.2. See above, 3.2.

⁷⁶ This corresponds also to the meaning of „promptly” in articles 9 and 14 CCPR: cf. Nowak, CCPR-Commentary, 210–240, 302–357. Nedyibi v. Austria, No. 8/1991, para 15; M’Barek v. Tunisia, No. 60/1996, para. 11.5–11.7; In Blanco Abad v. Spain, a delay of two weeks was found to constitute a violation of article 12. See Blanco Abad v. Spain, No. 59/1996.

⁷⁷ Sri Lanka Report, A/HRC/7/3/Add.6, para 94 (b).

⁷⁸ Sri Lanka Report, A/HRC/7/3/Add.6, para X.

⁷⁹ A/HRC/7/3/Add.3, para 58.

⁸⁰ A/HRC/4/33/Add.3, para 57.

that unambiguously prohibits and sanctions torture. Article 4 CAT creates an obligation for States to establish a specific crime of torture, as defined in article 1 CAT, in its domestic criminal code.

141. It is important that States adequately define torture in their domestic criminal law. Such definition must cover all elements contained in article 1 CAT. The definition is to explicitly include psychological torture, which is by no means less severe than physical abuse. A limitation to physical torture would provide loopholes for the perpetrators and encourage them to resort to psychological torture. It is also important to reiterate that torture requires no bodily injuries. In the past, States have increasingly resorted to torture methods disguised as “enhanced interrogation techniques” that leave no physical traces and are thus more difficult for the victims to prove.

142. Moreover, the offence of torture is to include any act of ‘complicity or participation’ in torture. Article 4(1) CAT must be read in conjunction with the torture definition in article 1(1) including instigation, consent and acquiescence. Consequently, States have to criminalize the incitement, instigation, superior orders or instructions, consent, acquiescence and concealment of acts of torture. Superior officials who knew or should have known about torture practices of their personnel are guilty of complicity and/or acquiescence. The non-intervention of State officials in incidents where torture occurs, even in the private sphere, must also be punishable as an act of torture.⁸¹ Lastly, the attempt to commit torture should also be criminalized. As a consequence, superior orders to apply torture that are not followed are to be punished as a criminal offence.⁸²

143. It was contested that the obligation to make torture a punishable offence under criminal law would require the establishment of a specific, separate offence.⁸³ In practice, it is difficult if not impossible, to cover all the different aspects included in the definition of torture under article 1 CAT without explicitly incorporating this definition in the domestic criminal code. A clear definition of the crime of torture in accordance with article 1 CAT is needed to establish universal jurisdiction. The criminalization of torture in one provision is required to provide for legal certainty. It allows law enforcement officials to understand and apply clear rules and facilitates complaints for victims of torture. The CAT Committee has increasingly urged States to include an explicit definition of torture in their national criminal legislation.⁸⁴ In order to avoid any problems of interpretation and implementation, the full *verbatim* incorporation of article 1 CAT is advisable. Of course, this does not apply to the ‘lawful sanctions’ clause in the last sentence of article 1(1) CAT.

144. In order to have a deterrent effect, the sentence for the offence of torture must be commensurate to the gravity of the crime. When torture is only met with disciplinary sanctions or minor sentences, it is an insufficient retribution for victims, but sends no deterrent message to potential perpetrators and creates no awareness among prosecutors and judges of the seriousness of the crime. Consequently, torture should be a crime similar to the ‘most serious offences under the domestic legal system’⁸⁵ punishable with imprisonment of between six and twenty years.⁸⁶

⁸¹ CAT Committee, Hajrizi Dzemailj et al. v. Yugoslavia, No. 161/2000, paras. 9.2, 10.

⁸² See the case against the deputy police director Wolfgang Daschner in Germany, Landgericht Frankfurt a.M., NJW 2005, 692.

⁸³ Burgers and Danelius, 129.

⁸⁴ CAT/C/SR.268, para. 2. See also Nowak and McArthur, 51–61.

⁸⁵ Burgers and Danelius, 129.

⁸⁶ Ingelse, The Committee Against Torture: One Step Forward, One Step Back, 18 NQHR 2000, 342; The CAT Committee has regularly deemed sentences of three years or less to be insufficient, CAT/C/SR.51, para. 31; CAT/C/SR.78, para. 4; CAT/C/SR.50, paras. 32, 39.

145. In order to make sure that the perpetrators of torture are prosecuted and punished, making torture an offence under criminal law with an adequate sanction is not sufficient. States have to guarantee that the criminal prohibition of torture is adequately applied. To this regard States have to guarantee the separation of powers, particularly the independence of the judiciary. When the cooperation between the police, prosecution services and judges is too close, judges might refrain from sentencing police officers or applying the law with the required stringency.

(b) *Independent body for the investigation of torture*

146. As outlined above, one of the main factors conducive to torture and leading to impunity for the perpetrators, is the lack of a prompt and independent investigation into allegations of torture or ill-treatment. Articles 12 and 13 CAT contain two of the most important provisions for the prevention of torture and ill-treatment: the obligation of States parties to investigate every potential case of torture and ill-treatment, either on the basis of an allegation by the victim (article 13) or ex officio on the basis of any reasonable ground to believe that an act of torture or ill-treatment has been committed (article 12).

147. There are plenty of opportunities for public prosecutors, police chiefs and prison directors to commence investigations if they are genuinely interested in preventing torture and cruel, inhuman or degrading treatment: Lawyers, doctors and family members might be encouraged to report allegations; independent prison inspection commissions, national human rights institutions or NGOs might be asked to find out whether torture practices exist in any given detention facility; boxes for depositing allegations might be established in all places of detention. Such investigations might at times lead to a full criminal investigation or even prosecution. Sometimes a disciplinary sanction or a better knowledge about the risks of torture and how such risks can more effectively be prevented might be sufficient. In other cases, the facts are established by civil courts in the context of civil proceedings leading to reparation for victims of torture.

148. While investigations by police chiefs, prison directors and public prosecutors often are necessary as a first step for a prompt investigation, it is advisable not to entrust the investigation solely to persons who have close personal or professional links with the persons suspected of having committed torture or ill-treatment, or who may have an interest in protecting these persons or the particular unit to which they belong. It is not surprising that countries where only police officers are investigating allegations against the police, military officers against the military and so on, are often not able to present a single conviction for torture, despite well-founded allegations to the contrary.⁸⁷

149. When impartial and vested with full investigative powers, competent authorities for investigations into torture allegations include *inter alia* courts, national human rights institutions, ombuds-institutions, detention monitoring commissions, public prosecutors and special independent police investigators entrusted with the sole task of investigating torture and CIDT by police officials (so-called 'police-police'). While NHRI's, ombuds-institutions and detention monitoring commissions usually lack full powers of criminal investigations, a special 'police-police', if truly independent from the police, may be in a better position to collect the evidence necessary to bring the perpetrators of torture to justice.

150. I was time and again confronted with the argument by State officials that torture allegations do not have to be taken seriously because criminals are not trustworthy and have a particular interest to fabricate such allegations in order not to be convicted. It shall not be

⁸⁷ A/HRC/4/33/Add.3, para 54.

denied that certain allegations of torture are fabricated or at least aggravated. But this should not be used as an argument not to investigate them. On the contrary, an impartial investigation is in the interest of Governments which have nothing to hide and which are genuinely interested in the truth.

151. In addition, my experience shows that cases where detainees falsely accuse officials of torture or ill-treatment are much less frequent than instances of police officers and prison guards falsely denying such allegations. While victims of torture run the risk of reprisals if complaining about torture, and certainly more often refrain from lodging a justified complaint than making false allegations, police officers and prison guards certainly have an interest not to tell that they have abused a detainee.⁸⁸

(c) *No safe haven for torturers*

152. The establishment and application of various types of jurisdiction include territorial, flag, active and passive nationality, as well as universal jurisdiction to the crime of torture,⁸⁹ is extremely important for the realization of the concept of no safe haven for torturers. Recognising the exceptional gravity of the crime of torture and that the torturer, like the pirate, the slave trader and the terrorist, is regarded as ‘*hostis humani generis*, an enemy of all mankind’,⁹⁰ as well as the importance of bringing perpetrators to justice, article 5 (2) of the Convention Against Torture establishes the application of the principle of universal jurisdiction as an international *obligation* of all States parties for the first time in a human rights treaty. The only precondition for the exercise of universal jurisdiction is that the suspected perpetrator must be present on the territory of a State. The provision goes beyond the traditional principles of territorial and national jurisdiction listed in articles 5 (1) (a)-(c) and obliges States parties to exercise jurisdiction over persons of any nationality who are suspected of torture in any country if they are on the territory of the State. It therefore provides a clear and unambiguous obligation for States to take the necessary legislative measures to establish jurisdiction in their domestic criminal codes, which was confirmed by the Committee Against Torture in the Habre case against Senegal, where it was decided that the State’s failure to establish universal jurisdiction (or any other type of jurisdiction envisaged in article 5) constituted a violation of article 5.⁹¹

153. In practice, the obligation to exercise universal jurisdiction means that if there are reasonable grounds for suspecting that a person on a State’s territory has committed an act of torture, the State is obliged to take the person into custody or otherwise ensure his or her presence and to conduct a preliminary investigation. If there are no requests for extradition from the States in which the crime was allegedly committed, or to which the suspect or victim belongs, the “forum” State that detained the alleged offender must prosecute him or her. This unusual measure of extensive jurisdictional powers and obligations was applied in order to fight against impunity for perpetrators of torture and to bring them to justice, wherever they may be.

154. However, it is unfortunate that despite this explicit provision in international law, many States have still not established such jurisdiction in their domestic criminal codes, and have proved extremely reluctant to exercise universal jurisdiction against suspected torturers. Looking back over the last twenty years, there have been very few cases in which

⁸⁸ Nowak and McArthur, CAT Commentary, 413–38.

⁸⁹ Obligatory universal jurisdiction only applies to torture as defined by article 1, not CIDT.

⁹⁰ Judgment of the United States Court of Appeal for the Second Circuit of 30 June 1980 in *Filartigav Peña-Irala*, 630 F.2d 876, at 890.

⁹¹ *Guengueng et al v. Senegal*, Communication No. 181/2001, paras. 3.2.-3.7.; Nowak and McArthur, 255.

it has been successfully pursued. Usually, authorities fail to even detain alleged perpetrators, as illustrated by the cases of Al-Duri in Austria and Almatov in Germany.⁹² Moreover, in the Al-Duri case, Austria argued that the lack of any extradition request prevented it from exercising universal jurisdiction, despite the fact that the need for conditions such as the existence of an extradition request were explicitly rejected at the drafting stage. This argument was again unambiguously rejected by the Committee against Torture in the Habre case.⁹³ Such specious arguments clearly demonstrate States' disinclination to make use of this tool for combating torture and bringing offenders to justice.

155. There have been occasional successes such as the UK's case against Afghan warlord Farayadi Sarwar Zardad for conspiring to torture and taking hostages in Afghanistan between 1991 and 1996, whose crimes were labelled "merciless", and "such 'an affront to justice' that they should be tried in any country."⁹⁴ However, the overall record of exercising the unique and vital measure of universal jurisdiction against suspected torturers is widely and shamefully disregarded, and one cannot help but conclude that torturers are thus often allowed to go free in order that States avoid undesirable diplomatic consequences.

2. Prevention – Visiting bodies under the OPCAT

156. Articles 2 and 16 CAT contain a general obligation of the 146 States parties to take effective legislative, administrative, judicial and other measures to prevent acts of torture and CIDT in any territory under their jurisdiction. In addition, the CAT contains a number of specific obligations to prevent torture and CIDT, such as the respective training of law enforcement, medical, military and other personnel (article 10) and the systematic review of interrogation practices and prison rules (article 11). Furthermore, as outlined above, international human rights law, including the relevant soft law standards, is very detailed in respect of procedural standards during detention which are aimed at preventing torture and ill-treatment.⁹⁵ These standards include, as a minimum, the prohibition of all secret and incommunicado detention, the obligation to properly register every detainee from the moment of arrest or apprehension, to keep police custody as short as possible and usually no longer than 48 hours and to move detainees thereafter to a pre-trial detention facility under a different State authority (usually the Ministry of Justice), to grant detainees the right to immediately inform family members of the arrest and to have prompt access to a lawyer, a doctor and an independent judge, to respect the presumption of innocence and the right of detainees to remain silent until properly represented by a lawyer, to properly record interrogations and ensure that confessions extracted by torture are inadmissible before a court, to properly investigate any allegation or suspicion of torture or ill-treatment etc.⁹⁶

157. The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny.⁹⁷ A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective

⁹² Ibid., 256.

⁹³ Guengueng et al. v. Senegal, communication No. 181/2001, para 9.7.

⁹⁴ R V Zardad, High Court judgment of 19 July 2005. The sentencing of Mr. Zardad, a former warlord in Afghanistan who had run a check point at which travellers were frequently abducted and subjected to torture and ill-treatment, was the first successful prosecution under universal jurisdiction laws in the United Kingdom. See also Nowak and McArthur, Article 5, 4.9.

⁹⁵ See above, II.B.2.

⁹⁶ See also Amnesty International's 12 point programme for the prevention of torture and other cruel, inhuman or degrading treatment or punishment by agents of state, ACT 40/001/2005, 21 April 2005.

⁹⁷ A/56/156, para 35.

means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials. I have conducted fact-finding missions to 15 countries where I was able to undertake unannounced, unrestricted and unsupervised visits to places of detention, interview detainees and law enforcement personnel in private and speak to government officials and representatives of civil society. A similar mandate to visit places of detention and speak to detainees in private has been entrusted to different national (judges, prosecutors, national human rights institutions, ombuds-institutions and civil society organisations), regional (e.g. the European Committee for the Prevention of Torture, CPT) and universal (e.g. Committee against Torture, Working Group on Arbitrary Detention) mechanisms.

158. The importance of visiting bodies in preventing torture and ill-treatment has been strengthened with the adoption of the Optional Protocol to the Convention against Torture (OPCAT) on 18 December 2002, whose objective it is to establish a system of regular preventive visits of international and national bodies to all places of detention. The OPCAT, which has been ratified or acceded to by 50 States, establishes a *Subcommittee on Prevention of Torture* (SPT) as an international visiting body and requires States to designate a *National Preventive Mechanism* (NPM) on the domestic level. The OPCAT is a most innovative international instrument focused on prevention instead of prohibition. By setting out the criteria and safeguards for effective preventive visits and ensuring the implementation of international standards at the domestic level, it strikes a new and hopeful path for the prevention of torture. Therefore, I have repeatedly stressed the importance of its universal ratification and implementation. Of the countries I have visited a total of seven have ratified OPCAT, sometimes on the basis of an explicit recommendation during my visit. Nigeria did not ratify until after my visit and explicit recommendation to expedite the ratification.⁹⁸

159. The international visiting body established by OPCAT, the SPT, consists of 25 independent experts and has the competence to carry out missions on the territories of the States parties where it is to be granted unrestricted access to all places of detention. It conducts unannounced and unsupervised visits to all places of detention, interviews detainees in private, assists the respective NPM and makes recommendations to States parties with a view to preventing torture and ill-treatment. The SPT started its work on 18 December 2006 and has so far conducted seven visits (Mauritius, Maldives, Sweden, Benin, Mexico, Paraguay and Honduras). This is a relatively small number in comparison to the European Committee for the Prevention of Torture which has conducted 276 visits since 1990, with up to 20 visits per year. Consequently, it is to be advised that the SPT, with its recently increased capacity of 25 experts,⁹⁹ will extend the scope and effectiveness of its mandate and follow the good example of the CPT.

160. The SPT is to be complemented by an NPM, the national counterpart to the SPT to undertake visits to all places of detention in the respective country. The establishment of an NPM is crucial for the prevention of torture since the SPT does not have the capacity to undertake regular and systematic visits to every State party. Furthermore, as a 'nationally owned' independent institution, an NPM is more likely to find acceptance in the local population and adequately follow-up on the findings and recommendations made during its visits.

⁹⁸ A/HRC/7/3/Add.4, para. 75, (z); E/CN.4/2006/6/Add.3, para 58.

⁹⁹ With the fiftieth ratification of OPCAT by Switzerland on 24 September 2009, the number of independent experts rose from ten to 25. Article 5(1) OPCAT.

161. The OPCAT, in conjunction with the Paris Principles, prescribes minimum standards for the functioning of an NPM.¹⁰⁰ A State has to guarantee functional and personal independence, a pluralistic composition, competent staff and adequate resources to ensure its effectiveness. An NPM is granted unrestricted, unsupervised access to all places of detention, the persons detained and all related information; it may conduct private interviews with any person deemed necessary without any reprisals against the source of information; it can make recommendations to the authorities on how to improve the treatment of detainees and can submit legislative proposals and observations. The NPM should be fettered with a broad mandate beyond the minimum competences to function as the main body overseeing the treatment of persons in detention. Besides its evident role as a visiting body, an NPM should closely consult with the Government in improving its legislation and regulations (e.g. reforming the criminal justice system). Furthermore, it should forward any allegations of torture to the authorities responsible for the instigation of criminal proceedings, in order to combat impunity.

162. Despite the obligation to set up an NPM within a year after OPCAT ratification,¹⁰¹ so far only 29 of the 50 States parties have designated an NPM. Of the 15 countries I have visited, only four had an NPM in place. None of the existing NPMs go beyond the minimum standards prescribed by OPCAT. I have regularly emphasized that a lack of independence and restrictions to the NPM seriously impede its function. In Georgia, for example, the NPM was appointed by the President, which does not guarantee its independence.¹⁰² At my training visit to Moldova as part of the follow-up to my mission,¹⁰³ it was reported that the NPM was too close to prison authorities to ensure genuine independence, that its visits were announced and that the interviews carried out were mostly not private.¹⁰⁴ Such restrictions and practice of the NPM seriously undermine the purpose of its function. Furthermore, it is of utmost importance that NPMs have the mandate to visit all places of detention and not only prisons. In Paraguay, the inter-institutional commissions set up as visiting bodies (although not yet designated as NPM) did not have the competence to visit police stations, where the risk of torture is highest.¹⁰⁵

163. States parties to OPCAT have taken different approaches to meeting the obligation to establish an NPM. A common approach has been the designation of existing Ombudspersons' offices as the NPM (e.g. Denmark, Uruguay). While this approach is often preferred because it requires less financial and organisational efforts, in practice it bears a number of problems. As noted upon my visit to Denmark, an Ombudsperson's office can be all too easily designated as NPM without making the necessary legislative amendments and allocating sufficient additional resources for the extension of its mandate. It may consequently suffer from a wide and unspecialized mandate, lack sufficient expertise in torture prevention and adequate staffing, such as the inclusion of health professionals in the visiting teams.¹⁰⁶ To overcome some of these shortcomings, a close cooperation with civil society organisations specialized in torture prevention and enjoying the confidence of detainees may be helpful (e.g. Moldova, Slovenia). In the past, some countries have established (e.g. France, Germany, Switzerland) or are considering (e.g. Argentina, Austria, Benin, Honduras, Paraguay) the establishment of a new institution as NPM. When setting

¹⁰⁰ Articles 18 et seq. OPCAT.

¹⁰¹ Article 17 OPCAT.

¹⁰² E/CN.4/2006/6/Add.3, para. 39.

¹⁰³ Training Visit by UN Special Rapporteur on Torture and Ludwig Boltzmann Institute as part of Follow-Up from July 2008 Mission, and Component of EC/UNDP Project, 13–16 September 2009.

¹⁰⁴ Those concerns were shared by the Committee against Torture in its recent Concluding Observations to Moldova's State report, CAT/C/MDA/CO/2, 19 November 2009, para. 13.

¹⁰⁵ A/HRC/7/3/Add.3, para. 28.

¹⁰⁶ A/HRC/10/44/Add.2, para. 25.

up a completely new NPM, it is important that States respect and go beyond the minimum standards for its functioning by granting it wide powers and allocating sufficient resources for their extensive functions. For the effective fulfilment of their tasks, good management and coordination of activities are important, especially when the NPM is comprised of several different visiting bodies, as is the case in the United Kingdom, where 18 oversight bodies act as the NPM. In Georgia, the number of visiting bodies was poorly coordinated with differing mandates, no common regular and systematic programme of visits, follow-up or a lack of investigatory powers.¹⁰⁷ In Moldova, the legal regulations of the NPM were ambiguous and the lack of clarity as to what constitutes the NPM impeded its effective functioning.¹⁰⁸ In all four countries visited with an existing NPM (Denmark, Georgia, Moldova, Uruguay), it appeared to be insufficiently resourced.¹⁰⁹

164. I am particularly concerned about the establishment of NPMs that are most obviously not capable of fulfilling their task. In Germany for example, with the highest population in Europe, the federal NPM is comprised of only one unpaid part-time person and a Joint Commission of the federal States (Länder) consisting of four unpaid part-time members, whose combined annual budget is not to exceed 300,000 EUR. This mechanism is evidently unable to ensure complete geographic coverage of all places of detention. Such approach to the implementation of OPCAT is counter-productive since it does not take the problem of torture and ill-treatment in detention seriously and sets a bad example for other States.

165. The ideal model for the designation of an NPM depends on the individual circumstances in the respective State. When setting up an NPM a State party can seek guidance and assistance from the SPT, the Special Rapporteur on Torture, the OHCHR and a number of human rights institutions that have specialized in that field.¹¹⁰ In the past years I have had the opportunity to participate in forums and conduct trainings in several countries to assist the set up of effective NPMs. I have also encouraged donors to focus their support on the establishment of independent NPMs in accordance with OPCAT.

166. Considering the immense potential of visiting bodies for the prevention of torture and ill-treatment in detention, the States parties to OPCAT are called upon to respect and go beyond the minimum standards for the functioning of an NPM. It is desirable that States parties show their unambiguous commitment to the prevention of torture by demonstrating a best practice for other States to follow. They can then set a good example which encourages further States to ratify OPCAT as well as advocate for the effectiveness of the prescribed visiting mechanisms.

D. Assisting victims of torture: remedy and reparation

1. The right of victims to an effective remedy and reparation

167. When we focus on the prevention of torture and ill-treatment and the fight against impunity of perpetrators, there is a certain risk that the individual victim and his or her pain, suffering and humiliation go unacknowledged. Throughout the exercise of my mandate, like my predecessors, I have attempted to remind States of their obligation towards the victims of torture and their dependants to provide for an effective remedy and reparation. In

¹⁰⁷ E/CN.4/2006/6/Add.3, para. 39.

¹⁰⁸ CAT/C/MDA/CO/2, para. 13.

¹⁰⁹ E/CN.4/2006/6/Add.3, para. 39; A/HRC/10/44/Add.3, para. 74; A/HRC/10/44/Add.2, para. 25. A/HRC/13/39/Add.2.

¹¹⁰ E.g. the Association for the Prevention of Torture, The Boltzmann Institute of Human Rights (BIM); “The OPCAT Project” at the Law School of the University of Bristol.

doing so, I was guided by article 14 CAT, which provides that 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, the victim's dependants are entitled to compensation. The rights enshrined in article 14 should be seen as a specific manifestation of the general right of victims of human rights violations to a remedy and adequate reparation, as laid down in various international and regional human rights treaties (see e.g. article 2(3) CCPR) and should also apply to victims of other forms of CIDT. While the State bears the primary responsibility to provide an effective remedy and full reparation for victims of torture, the individual perpetrator, his or her superiors and the authorities directly responsible should be held accountable to bear the costs for as full rehabilitation as possible, which may also have a deterrent effect.

168. The right of victims of torture to a remedy and adequate reparation is closely linked to the right of victims to make a complaint to a competent authority under article 13 CAT, and the obligations on the part of the authorities to initiate, *ex officio*, investigations into torture allegations as stipulated by article 12 CAT. Both provisions aim at the establishment of the facts by a competent and independent authority in an expedient and impartial manner, which constitutes a prerequisite not only for further criminal prosecution of the perpetrators, but also for any claim by the victims to adequate reparation under civil law. Without the possibility to lodge a complaint, either because mechanisms are ineffective or non-existent, or because victims or witnesses are too afraid to speak out due to fear of further ill-treatment and reprisals, the right to an effective remedy and reparation remains illusory in practice. Equally, where official investigations are ineffective and slow to establish the facts, victims of torture are in most cases also deprived of further avenues to claim reparation.

169. In my experience as Special Rapporteur, being able to voice the experience of pain, suffering and humiliation before a competent authority may already bring an important element of relief and healing to victims and further encourage them to seek justice. During the many interviews with victims of torture I conducted, what seemed to matter most to them was breaking the wall of silence, being able to tell their story and being heard. A very telling experience in this respect was the courage with which victims of torture and other ill-treatment in Equatorial Guinea were willing to speak about what happened to them despite the fear of imminent reprisals. I was told many times that what mattered to them was that they were not forgotten and that their stories be made public. This also shows that public acknowledgment of the pain, suffering and humiliation experienced by the victims is an important first step in ending their situation of powerlessness and seeking redress.

170. The scope of the right to a remedy and adequate reparation should, in line with the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, be interpreted in a broad sense to encompass not only monetary compensation, but also include measures of reparation aimed at the restitution, rehabilitation and satisfaction of the victim, including guarantees of non-repetition (see principles 19–23). Although the use of the terms “redress” and “compensation” in article 14 CAT does not reflect the same terminology, the Committee against Torture has regularly drawn attention to the fact that the rights contained therein involve not only the provision of material compensation and redress but also physical, mental and social rehabilitation.¹¹¹ In its leading case in *Guridi v Spain*, the Committee held that adequate reparation should cover all the damages suffered by the victim, including restitution, compensation and

¹¹¹ CAT/C/SR.36, para 21.

rehabilitation, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case.¹¹²

171. I would like to emphasise again that on the procedural level, States commit themselves under article 14 to establish suitable institutions (i.e. primarily judicial institutions, such as criminal, civil, constitutional and special human rights courts, or national human rights institutions and torture rehabilitation bodies) to enable victims of torture to obtain reparation.¹¹³ It is important that the victims of torture themselves be entitled to initiate such procedures and enjoy equal access to these mechanisms without fear of reprisals. Given the special situation of victims of torture and other ill-treatment, who often suffer from trauma, States should ensure that special care is taken to avoid re-traumatisation in the course of legal and administrative proceedings designed to provide justice and reparation. These considerations are particularly relevant with regard to victims of gender-based and sexual violence who need to be protected from further stigmatisation. In order to make effective use of existing remedies, victims are also often in need of legal aid and legal services, including forensic and medical expertise to secure evidence and substantiate their claims. In my experience, women and children often face particular difficulties in accessing these services, which deprives them of the possibility to effectively access the justice system. In this context, it also needs to be emphasised that, as the standard of proof may be higher in criminal proceedings, the availability of civil procedures to claim reparation should not be dependent on the outcome of a criminal procedure.

172. On the substantive level, reparation should be proportional to the gravity of the violations and harm suffered. What victims perceive as fair and adequate reparation for the ordeals they endured may differ from case to case. In my experience, victims of torture may not primarily be interested in monetary compensation, but in those means of reparation that are best suited to restore their dignity and humanity. As mentioned before, the public acknowledgment of the harm and humiliation suffered and the establishment of the truth through a comprehensive and impartial investigation, together with a public apology may often provide greater satisfaction to the victim than monetary compensation. The progressive jurisprudence of the Inter-American Court of Human Rights in this regard is welcomed. In *Vargas Areco v Paraguay*, for example, the Court ordered the State inter alia to organise an official public event to acknowledge its international liability and apologise to the victim's relatives, conduct public awareness-raising activities in schools and name a street after the victim.¹¹⁴

173. For many victims, justice is only perceived as being delivered when criminal prosecution has led to an appropriate punishment of the perpetrators. Criminal investigations and sanctions against persons liable for the violations are thus an important part of the full reparation for the harm suffered. In the case of victims of torture, full restitution to the status before the infliction of severe mental or physical pain is not possible. Since victims of torture often suffer from long-term physical injuries and post-traumatic stress disorders that may even make it impossible for them to return to their "normal" private and professional lives, reparation must include all necessary measures of medical, psychological, social and legal rehabilitation. The amount of monetary compensation must therefore include any economically assessable damage, such as the costs of long-term rehabilitation measures and compensation for lost opportunities, including employment, education and social benefits. In addition to reparation tailored to the needs of the individual victim, States are also obliged to adopt more general guarantees of non-repetition, such as taking resolute steps to fight impunity, including through the

¹¹² Communication No. 212/2002.

¹¹³ A/HRC/4/33 para 63.

¹¹⁴ *Vargas Areco v. Paraguay* (2006).

revision of amnesty laws, the establishment of independent investigation units, or the promotion of the observance of codes of conduct for law enforcement officials.

2. Obstacles to the right to a remedy and adequate reparation in practice

174. In practically all countries visited by the Special Rapporteur, the right to remedy and adequate reparation of victims of torture was either non-existent or severely limited, and adequate reparation was almost never provided in practice. In some countries, laws guaranteeing the provision of reparation to victims of torture did not exist at all,¹¹⁵ while in others, compensation for acts of torture were instituted as an alternative for criminal sanctions, which has contributed to a culture of impunity.¹¹⁶ In other countries, the payment of damages was foreseen for unlawful sentencing, arrest and detention, but no reference to torture and ill-treatment was contained in the law, thereby failing to provide reparation commensurate with the gravity of the pain, suffering and humiliation inflicted by torture.¹¹⁷ In addition, a common problem was that victims and relatives of victims often did not enjoy legal standing in relation to allegations of torture and were therefore prevented from claiming reparation. Even where legal provisions on the right to a remedy and reparation for torture cases existed, victims of torture were often not aware of their rights or lacked the financial and other capacities to exercise their rights in practice and effectively access the justice system.

175. In my experience, the prevalence of impunity is the most common obstacle to the realisation of the right to a remedy and adequate reparation of torture victims. I am particularly concerned about laws and other measures that limit the legal responsibility of State officials for torture and other forms of ill-treatment of detainees, such as regulations on indemnities for police officers or the granting of amnesties. The criminalisation of acts of torture and the revision of amnesty laws to lift the shield of immunity are therefore also central preconditions for the realisation of the victims' right to reparation. Furthermore, I have frequently noted that the general mal-functioning of the administration of justice, including various procedural and substantive shortcomings and barriers regularly prevent the provision of adequate reparation to victims of torture. I am particularly concerned that in places where survivors of torture are silenced out of fear of further repression, or are denied from access to justice due to the lack of willingness on the part of the authorities to effectively investigate allegations of torture, victims enter a cycle of re-victimisation and despair.

176. Among the procedural obstacles to reparation faced by victims of torture and their relatives is the fact that in a number of countries, the burden of proof is placed on the victim, who often lacks the means to produce the necessary forensic, medical and other evidence required by the high standards of proof in criminal proceedings, thereby often impeding effective investigations and establishment of the facts from the start. Proper investigations are also often pre-empted due to restrictive statutes of limitations for complaining about acts of torture and instituting proceedings for compensation. In addition, access to fair and adequate reparation is rendered complicated in a number of countries, where the award of reparation for torture depends on the outcome of criminal proceedings. In these countries, the lack of willingness and capacity on the part of the prosecution to conduct prompt, thorough and effective investigations securing all relevant evidence can result in an altogether frustrating the pursuit of reparation claims by the victims. A related problem I encountered was that victims and their relatives were often not informed of the status of the official inquiry into their case, which also prevented them from instigating

¹¹⁵ A/HRC/7/3/Add.7.

¹¹⁶ E/CN.4/2006/6/Add.5.

¹¹⁷ E/CN.4/2006/6/Add.4.

civil proceedings. More generally, torture victims are particularly likely to face a lack of political will on the part of the authorities to investigate and acknowledge abuse inflicted by public officials linked to those authorities mandated to investigate and prosecute these allegations. I have therefore continuously urged States to establish complaint and investigation mechanisms that are institutionally and politically independent from those public authorities they are supposed to control.

177. On the substantive level, the amount of compensation awarded to victims in most cases does not reach more than a symbolic sum and by no means covers the actual costs of medical treatment and rehabilitation, which survivors of torture and ill-treatment have to fund by themselves or with the support of family, friends and civil society organisations. The majority of torture survivors, however, do not have access to the necessary medical, psychological and social rehabilitation measures at all, either because such services are too costly or altogether non-existent. In fact, in most countries I have visited so far, rehabilitation centres for torture victims were not set up by the State, but depended on private, mostly foreign funding and only had limited reach. In Moldova for example, the Medical Rehabilitation Centre for Torture Victims “Memoria”, which provided excellent services, was totally dependent on foreign funding and was therefore unable to cover the entire country. The same holds true for the excellent rehabilitation centre for torture victims in Zimbabwe which I visited in 2008. Existing rehabilitation services not only suffer from a lack of financial resources for the establishment of adequate facilities and adequate training of health personnel, but, to my utmost concern, have also sometimes received threats from the perpetrators of torture. I therefore strongly urge all States to provide support and protection to rehabilitation centres and other service facilities that provide relief and rehabilitation to victims of torture and their relatives. In addition, I would like to once again encourage States and civil society organisations to cooperate in stepping up efforts to provide assistance to torture survivors.

178. At the international level, the UN Voluntary Fund for Victims of Torture is a highly important step by the international community to demonstrate acknowledgment of the suffering of torture survivors around the world. However, much more financial commitment is needed to reach out to victims and their relatives, particularly in post-conflict countries, where the majority of the population is traumatised by years and decades of brutal conflict and abuse. As I have suggested in a previous report to the Human Rights Council, consideration should be given as to how to hold those States, where torture is systematic or widespread, accountable to their obligations arising under article 14, for example by requiring them to contribute substantively to the UN Voluntary Fund.

3. The provision of extra-territorial reparation

179. In principle, the right of victims to adequate reparation needs to be interpreted as a remedy in relation to the perpetrator or the State responsible for the acts of torture. However, in most cases of serious and systematic torture, an effective remedy against the torturing State is not available in that State. If they have the opportunity, many victims flee the place of their torment and seek protection and asylum in other countries. Traumatized by the pain and suffering inflicted upon them, they are often in urgent need of medical and psychological care as well as professional rehabilitation services in the host country, which they are however in most cases not able to afford without monetary compensation, assistance from the host State or private donations. The question therefore arises whether the right to a remedy and reparation also applies under the jurisdiction of the State of residence, if this State was not involved in the act of torture. In other words, what is the extra-territorial scope of the right to a remedy and reparation of victims of torture and CIDT?

180. In contrast to other provisions in the Convention against Torture, article 14 does not contain an express limitation regarding the applicability of the rights contained therein to acts of torture committed *within the territory under the jurisdiction* of the State party in question. In light of the drafting history and the reservations made by State parties upon ratification, an extraterritorial scope of the right to a remedy remains however ambiguous.¹¹⁸ In my opinion, a direct legal obligation of the State of residence to provide full reparation to victims of torture inflicted in a foreign territory and without any involvement of that State can at the present state of international law not be construed under article 14 CAT. I welcome however, recent developments of international standards towards greater responsibility of States for transnational human rights violations as expressed, for example, in Principle 16 of the UN Basic Principles which stipulates that “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered [including foreign States] are unable or unwilling to meet their obligations”. In addition, obligations of the host State to provide direct assistance to victims of torture who have sought protection in foreign countries may of course arise under other international treaties, such as the right to the highest attainable standard of physical and mental health under article 12 ICESCR, or the specific obligations under the Geneva Convention Relating to the Status of Refugees.

181. In any case, States should not obstruct the efforts of victims to obtain reparation from perpetrators, but should instead take such legislative measures as are necessary to enable survivors of torture to sue their tormenters for damages in civil courts. Such measures concern in particular the establishment of *jurisdiction of a State’s civil courts* in tort cases against the perpetrators, including where the act of torture was committed outside the territory of the forum State. It also pertains to legislative *exceptions to State immunity and functional immunity of foreign State officials* to enable victims to effectively claim reparation from the perpetrator State or those State officials responsible for torture.

182. In practice, few States have enacted or are considering enacting such enabling legislation which establishes universal jurisdiction of domestic courts in civil cases. The most well-known example is the US Alien Tort Claims Act (ATCA), which was used in the famous *Filartiga v Pena-Irala* case to allow an alien to sue another alien for damages in a US court for injuries caused by extraterritorial violations of international law.¹¹⁹ This legislation was subsequently at issue before the US Supreme Court in the case *Sosa v Alvarez-Machain*, in which the Court in principle acknowledged its jurisdiction over extraterritorial tort claims. In its amicus curiae brief submitted in this case, the European Commission argued that while the principle of *universal civil jurisdiction* remained controversial, it should most appropriately be applied in relation to those human rights violations for which universal criminal jurisdiction is established. Moreover, the principle was considered particularly relevant in cases where the claimant would otherwise face a denial of justice.

183. Ironically, given its pioneering role with regard to civil suits under domestic legislation, the US has been among the strongest opponents of an extraterritorial application of the procedural obligations under article 14 CAT. While an extraterritorial scope of the right of victims of torture to a remedy and reparation has not yet been explicitly assumed in the State reporting procedures under the Convention, the Committee against Torture has however encouraged States “to review their position under article 14 of the Convention to

¹¹⁸ Nowak/McArthur, p. 492. See in particular the express reservation made by the US upon ratification, which limits the application of article 14 to acts of torture “committed in the territory under the jurisdiction of that State Party”.

¹¹⁹ The case concerned the torture and murder of a young Paraguayan who was respectively the son and brother of the plaintiffs), *Filártiga v Peña-Irala*, 630 F.2d 876 (C.A., 2d Cir. 1980).

ensure the provision of compensation through its civil jurisdiction to *all* victims of torture”.¹²⁰ From the practice of the Committee, it can therefore be concluded that the establishment of universal civil jurisdiction, while not being obligatory under the Convention, is at least permissive in view of the wording and spirit of article 14.

184. In light of my experience which shows that victims of torture largely lack any effective remedy in States where torture is practised systematically or in a widespread manner, I believe that the procedural element of the right to a remedy under article 14 CAT should be interpreted as having extra-territorial effect, in order to allow victims to seek reparation from the perpetrators in foreign courts. Such an extra-territorial reading of article 14 is necessary to render this provision meaningful in practice. I would also suggest that this reading is only a logical consequence from the broadening of criminal jurisdiction for torture crimes as foreseen in article 5 CAT. Following State parties’ obligation to prosecute perpetrators, who are their own nationals (active nationality principle) under paragraph 1 lit b of this provision, regardless of where the act of torture was committed, victims are in most countries allowed to join the criminal proceedings as private parties to claim damages from their tormenters. In addition, and following the Committee’s doctrine that the right to a remedy and adequate reparation should not be dependent on the outcome of criminal proceedings, victims must also have the possibility to lodge a separate civil law suit against the perpetrator. *In my opinion, victims of torture should therefore be enabled to pursue civil damages in all cases where States have established criminal jurisdiction of their domestic courts over the crime of torture, including pursuant to their obligation to establish universal jurisdiction under paragraph 2 of the said Article.* Given the close nexus between the duty to criminal prosecution of torture crimes and the right of victims to join the criminal proceedings as civil claimants, I would even go further and suggest that article 14 CAT encourages States to provide victims of torture with a procedural remedy capable of obtaining adequate reparation from the perpetrators to the same extent that States are obliged to establish criminal jurisdiction over torture crimes under the Convention. I therefore encourage States to make the necessary legal and procedural adjustment to their civil justice systems to establish civil jurisdiction of domestic courts over acts of torture committed on foreign territory analogous to existing jurisdiction in criminal cases.

185. Even where domestic courts were able to exercise jurisdiction over extra-territorial acts of torture, cases have been dismissed on the ground of immunity provisions. While the international law on immunities is a complex and evolving field, I would submit that the same principles should be applied to civil liability as have been established for criminal responsibility under international law. We can therefore assume that individuals acting in an official capacity, such as members of the police, military, intelligence service, and other officials responsible for torture, except for acting Heads of States, Ministers of Foreign Affairs and individuals enjoying the protection of the 1961 Vienna Convention on Diplomatic Immunities are not protected by *immunity ratione personae*.¹²¹ The question of individual liability has to be distinguished from the question of liability of the State for torture committed by its officials. While States bear the primary responsibility for providing a remedy and adequate reparation in relation to torture committed on their own territory, recent case law has confirmed that States can rely on the principle of sovereign immunity before foreign courts in relation to extra-territorial claims for damages.¹²² The application

¹²⁰ A/55/44, emphasis added.

¹²¹ International Court of Justice in the *Arrest Warrant Case* (Democratic Republic of Congo v Belgium, Judgment of 14 February 2002, Nr. 121).

¹²² Judgment of the European Court of Human Rights of 21st November 2001 in *Al-Adsani v United Kingdom* (Application No. 35763/97) para. 66; Judgment of the Canadian Court of Appeal for Ontario of 30 June 2004 in *Bouzari v Iran*, C38295 (2004).J.2800 para. 81.

of the principle of sovereign immunity in relation to reparation claims for serious human rights violations is currently at issue before the International Court of Justice.¹²³ Pending the Court's decision, I would submit that if States are serious in wanting to combat torture, State immunity should not be permitted to act as a shield, whether in criminal or civil proceedings. In this respect, I welcome efforts in the British House of Lords to adopt the draft Torture Damages Act, which would not only establish civil jurisdiction of British courts over extra-territorial acts of torture, but also contains an exception to the principle of State immunity.¹²⁴ A similar bill was initiated in the Canadian Parliament at the end of 2009, which would allow victims of extra-territorial torture to sue their tormentors in Canadian courts for damages.¹²⁵ I encourage legislatures in other countries to adopt similar legislative initiatives to provide a legal basis for civil remedies for all torture victims, regardless of where the torture was committed.

III. Cruel, inhuman and degrading treatment and punishment

A. Definition

186. The prohibition of torture in articles 7 ICCPR and relevant provisions of regional human rights treaties include a prohibition of cruel, inhuman and degrading treatment and punishment (CIDT), which is separately prescribed in article 16 CAT. The prohibition of CIDT is also non-derogable. While the CAT expressly defines torture, there is no such definition of CIDT in international treaties. As a consequence, CIDT is commonly defined by its distinction from torture, according to article 1 CAT. Other than for purposes of definition, the distinction between torture and CIDT is important since certain obligations under the CAT only apply to torture, above all, the obligation to criminalize acts of torture and apply the principle of universal jurisdiction in this regard.

187. In my view, cruel and inhuman treatment is not to be distinguished from torture by the intensity of the suffering inflicted, as suggested by some scholars and the European Court of Human Rights in the *Northern Ireland* case.¹²⁶ The *travaux préparatoires* of article 1 CAT reveal that the insertion of any requirements of an "aggravated" treatment or "extremely" severe pain or suffering for the qualification as torture has been rejected. A distinction by the severity of the treatment also seems to run counter to the practice of the Committee against Torture, which has repeatedly found instances of torture without questioning the particular severity of the pain.¹²⁷ This means that in principle, all forms of cruel and inhuman treatment and punishment, including torture, require the infliction of severe pain or suffering. This is different for the qualification of degrading treatment or punishment in the sense of article 16 CAT, where the particular humiliation of the victim is sufficient, even if the pain or suffering is not severe.

188. The systematic and historical interpretation of articles 1 and 16 CAT suggest that the decisive criteria for distinguishing CIDT from torture are the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim. Torture constitutes such a horrible attack on the dignity of a human being because the perpetrator of torture

¹²³ "Germany Institutes Proceedings Against Italy for Failing to Respect its Jurisdictional Immunity as a Sovereign State" Press Release, ICJ, 23 December 2008.

¹²⁴ Torture Damages Bill, House of Lords, Session 2008–09, available at: <http://www.publications.parliament.uk/pa/ld200809/ldbills/017/09017.i-i.html>.

¹²⁵ "Canada bill clears way to sue foreign torturers", AFP 26 November 2009.

¹²⁶ European Court of Human Rights, *Ireland v. United Kingdom*, 18 January 1987, para. 167.

¹²⁷ E.g. No. 207/2002, para. 5.3; A/48/44/Add.1, para. 52; A/56/44, paras. 44, 43.

deliberately inflicts severe pain or suffering on a powerless victim for a specific purpose, such as extracting a confession or information. Cruel and inhuman treatment, on the other hand, means the infliction of severe pain or suffering without purpose or intention and outside a situation where a person is under the de facto control of another. It follows that one may distinguish between justifiable and non-justifiable treatment causing severe suffering. Examples where the causing of severe suffering may be justifiable are the lawful use of force by the police in the exercise of law enforcement policies (e.g. arrest of a criminal suspect, dissolution of a violent demonstration) and by the military in an armed conflict. In such situations, the principle of proportionality has to be strictly observed. If the use of force is not necessary and, in the particular circumstances of the case, disproportional to the purpose achieved, it amounts to cruel or inhuman treatment. In a situation where a person is under the de facto control of another and thus powerless, the test of proportionality is no longer applicable. Other situations which may amount to CIDT are particularly severe conditions of detention, domestic violence, female genital mutilation and trafficking in human beings.

B. Excessive use of force by law enforcement bodies

189. Upon my fact-finding missions I have received numerous worrying allegations of excessive use of force by police authorities outside of the context of detention. As stated above, this may amount to CIDT if it does not meet the test of proportionality.¹²⁸

190. In many countries it is unfortunately not uncommon for police officers to resort to excessively brutal force when apprehending a criminal suspect. Effective methods of recording and monitoring the arrest are often absent, allowing the police to handle suspects at will and giving them a high chance to escape accountability for official misconduct. Particularly disturbing examples have been witnessed in Nigeria where persons suspected of armed robbery were often shot in the legs or feet, a practice that often even amounted to torture. Excessive police force is especially prevalent during large-scale police operations such as raids. In such situations innocent persons also run a risk of becoming victims of cruel and inhuman treatment. During my fact-finding mission to Indonesia, I received consistent and credible allegations about the use of excessive force by mobile paramilitary units in West Papua that routinely conducted largely indiscriminate village “sweeping” operations, while searching for alleged independence activists or raids on university boarding houses.¹²⁹

191. Most cases of excessive police violence occur during demonstrations or public turmoil. Over the past years I received a large number of consistent and credible allegations of excessive force used by police, security and military officers from countries such as Azerbaijan, Bahrain, Cambodia, China, Egypt, Georgia, India, Indonesia, Iran, Kenya, Moldova, Myanmar, Nepal, Pakistan, Paraguay, the Philippines, the Russian Federation, Uzbekistan, Sudan, Turkey and Zimbabwe.¹³⁰ In many of those cases, people were peacefully exercising their right to assembly when police or security officers violently dispersed the demonstration by beatings, the use of pepper and tear gas, sound bombs, water cannons, rubber bullets or firearms indiscriminately fired on the masses. This has all too often led to persons getting severely injured or killed. A particularly concerning example of excessive and indiscriminate violence against protesters occurred in Andijan,

¹²⁸ This was confirmed by the Committee against Torture that has considered cases of excessive use of force in dissolving riots or demonstrations as a violation of article 16 CAT, A/52/44, para. 182; A/54/44, para 76 (g); A/56/44, paras. 58 (a), 95(i), 113(c).

¹²⁹ A/HRC/7/3/Add.7, para. 39.

¹³⁰ E/CN.4/2006/6/Add.1; A/HRC/4/33/Add.1; A/HRC/7/3/Add.1; A/HRC/10/44/Add.4.

Uzbekistan in May 2005, where military and security forces indiscriminately shot at crowds of protesters leading to hundreds of deaths.¹³¹ I criticized the lack of investigation, prosecution and punishment of the perpetrators and other persons responsible. More recently, I received reports of excessive violence during demonstrations in the Tibet Autonomous Region and surrounding areas in China, including the killings of an unconfirmed number of people. I am further concerned with the use of excessive force against Uyghur protesters in the autonomous province of Xinjiang.

192. Violent attacks on protesters have been particularly prevalent in times of post-election turmoil. The elections in Kenya in December 2007 were followed by heavy protests, resulting in ethnic clashes and the widespread disproportionate use of force by the police, which led to many deaths.¹³² In Zimbabwe, following the election victory of the MDC in March 2008, police officers, soldiers and members of the ruling party Zanu PF attacked MDC supporters and journalists as a part of a reprisal campaign. I received a large number of allegations where such attacks have led to broken bones typical of “defence injuries” or even deaths.¹³³ Similarly in Moldova, the elections of April 2009 were met with widespread and often violent protests. I received several allegations of beatings and other cruel, inhuman and degrading treatment upon detention during and after the protests, which were confirmed during my follow-up visit in September 2009. In Iran, where the June 2009 elections were followed by widespread protests of opposition supporters, they were met with excessive violence by the police and Government militias. I received credible allegations on the killing of at least 12 students participating in opposition protests. While the post-election protests have been largely peaceful, agents of the Revolutionary Guards, paramilitary Bassij, and State Security Force (SSF) have reportedly employed extreme force to suppress protesters by opening fire during demonstrations and using pepper spray and batons to disperse demonstrations.

193. Of particular concern are the reports of police brutality against vulnerable, disadvantaged groups and minorities. In Paraguay, I have received numerous allegations of excessive force by the police against members of indigenous communities and the military in dispersing demonstrations of campesino movements. The Committee against Torture has equally expressed its concern about reports of police brutality against vulnerable groups such as racial minorities, migrants and persons of different sexual orientation, which have not been adequately investigated.¹³⁴ Furthermore, journalists covering protests often risk being targeted by police and security officers. I am particularly concerned about the harassment and targeted killings of journalists and human rights defenders in the Russian Federation, including the killings of Anna Politkovskaya¹³⁵ and Natalya Estemirova,¹³⁶ which occurred in relation to their denunciation of human rights abuses in Chechnya.

194. I have repeatedly stated that the use of force must be exercised with restraint and only once non-violent means have been exhausted. Law enforcement bodies shall refrain from the use of firearms, except in self-defence or defence of others from an imminent

¹³¹ OHCHR, Report of the Mission to Kyrgyzstan concerning the killings in Andijan, Uzbekistan of 13–14 May 2005, 12 July 2005.

¹³² ‘Waki report’ of the Commission of Inquiry into Post-Election Violence (CIPEV), pp. 416 et seq. speaking of “a heavy-handed Police response whereby large numbers of citizens were shot — 405 fatally — by Police”, p. 417; Report from OHCHR Fact-finding Mission to Kenya, 6–28 February 2008, <http://www.ohchr.org/Documents/Press/OHCHRKenya-report.pdf>.

¹³³ /HRC/10/44/Add.4, pp. 404 et seq.

¹³⁴ CAT/CUSA/CO/2, para. 37; CAT/C/FRAU/CO/3, para. 5.

¹³⁵ A/HRC/4/33/Add.1, para 229.

¹³⁶ United Nations, “UN experts ready to assist Russia in investigating series of killings of human rights defenders”, Press release, 21 July 2009.

threat of death or serious injury. In this regard, strict rules on the use of force for police and security forces should be applied. Furthermore, ways to improve the recording and monitoring of arrests and the control of demonstrations should be explored.

C. Domestic violence

1. The protection of women and children from torture and ill-treatment by private individuals

195. Women and children who are victims of domestic violence, trafficking or female genital mutilation (FGM) have to deal with the same or similar grave effects to their physical and mental health as victims of torture and ill-treatment in detention. I therefore decided to raise this topic in one of my general reports to the Human Rights Council.¹³⁷

196. In 1992, the Human Rights Committee stated in its General Comment No. 20 on article 7 of the Covenant that “The aim of the provisions 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 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”.¹³⁸ Consequently, the prohibition of torture and cruel, inhuman or degrading treatment, like any other human right, creates corresponding obligations of States to respect, protect and fulfil.¹³⁹ Articles 1 and 16 CAT include in their definitions of torture and cruel, inhuman or degrading treatment “acquiescence by a public official”, which clearly extends State obligations into the private sphere and which should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private actors. I consider that the concept of “acquiescence” contained in the CAT, goes beyond the protection obligations and entails a duty for the State to prevent acts of torture in the private sphere, and recall that the concept of due diligence should be applied to examine whether States have lived up to their obligations.¹⁴⁰

2. The protection of women from trafficking

197. In recognition of the fact that victims of human trafficking are often subjected to severe forms of physical and mental violence, including being beaten, raped, and sometimes killed, and since the Republic of Moldova is widely considered to be a major country of origin for trafficking, I undertook my fact-finding mission to the country together with the UN Special Rapporteur on Violence against Women, Yakin Ertürk. We visited shelters and other facilities for victims of trafficking and domestic violence in Chişinău, where we spoke to a number of women. Women constitute the majority of trafficked persons in Moldova and more than half of them are between the ages of 19 and 24.¹⁴¹

198. In one of the shelters, I spoke to a young blind woman who reported of her ordeal. She had accepted the offer of a stranger to go abroad and work as a housekeeper and caretaker of elderly people. She suffered from diabetes and decided to take the offer because insulin was very expensive and she wanted to support her family by working

¹³⁷ A/HRC/7/3.

¹³⁸ CCPR General Comment No. 20, para. 2.

¹³⁹ See the discussion in the introduction to this study. See also Nowak, *Introduction to the international human rights regime*, Nijhoff, 2003, 27.

¹⁴⁰ A/HRC/7/3, para. 68.

¹⁴¹ A/HRC/10/44/Add.3, paras. 49–52.

abroad. She was taken to Geneva and locked into a room in a house for several weeks; she was not given enough food or any insulin. The man who initially approached her came and went regularly. He wanted her to work in a brothel, but she refused. Each time he came he beat her. She screamed for help, but to no avail. The door of the room was locked and the windows were barred. One day she managed to escape. However, as a result of the lack of insulin she had become completely blind. She was still afraid that the man who had locked her into the house in Geneva might be looking for her.¹⁴²

199. Although the Government of Moldova has taken a number of steps to address trafficking in human beings, including through criminal investigations, the scale of the problem remains relatively unknown because most victims are not identified due to the absence of systematic identification processes in Moldova and some destination countries.¹⁴³

200. In line with the Committee against Torture, which has recognized that human trafficking and torture are closely intertwined and has repeatedly commented on the need for legislation and other measures,¹⁴⁴ I wish to reiterate that in certain cases trafficking can amount to torture and/or ill-treatment, if the State fails to fulfil its due diligence and rehabilitation obligations in terms of the prevention of trafficking and the protection of individual victims. The social exclusion resulting in some cases from past trafficking can also lead to a re-victimization of the victims and may amount to inhuman and degrading treatment.

3. The protection of women and girls from female genital mutilation (FGM)

201. Shock induced by the extreme pain, psychological trauma, exhaustion from screaming, and all too often death through severe bleeding are only a few of the horrible consequences young girls and women who have to undergo FGM are faced with. The Human Rights Committee has stated that FGM constitutes a breach of article 7 ICCPR,¹⁴⁵ an opinion I fully share.

202. Both Nigeria and Togo, which I visited in March and April 2007, had enacted specific regulations outlawing FGM. In Togo, however, I found that since the enactment of the respective law in 1998, only one sentence had been imposed against a woman who had performed FGM and the father of the victim. In addition, no data on the scale of the practice had been collected since a 1998 study, which found that in some parts of the country, up to 33 per cent of the women might have undergone female genital mutilation.¹⁴⁶ I was very concerned in both countries about the persistence of FGM and the social acceptance of these practices, as well as the lack of effective mechanisms to enforce the existing prohibitions.¹⁴⁷ During my visit to Denmark in 2008, I was informed that female genital mutilation was made a separate crime under section 245a of the Danish Criminal Code, and is subject to a maximum penalty of a six-year prison term.¹⁴⁸ In the first case

¹⁴² A/HRC/10/44/Add.3, Appendix II, para. 15.

¹⁴³ A/HRC/10/44/Add.3, paras. 50–51.

¹⁴⁴ CAT/C/RUS/CO/4; CAT/C/TGO/CO/1; CAT/C/QAT/CO/1; CAT/C/KOR/CO/2; CAT/C/TJK/CO/1; CAT/C/ZAF/CO/1; and CAT/C/AUT/CO/3.

¹⁴⁵ HRC General Comment No. 28 (2000) on article 3, para. 11; CCPR/CO/80/UGA, para. 10; CCPR/CO/77/MLI, para. 11; CCPR/CO/74/SWE, para. 8; and CCPR/CO/84/YEM, para. 11.

¹⁴⁶ A/HRC/7/3/Add.5, para. 54.

¹⁴⁷ A/HRC/7/3/Add.4, para. 62.

¹⁴⁸ A/HRC/10/44/Add.2, para. 51.

under this provision in June 2008, a Danish couple of Sudanese origin was arrested on suspicion of having taken their two daughters to Sudan in 2003 for circumcision.¹⁴⁹

203. Frequently, I have also sent specific communications to Governments who reportedly did not take the risk of FGM upon return into consideration when deciding on claims for asylum, such as in the case of a mother of three children in Nigeria. A fourth child, her eldest daughter, had allegedly died on 16 July 1994, when she was 18 months old, as a result of profuse bleeding arising from the forcible perpetration of FGM on her. Her husband's family had insisted on carrying out FGM on her. On at least three occasions, members of the extended family had tried to kidnap the two remaining girls, the mother and her husband decided that she and the children should leave Nigeria for their safety. The mother, together with her two daughters, claimed asylum in Ireland in January 2005 on the basis that she feared for the safety of her two younger daughters, but their claim was reportedly turned down.¹⁵⁰

4. The most current form of violence against women, however, is perpetrated by husbands and other intimate partners

204. While in some countries the use of violence against women is still legal and husbands who "discipline" their wives are exempt from criminal liability, the legal systems of many countries I have visited, such as Moldova, Uruguay and Kazakhstan,¹⁵¹ provided for some form of prohibition of domestic violence and other safeguards, like the possibility of granting protective orders obliging the perpetrator to stay away from the victim. Denmark is to be mentioned as a particularly positive example, having put into place a number of measures that have shown positive effects, decreasing the number of reported incidents. These measures include a comprehensive criminalization of rape and 'stalking'; the provision of assault alarms to women at risk; the establishment of a nationwide network of free local counselling services for victims; the obligation to carry out ex officio criminal investigations of assault cases; strategies and plans of action in this regard.¹⁵²

205. A recurring theme in most countries, however, was the lack of awareness among public officials of the need to address domestic violence. In Uruguay, for example, I was alarmed to hear about the increasing number of reported cases of domestic violence, some of them even after precautionary measures were imposed by the judiciary. A clear example of this trend was that in 2008, five women were killed as a result of domestic violence, despite the fact that they had obtained precautionary measures from a judge. Some of the difficulties faced in effectively addressing domestic violence were the reluctance of judges to implement the law and the lack of an enforcement procedure. In Kazakhstan, despite reports of widespread violence against women within families, measures were taken only if domestic violence resulted in serious injuries. Lack of awareness and sensitivity or prejudices of police and judicial personnel make women who file complaints particularly prone to possible re-victimization.

206. Another observation I made in many countries was that the infrastructure to support survivors of domestic violence was often lacking. In Moldova, only one shelter existed in July 2008, which was privately run and situated in the capital. In Uruguay, there were no shelters for women at all. In light of these shortcomings, I call on all Governments to

¹⁴⁹ Politiken.dk, "Forældre anholdt for omskæring af døtre", 12 June 2008, <http://politiken.dk/indland/article523017.ece>.

¹⁵⁰ A/HRC/10/44/Add.4, para. 174.

¹⁵¹ A/HRC/10/44/Add.3, para. 53; A/HRC/13/39/Add.2, para. 72 and A/HRC/13/39/Add.3, para. 37.

¹⁵² A/HRC/10/44/Add.2, paras. 49 et. seq.

engage in awareness-raising and capacity building activities for the judiciary and law enforcement officials and to establish shelters for victims of domestic violence.

207. The most extreme form of violence against women in the domestic sphere I encountered was in Jordan, where females were taken under “protective” detention because they were at risk of becoming victims of an honour crime. Some of the women I met had been deprived of their liberty for as long as 14 years, which I qualified to constitute inhuman and highly discriminatory treatment. A woman I spoke to in the Juweidah Women’s Correction and Rehabilitation Centre in Amman had been detained since 1996, when she was 22. She told me that she had been raped by her brother and nephew. Unaware that she had become pregnant as a result, she went to the doctor, who alerted the police since she was unmarried. Her nephew eventually received seven years’ imprisonment and she received three-and-a-half for unlawful sex. Even after serving her time, the Governor, on the basis of the 1954 Crime Prevention Law, insisted that she remain in the facility for her own protection until she obtained a sponsor, or got married. She accounted that she had considered suicide because she was not permitted to leave. In the official reply, the Government informed that with respect to women held in protective custody, the aim was to protect these women’s lives, since they face death threats from their families.¹⁵³

208. This way of dealing with the matter of violence against women by a State is clearly ill-conceived and constitutes a further violation of the rights of women, who have already been faced with severe ill-treatment often amounting to torture from the side of their own families.

D. Corporal punishment

1. Introduction: The different facets of corporal punishment

209. The issue of corporal punishment is an integral part of the mandate of the Special Rapporteur on Torture, as was concisely clarified one of by my predecessors, Sir Nigel Rodley.¹⁵⁴ During my fact finding mission I encountered different types of corporal punishment. In a number of States, corporal punishment is still permitted as judicial sentence in criminal law or as a disciplinary sanction against detainees, in schools or in the military. In other countries, corporal punishment is neither explicitly authorised nor prohibited by law which usually means that it is widely applied in practice. But even in countries explicitly prohibiting corporal punishment in detention facilities, the military, police, schools, and in the domestic sphere, the implementation of these laws often leaves much to be desired. What is common to all these forms of corporal punishment, however, is that physical force is used intentionally against a person in order to cause a considerable level of pain. Furthermore, without exception, corporal punishment has a degrading and humiliating component. All forms of corporal punishment must therefore, be considered as amounting to cruel, inhuman or degrading punishment in violation of international treaty and customary law.

210. I will particularly focus on corporal punishment that in certain countries is still considered to be legal and is used as a form of judicial sanction in criminal procedure. I will also give account of the humiliation and suffering that many detainees I met during my fact-finding missions had to endure because the administration of detention facilities considered it lawful and necessary to chastise them, often for minor infractions.

¹⁵³ A/HRC/4/33/Add.3, Appendix, para. 40.

¹⁵⁴ E/CN.4/1997/7, paras. 3–11.

211. This focus, however, does not mean that I consider the issue of corporal punishment against children in the home or in educational settings less important. On the contrary, I share the view of my predecessors, that any form of corporal punishment against children is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and that “efforts must now be made to promote dialogue between generations and envisage positive, non-violent forms of discipline and punishment that are based on respect for the physical and psychological integrity of the child and his or her inherent dignity”.¹⁵⁵ In addition, the relevant judgments of the European Court of Human Rights, including *A v. The United Kingdom*, which concluded that corporal punishment in the home constitutes degrading punishment contrary to article 3 of the European Convention on Human Rights, must be borne in mind.¹⁵⁶ Finally, I wish to reiterate the findings and recommendations drawn by *Paulo Sérgio Pinheiro*, independent expert appointed by the Secretary-General pursuant to General-Assembly resolution 57/90 of 2002, in his study on violence against children¹⁵⁷ and General Comment No. 8 (2006) of the Committee on the Rights of the Child on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.¹⁵⁸

2. Corporal punishment as a judicial sanction

212. On occasion, some States have argued that any sanction imposed in accordance with domestic law, including the most severe forms of corporal punishment, was covered by the wording of the second sentence in article 1(1) CAT, the so-called lawful sanctions clause.

213. In this respect I want to draw the attention to the discussions that took place during the drafting of the UN Convention against Torture.¹⁵⁹ Article 1 of the UN Declaration against Torture of 9 December 1975¹⁶⁰ and article 1 of the draft submitted by Sweden on 18 January 1978¹⁶¹ served as basis for the debate on the definition of torture in the Working Groups. Both provisions included a clause on so-called lawful sanctions, which were exempted from the definition of torture, stating that “It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners”. Thus, the application of any sanctions that should not fall under the definition of torture was linked to consistency, in particular with the Standard Minimum Rules, and in particular article 31 of these rules (“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”).

214. The lawful sanctions clause and the reference to an internationally non-binding instrument (the Standard Minimum Rules) was the subject of intense discussions during the Working Group’s 34th and 35th session. The reference to the Standard Minimum Rules was eventually deleted from article 1 CAT only on the ground that certain Governments did not wish to include a reference to a non-binding soft law instrument in a binding treaty. When

¹⁵⁵ A/57/173, para. 47.

¹⁵⁶ *A v. The United Kingdom*, European Court of Human Rights, Reports 1998-VI, judgment of 23 September 1998, para. 21.

¹⁵⁷ A/61/299.

¹⁵⁸ CRC/C/GC/8.

¹⁵⁹ See Nowak and McArthur, Article 1. See also Burgers/Danelius, 121. For an overview of the relevant jurisprudence of international and regional human rights mechanisms on corporal punishment see A/60/316, paras. 19–25, and Association for the Prevention of Torture (APT)/Center for Justice and International Law (CEJIL), *Torture in International Law. A guide to jurisprudence*, 2008.

¹⁶⁰ GA Res. 3452 (XXX).

¹⁶¹ E/CN.4/1285.

these Governments realized that the deletion of the reference to the Standard Minimum Rules would in fact open the door to an exemption of serious types of corporal punishment from the prohibition of torture, they tried to replace it by another limitation referring to binding international standards. The United States, for instance, proposed that lawful sanctions “imposed in flagrant disregard of accepted international standards” would not be permitted. As the drafters could not reach agreement on defining these “accepted international standards”, many Governments unsuccessfully tried to delete the lawful sanctions clause altogether. Others insisted in their written comments that the term “lawful sanctions” must be interpreted to refer both to domestic and international law. The Working Group deliberately did not include a similar clause in article 16 CAT, which prohibits other forms of cruel, inhuman or degrading treatment or punishment.¹⁶²

215. The extreme interpretation advocated by some Islamic States who maintained that any sanction imposed in accordance with domestic law, including corporal punishment, was covered by the lawful sanctions clause is in clear contradiction with general international human rights (and humanitarian) law as expressed, for instance, in the case law of the Human Rights Committee in relation to article 7 CCPR, which considers any form of corporal punishment as a violation of international law.¹⁶³ Such interpretation would suggest that the CAT, which was adopted in 1984 with the clear object and purpose of strengthening the already existing State obligations to prevent and punish torture, in fact had lowered this international standard. Accordingly, such an interpretation is clearly incompatible with the object and purpose of the Convention and can, therefore, not be upheld in light of article 31 of the Vienna Convention on the Law of Treaties (VCLT). In addition, the savings clause in article 1(2) CAT prevents such an interpretation.

216. Since assuming my mandate, I have sent several communications relating to corporal punishment to a certain number of countries. In fact, a review of these communications reveals that only a very limited number of countries seem to sustain this cruel and inhuman form of judicial sanctions. Another fact that can be observed from assessing my communications is, on the one hand, the incredible cruelty of some of the reported punishments, such as amputations of the right hand and the left foot¹⁶⁴ or flogging with 5000 lashes.¹⁶⁵ On the other, many of the offences sanctioned with corporal punishment involved acts related to sexuality, such as “un-Islamic sexual activities”,¹⁶⁶ “illicit relations”,¹⁶⁷ or adultery.¹⁶⁸

217. Adultery is also the offence most often quoted in cases where individuals are sentenced to death by stoning. In an urgent appeal sent to Somalia in 2008, it was alleged that a woman who had attempted to report that she had been raped was accused and convicted of adultery. She was reportedly sentenced to death by stoning; her hands and feet

¹⁶² Nowak and McArthur, 44 et seq.

¹⁶³ The Human Rights Committee has already in its General Comment 7/16 of 27 July 1982, para 2, expressed the unanimous opinion that the prohibition of article 7 CCPR “must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure”. Since the landmark decision of *Osbourne v. Jamaica* of March 2000 (No. 759/1997, para. 9.1), in which the Committee unanimously confirmed its “firm opinion” that “corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant”, this interpretation has developed into constant jurisprudence. *Higginson v. Jamaica*, No. 792/1998; *Sooklal v. Trinidad and Tobago*, No. 928/2000; *Errol Pryce v. Jamaica*, No. 793/1998; and cf. Nowak, CCPR-Commentary, 167 et seq.

¹⁶⁴ A/HRC/4/33/Add.1, para. 270.

¹⁶⁵ A/HRC/10/44/Add.4, para. 187.

¹⁶⁶ E/CN.4/2006/6/Add.1, para. 398.

¹⁶⁷ A/HRC/4/33/Add.1, para. 106.

¹⁶⁸ A/HRC/4/33/Add.1, para. 318.

were tied and she was buried in the ground up to the neck. Approximately fifty men stoned her to death while thousands of people watched. She was unburied three times in order to confirm whether she was dead.¹⁶⁹ The Penal Code of Iran provides the following: A woman sentenced to stoning is to be buried in the ground up to a line above her breasts (article 102 Penal Code) before being stoned with stones that should not be large enough to kill the person by one or two strikes, nor so small that they could not be defined as stones (article 104 Penal Code).

218. During my mission to Indonesia, I expressed my sincere concern about penalties provided for by Sharia law, such as public flogging, incorporated into the 2005 Aceh Criminal Code. These local regulations criminalize the consumption of alcohol, close proximity between unwed couples, and gambling, and penalize them by flogging. Such offences of morality are normally tried in public hearings, at which the audience can shout at the defendant, rendering the presumption of innocence meaningless. Moreover, punishments are carried out in public and are often televised. I found that the Aceh Criminal Code entailed particularly discriminatory sanctions for women: Besides public flogging, punishments include cutting women's dresses in public and the forced shaving of their heads, which constitute inhuman and degrading treatment. Moreover, the fact that these punishments are carried out in public generates stigmatization and social sanctioning lasting well beyond the execution of the punishment, as women sentenced to such public punishments are labelled as immoral by their husbands, families and communities. This social exclusion can equally amount to inhuman and degrading treatment.

219. In general, as I stated in my report to the Human Rights Council in 2008, women are disproportionately found guilty of adultery and other related offences and subjected to corporal punishment including stoning to death, which is inconsistent with the prohibition of discrimination on the basis of sex enshrined in all major human rights instruments, including the Convention on Elimination of All Forms of Discrimination against Women (CEDAW).¹⁷⁰

3. Corporal punishment against detainees as a disciplinary measure

220. As pointed out earlier, torture mainly takes place in police detention, when public officials try to obtain a confession or information from an arrested person. This means that detainees are in general less at risk of such ill-treatment once they have been transferred to pre-trial detention centres or prisons. However, in a number of countries, ill-treatment of detainees continues beyond police detention. During my missions, I became aware of the fact that detainees are extremely vulnerable to corporal punishment as a sanction for breaching prison discipline or for other reasons. This problem is prevalent in many countries to various degrees. In Equatorial Guinea, I found that with the exception of one prison, corporal punishment in prisons by prison guards was the rule rather than the exception.

221. Another serious case of corporal punishment I found in prison was in Jordan. The Al-Jafr Correction and Rehabilitation Centre was in fact a punishment centre, where detainees were routinely beaten and subjected to severe corporal punishment. Detainees who did not "behave" in other prisons, many of them drug users, were brought to this remote place in the middle of the desert. In order to make them understand the new "regime" they were thrown down from the vehicle upon arrival and greeted by a "welcome party", i.e. severe beatings with different instruments by the guards. The overwhelming number of detainees I spoke to in Al-Jafr showed scars and bruises on their backs and other

¹⁶⁹ A/HRC/10/44/Add.4, para. 194.

¹⁷⁰ A/HRC/7/3, para. 40.

parts of the body. I am grateful to the Government of Jordan that my recommendation was taken up and Al-Jafr was closed in December 2006.

222. In some countries, corporal punishment is explicitly prohibited, such as in Sri Lanka under the Corporal Punishment Act No. 23 of 2 August 2005. However, in the course of my visit, I received disturbing complaints of cases of corporal punishment corroborated by medical evidence. In Bogambara prison in Kandy, I heard of a number of instances of corporal punishment and was informed of the names of prison guards who regularly beat prisoners. In the office indicated by the informants, I even found instruments that could have no use other than beatings, such as plastic tubes bound together in a bundle. I spoke to a detainee who bore visible marks on his back of recent abuse. The detainee indicated the following: “Nimal said, ‘You must learn how to speak to officers. We are the bosses and we can do what we want.’ Other detainees were ordered to hold him down while Nimal was beating him on the knees with a baton. He then had to stand spread-eagled against the wall while Nimal was beating him with a thumb-thick knotted electric cable on his back. After each blow he straightened the cable again. After 10 blows he could not stand the pain anymore and sat down. He begged him not to beat him anymore but he continued. More than 100 detainees were watching the scene through the office window. Nimal shouted dirty words about his mother at him, ordered him to kneel, apologize to the officers, and demanded that he worship him. When he did as he was ordered Nimal stopped the beating”.¹⁷¹

223. According to the study on violence against children conducted by *Paulo Sérgio Pinheiro*, corporal and other violent punishments are accepted as legal disciplinary measures for children in penal institutions in at least 77 countries. “Children may be beaten, painfully restrained, and subjected to humiliating treatment such as being stripped naked and caned in front of other detainees.”¹⁷² I noticed during my missions that children in detention were much more vulnerable to corporal punishment than adult detainees.

224. Article 376 of the Togolese Child Code provides that: “Corporal punishment and any other form of violence or ill-treatment are prohibited in schools, vocational training centres and institutions.” However, at the special juvenile detention centre in Lomé, where abandoned, trafficked and marginalized children, some younger than ten, were held together with young adults who had committed crimes, corporal punishment appeared to be a routine practice. The children reported that they were beaten with a special stick on the back or on the buttocks while others were watching; they had to crouch in uncomfortable positions for hours; and they had to hold their hands through the iron bars so they could be beaten on them. Children were punished for minor mistakes, such as talking in the cells.¹⁷³

225. Similarly in Indonesia, Moldova and Kazakhstan, I assessed that minors and children are at high risk of corporal punishment and ill-treatment when they are in detention. At the juvenile detention centres in Pondok Bambu prison (Jakarta), as well as in Yogyakarta prison, many of the minors alleged that they had been beaten either by policemen or by co-detainees during police custody, often with the knowledge of the officers. At Kutoarjo juvenile prison, detainees consistently reported regular beatings, often in public, to intimidate the other juveniles. These allegations were openly admitted by the prison management. With regard to Moldova, I received credible allegations of corporal punishment and forced labour in the Lipcani educational colony, reportedly to prepare minors for life in adult prisons. In Kazakhstan, at the Centre for temporary isolation, adaptation and rehabilitation (CVIARN) Karaganda the register showed that some children

¹⁷¹ A/HRC/7/3/Add.6, Annex para 94.

¹⁷² A/61/299, para. 62.

¹⁷³ A/HRC/7/3/Add.5, Annex paras. 27–36.

had been held for several months despite a maximum duration of detention of 30 days. Numerous minors reported confidentially of beatings by educators with fists or objects as forms of corporal punishment.¹⁷⁴

226. In some countries, such as Sri Lanka, Indonesia and Togo, the prison administration openly admitted the use of corporal punishment. In most cases, these admissions were confessions of the failure and inability to keep discipline among detainees in a civilized manner, rather than a belief in the effectiveness of this kind of punishment.

227. Not only am I of the view that corporal punishment is inconsistent with the prohibition of cruel, inhuman or degrading punishment. It also appears from my experiences that it is also inevitably members of vulnerable, discriminated or powerless groups, such as women, children or detainees falling victim to corporal punishment, which makes it even less comprehensible why the use of corporal punishment is still defended.

228. In my report to the Human Rights Council in 2009, I also raised the question whether capital punishment, as the ultimate form of corporal punishment, can be reconciled with the absolute prohibition of cruel, inhuman or degrading punishment.¹⁷⁵ I was heavily criticized by certain Governments which even went as far as accusing me of having overstepped my mandate and violated the Code of Conduct.¹⁷⁶ Rather than repeating the various arguments raised in my report and during the inter-active dialogue in the Human Rights Council, I wish to reiterate my recommendation that a special study of independent experts on this controversial issue should be commissioned by the General Assembly, the Human Rights Council or the Secretary General of the United Nations.¹⁷⁷

E. Conditions of detention

229. Human beings may be deprived of personal liberty for various reasons. Most importantly, they may be punished by a court to a prison sentence for having committed a crime. In addition, persons may be detained for certain precautionary or security reasons, such as preventing the spreading of infectious diseases or preventing the escape of a person suspected of having committed a crime or against whom an expulsion order was issued.¹⁷⁸ The aim of the punishment or precautionary measure is achieved by the deprivation of personal liberty, which is one of the most precious human rights. Detainees should, therefore, continue to enjoy all other liberties and human rights, unless further restrictions are absolutely necessary for upholding prison discipline or similar justified reasons.

230. As I described in my most recent report to the General Assembly,¹⁷⁹ the reality in most countries looks totally different. Since it is an essential element of my fact-finding during country missions to visit prisons, police lock-ups, closed psychiatric institutions and other places of detention, I got a fairly comprehensive impression of the conditions of detention around the world. In many countries I was simply shocked by the way human beings are treated in detention. As soon as they are behind bars, detainees lose most of their human rights and often are simply forgotten by the outside world. With a few notable

¹⁷⁴ A/HRC/13/39Add.3, Appendix, para 95.

¹⁷⁵ A/HRC/10/44.

¹⁷⁶ Cf., e.g., the respective comments made by the representatives of Egypt, Pakistan (on behalf of the OIC), Saudi Arabia, China, Yemen (on behalf of the Arab Group), Algeria and Sudan during the inter-active dialogue in the HRC on 10 March 2009.

¹⁷⁷ A/HRC/10/44, para. 48.

¹⁷⁸ For a list of legitimate purposes of deprivation of liberty see, e.g., article 5 ECHR. Article 9 ICPR is less precise and prohibits only arbitrary arrest or detention.

¹⁷⁹ A/64/215, 8 et seq.

exceptions, above all Denmark including Greenland, *conditions of detention in many of the facilities I visited can only be qualified as inhuman or degrading*. I am not only referring to corporal punishment and other forms of torture and ill-treatment inflicted upon detainees, but I am even more concerned about the structural deprivation of most human rights, mainly the rights to food, water, clothing, health care and a minimum of space, hygiene, privacy and security necessary for a humane and dignified existence. It is the combined deprivation and non-fulfilment of these existential rights which amounts to a systematic practice of inhuman or degrading treatment or punishment. For me, the way how a society treats its detainees is one of the best indicators for its human rights culture in general.

231. Many detainees complained that they felt like they were treated worse than animals. Indeed, most human beings would not like their dogs or cats to be treated in the same way that many human beings are treated in detention. They usually belong to the most disadvantaged, discriminated and vulnerable groups in society, such as the poor, minorities, drug addicts or aliens. Within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as children, the elderly, persons with disabilities and diseases, gays, lesbians, bisexuals and trans-gender persons, suffer double or triple discrimination.

232. Cells in *police stations* are usually designed to keep criminal suspects for a few hours until they are brought before a judge who shall decide whether they are kept in pre-trial detention facilities or released. That is why they are in most cases not equipped with any kind of furniture. In most countries I visited, people in police custody sat or slept on the concrete or mud floor without anything but the clothes they were wearing when arrested. They did not have beds, mattresses or blankets, no toilets apart from a whole or bucket in a corner, no toilet paper, water or food. All too often, these cells were dirty, overcrowded and without adequate light and fresh air. Such conditions might perhaps be tolerable if persons were kept there for no longer than a few hours or one night. In reality however, detainees are locked up in such conditions for many days, weeks or even months, partly in violation of domestic laws, but all too often in conformity with domestic laws which allow for extended periods of police custody under ordinary or emergency legislation. It is beyond doubt that such conditions, even in the absence of physical violence, amount to inhuman and degrading treatment.

233. Police officials often openly claim that it is not their responsibility but rather the task of families to provide detainees with the minimum necessary for a dignified existence or survival. In Equatorial Guinea, for example, the families had to bring bottles with water and plastic bags with food. Since most police lock-ups simply had no toilets, detainees had to use the same bottles to urinate and the plastic bags to defecate. If they had no family in the vicinity, detainees had “bad luck” and were dependent on their fellow-detainees to ensure their survival. Unfortunately, Equatorial Guinea is not the only country where I found such appalling conditions of police custody.

234. Conditions in *correctional institutions* are usually much better. Convicted prisoners often have their own beds or mattresses, may walk outside their cells during the day, may interact with other prisoners and sometimes engage in meaningful activities, such as work, vocational training, sports and other forms of recreation. Nevertheless, many prisons are severely overcrowded, they lack sufficient staff and financial resources. As a consequence, work, education and recreation are only available for a few privileged prisoners who “cooperate” and/or pay the necessary corruption fees. Often, prison regimes are not aimed at the rehabilitation and reintegration of prisoners into society but follow purely punitive policies. In many post-Soviet countries, for example, long-term prisoners are under a special or strict regime which means that they are locked up in cells most of the time, sometimes even in solitary confinement, as in Mongolia, and family visits are subject to severe restrictions. Solitary confinement and similar forms of deprivation of human contact

for a prolonged period of time also amount to inhuman or degrading treatment. In Uruguay, I found a surprisingly big difference among prisons, ranging from fairly good conditions for a few privileged prisoners in the Central Prison of Montevideo to absolutely appalling conditions in “Las Latas”, a section for the least “cooperative” prisoners in the infamous “Libertad” Prison. Three detainees were locked into tiny metal boxes designed for one person each, without adequate air, light, water, sewage, health care, etc. The noise, smell, heat and violence in those cages was unbearable even for the prison wardens and absolutely intolerable for the prisoners, some of whom had survived many months or even years under these inhuman conditions.

235. One of the most vulnerable groups are *pre-trial detainees*. Although they are entitled under article 14(2) ICCPR to be presumed innocent until found guilty by a competent court, and even though article 9(3) requires that pre-trial detention should be the exception rather than the rule and as short as possible, pre-trial detainees are kept together with convicted prisoners in many countries, often for many years and usually under much worse conditions than convicted prisoners. The percentage of pre-trial detainees among the total prison population is one of the best indicators for the well-functioning or malfunctioning of the administration of justice. If more than 50% of all detainees, and in some countries up to 80%,¹⁸⁰ are in pre-trial detention, something is wrong. It usually means that criminal proceedings last far too long, that the detention of criminal suspects is the rule rather than the exception, and that release on bail is misunderstood by judges, prosecutors and prison staff as an incentive for corruption. It is also a sign that the function of sentencing human beings to imprisonment has shifted from judges to prosecutors and the police. In many countries, even the language used indicates that it is the police, together with the prosecutors, who in practice “sentence” a suspect to pre-trial detention, and many detainees do not even know whether they have already been convicted by a court. It simply does not matter as the judge, in the end, pronounces a sentence equivalent to the time already spent in pre-trial detention. In Nigeria, I recommended that more than 20.000 persons be immediately released as the time they had already spent in police custody and pre-trial detention had exceeded the maximum penalty possible in relation to the crime they had been suspected of.¹⁸¹ Such practices lead to a profound change in the function of pre-trial detention. In far too many countries, pre-trial detention is no longer a precautionary measure aimed at preventing the escape of highly dangerous persons suspected of having committed a serious crime, but in reality serves as a type of preliminary punishment for all criminal suspects who lack sufficient money to bribe corrupt police or prison officials, judges and prosecutors. This attitude might also explain the fact that in the majority of the prisons I visited, pre-trial detainees were not separated from convicted prisoners.¹⁸²

236. As stressed in my report to the General Assembly, more than one million children are deprived of their liberty around the world. *Children in detention* are particularly vulnerable as they are in their “formative years”, making their time in detention highly influential on the rest of their lives.¹⁸³ It is therefore of utmost importance that the deprivation of a child’s liberty always remains a last resort, that it is restricted to the shortest time possible, that children in detention are strictly separated from adults and treated with special care. Although these principles seem self-evident, in practice they are all too often violated. Rather than being subjected to preferential treatment, I found that

¹⁸⁰ For relevant statistics, see King’s College London/International Centre for Prison Studies, World Pre-trial/Remand Imprisonment List, 2008. Available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf>.

¹⁸¹ A/HRC/7/3/Add.4.

¹⁸² A/HRC/7/3/Add.3, A/HRC/7/3/Add.4, A/HRC/7/3/Add.6, A/HRC/7/3/Add.5.

¹⁸³ A/64/215, 18 et seq.

children in detention are even at a higher risk of abuse and ill-treatment than adults. They are more likely to be subjected to corporal punishment and abuse by fellow detainees.

237. Other *highly vulnerable groups* are persons with disabilities, both in general detention facilities and in psychiatric institutions; persons with diseases, such as tuberculosis or HIV/AIDS; drug addicts; the elderly; or persons suspected of specific crimes. In Nigeria, for example, persons suspected of having committed armed robbery, were usually separated from other detainees and faced a higher risk of being subjected to particularly harsh treatment, such as being shot in their legs from short distances.¹⁸⁴ In many countries, persons suspected of drug-related crimes are separated from other detainees and subjected to special treatment, including the deliberate denial of any drug substitutes.¹⁸⁵ Persons suspected of terrorism and similar crimes are also often held separate from other detainees,¹⁸⁶ sometimes even in secret places of detention and other facilities outside the protection of the law.¹⁸⁷

IV. Non-refoulement

A. Meaning and scope

238. The principle of non-refoulement is an important principle of international law prohibiting the expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he or she would face the risk of being tortured. It is codified in international conventions (article 3 CAT, article 33 Refugee Convention) and considered a part of the prohibition of torture and ill-treatment (article 7 ICCPR, article 3 ECHR) according to the well-established case law of the Human Rights Committee (HRC)¹⁸⁸ and the European Court of Human Rights.¹⁸⁹ Furthermore, it is considered as part of international customary law, thus binding all States irrespective of the ratification of any of the mentioned treaties.¹⁹⁰ As a consequence, States are not only prohibited from subjecting persons to torture by its own authorities but also from sending them to a State where they run the risk of being tortured. This includes the sending of aliens to a State that will send them to a third State where they risk being tortured, so called indirect or ‘chain-refoulement’. It is therefore the responsibility of the sending State to assess the general situation in the receiving State and the risk of the particular individual concerned upon return.

239. The refoulement procedure is not to be equated with the asylum procedure. While article 33 Refugee Convention foresees limitations to the principle for the protection of national security (para. 2) and applies only to refugees as defined in the Convention, articles 3 CAT, 7 ICCPR and 3 ECHR apply to every person and are not subject to any limitation or exclusion clauses. Consequently, the non-refoulement principle is absolute and applies irrespective of the victim’s conduct. Nevertheless, there are many similarities

¹⁸⁴ A/HRC/7/3/Add.4, para 39.

¹⁸⁵ A/HRC/7/3/Add.7, para 22, A/HRC/7/3/Add.6.

¹⁸⁶ A/HRC/4/33/Add.3, pars 40–47, A/HRC/7/3/Add.7, A/HRC/7/3/Add.6, para 70.

¹⁸⁷ E/CN.4/2006/120 and A/HRC/13/42.

¹⁸⁸ CCPR/C/48/D/470/1991, para. 13.2; HRI/GEN/Rev.7, pp. 150 *et seq.*, para. 9.

¹⁸⁹ ECtHR, *Jabari v. Turkey*, 11.07.2000, Application no 40035/98, para. 38.

¹⁹⁰ M. Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, second edition, (Engel, Kehl, 2005), Art. 7, para. 45; UN Declaration on Territorial Asylum 1967; GA Resolutions 37/95, 48/116; Sanremo Declaration on the Principle of Non-Refoulement; UNHCR ExCom Conclusions on International Protection No. 25 (1982), No. 55 (1989), No. 79 (1996).

between the non-refoulement and asylum procedures and in practice, the risk of refoulement is usually examined in regular domestic asylum procedures, which in many countries display shortcomings. The respect of the principle of non-refoulement is difficult in practice since it requires adequate procedures for the assessment of an objective and subjective risk of torture. For the non-refoulement principle to be effective, it must be emphasized that the applicant only has the burden of showing the risk of torture, while the burden of proof is carried by the State throughout the procedure. The State has to undertake a proper risk assessment by collecting relevant information and evidence. While doubts about the credibility of the facts provided by the applicant can result in the refusal of asylum, the State has to ensure that the security of the applicant is not endangered, as continuously held by the CAT Committee.¹⁹¹ In this regard, I am concerned with the increased tightening of immigration laws and speeding up of procedures that often only provide for a superficial collection of evidence by the domestic authorities. Despite great immigration pressures or xenophobic tendencies among the population, States have to take their obligations to protect people fleeing from torture seriously.

B. Challenges in the “war against terror”

240. As elaborated earlier, the principle of non-refoulement is absolute. Nevertheless, some States have claimed that it is necessary to deport dangerous individuals in order to protect their communities from terrorist threats. In this regard a *test of reasonableness* for terrorist suspects, balancing the risk of torture against the threat to national security, has been applied. Such approach was for example supported by the Canadian Supreme Court in the 2002 *Suresh* judgment, whereby it accepted that refoulement could occur in exceptional circumstances if a substantial risk to the national security of the State was proven.¹⁹² The CAT Committee has rejected this approach and confirmed the absolute nature of article 3 on numerous occasions.¹⁹³ It has stated that “The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”¹⁹⁴ Similarly, the European Court of Human Rights has discarded any ‘balancing act’. While recognizing the danger of terrorism and the “immense difficulties” for States to protect their communities, it has stated that this “must not, however, call into question the absolute nature of Article 3”.¹⁹⁵

241. Some States have argued for a *geographical limitation* of the principle of non-refoulement. States maintaining detention facilities outside their territories, such as the United Kingdom and the United States in Iraq or Afghanistan, have claimed that the non-refoulement principle was not applicable to the detainees held there but restricted to their own territories. Thus, they transferred detainees to the domestic authorities of Iraq or Afghanistan without assessing any risk of torture. Such practice may have dangerous consequences for the returned individuals who are often suspected terrorists or fundamentalists and consequently run a particularly high risk of being tortured or ill-treated upon return. Such attempts to limit the principle of non-refoulement to State territories are

¹⁹¹ CAT Committee, *Amei v. Switzerland*, No. 34/1995, para. 9.6; *A.S. v. Sweden*, No. 149/1999, para. 8.6; Nos. 13/1993, para. 9.2; 15/1994, para. 12.3; 34/1995, para. 9.6; 138/1999, para. 7.3. For a detailed analysis of the practice of the CAT Committee see Nowak and McArthur, Article 3, 3.

¹⁹² Supreme Court of Canada, *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. File No.: 27790.

¹⁹³ CAT/C/18/D/39/1996, para. 14.5; CAT/C/SR.652, para. 59; CAT/C/NPL/CO/2, para. 17; CAT/C/FRA/CO/3, para. 6.

¹⁹⁴ CAT Committee, *Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, 28 April 1997, para. 14.5.

¹⁹⁵ ECtHR, *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, para. 137.

contrary to international law and have been vehemently rejected by human rights monitoring bodies in the past. The CAT Committee stated on several occasions that the CAT applies in any territory under a State party's jurisdiction which is to be understood to include "all areas under the effective de facto control" of the State party, and "all persons under the effective control of its authorities, of whichever type, wherever located in the world."¹⁹⁶ Equally, the Human Rights Committee and European Court of Human Rights have held that States parties are responsible for violations beyond their territories in cases of effective control over a territory¹⁹⁷ or a person.¹⁹⁸ Consequently, the prohibition of non-refoulement is also applicable to transfers of detainees in custody beyond the State territories. Otherwise this would give States the possibility to circumvent their obligations by transferring a person to one of their own detention facilities abroad.

242. A means that has been increasingly applied by States to deport terrorist suspects to countries where they would normally be at risk of torture is the request and reception of *diplomatic assurances* from the respective foreign authorities to refrain from torturing the individual upon return. The United Kingdom has even concluded general Memoranda of Understanding with third countries, such as Jordan, Libya, Lebanon and Algeria.¹⁹⁹ At the European level, discussions on developing guidelines for their application were initiated at the Council of Europe, but were finally brought to an end after severe criticism by the main actors in the field of torture prevention. Nevertheless, a "deportation with assurances" strategy enabling States to deport persons despite of a torture risk only on account of a diplomatic assurance has been accepted by the British House of Lords in a recent case.²⁰⁰ While the CAT Committee, the Human Rights Committee, and European Court of Human Rights have not generally opposed diplomatic assurances, they have clarified that they do not absolve a State from its obligation to assess the risk of torture in the individual circumstances of the case.²⁰¹

243. I have repeatedly criticized the practice of diplomatic assurances as "nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement".²⁰² I am concerned of their increased application by Governments and acceptance by courts. Diplomatic assurances are an unreliable and ineffective instrument for the protection against torture, as witnessed by numerous cases where suspected terrorists were subjected to torture upon return despite of given assurances and guarantees.²⁰³ My main concerns are that the assurances are sought from countries with a proven record of torture and mostly in relation to persons belonging to a high-risk group (e.g. "Islamic fundamentalists"). They are

¹⁹⁶ CAT/C/CR/33/3, para. 4 (b); CAT/C/USA/CO/2, para. 20.

¹⁹⁷ CCPR/C/79/Add. 93, para. 10, Issa and Others v. Turkey, 16 November 2004, ECtHR, Application no. 31821/96, paras. 68 et seq. Öcalan v. Turkey, 12 May 2005, ECtHR, Application no. 46221/99, para. 91.

¹⁹⁸ HRC, Delia Saldias de Lopez v. Uruguay, supra note 288, paras. 12.1–3.; Öcalan v. Turkey, 12 May 2005, ECtHR, Application no. 46221/99, para. 91.

¹⁹⁹ E/CN.4/2006/6, para 29; Nowak/McArthur, page 216, fn 474; Human Rights Watch, "Not the Way forward - The UK's Dangerous Reliance on Diplomatic Assurances", 22 October 2008. <http://www.hrw.org/en/reports/2008/10/22/not-way-forward>.

²⁰⁰ House of Lords (United Kingdom), RB (Algeria) (FC) and Another (Appellants) v. Secretary of State for the Home Department (Respondent); OO (Jordan) (Original Respondent and Cross-appellant) v. Secretary of State for the Home Department (Original Appellant and Cross-respondent), [2009] UKHL 10, 18 February 2009, available at: <http://www.unhcr.org/refworld/docid/499be5b92.html> [accessed 13 November 2009].

²⁰¹ CAT/C/34/D/233/2003 (2005), para. 13.1–5; ECtHR, Saadi v. Italy, Appl. No. 37201/06, 28 February 2008, para. 148; CCPR/C/88/D/1416/2005.

²⁰² E/CN.4/2006/6, para 32; A/HRC/10/44/Add.2, para. 68.

²⁰³ CAT Committee, Agiza v. Sweden; Human Rights Committee, Alzery v. Sweden.

not legally binding and thus unlikely to be complied with by States who otherwise violate their binding obligations under international law. In addition, the authority providing the assurance might not have the power to enforce their compliance vis-à-vis its own security forces. Diplomatic assurances cannot be and are often not securely monitored; even the best monitoring mechanisms (e.g. ICRC, CPT) are no guarantee against torture. They neither provide for sanctions nor for recourses for the victims in case of a violation.²⁰⁴ The practice of diplomatic assurances leads to an erosion of the principle of non-refoulement. It encourages States to seek an exception to their obligation instead of using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations. In cases of violations of the principle upon return, despite of given assurances, both the sending and receiving States have a common interest in denying it and exert pressure to blur accountability.

244. A particular serious problem in the context of counterterrorism and obligatory departure of individuals is the use of *extraordinary renditions* of suspected terrorists.²⁰⁵ Extraordinary renditions were practised by the United States for the purpose of transferring terrorist suspects to countries with ‘harsher interrogation methods’ than those applied in the US detention facilities at Guantanamo Bay (Cuba), Abu Ghraib (Iraq), Bagram Air Base (Afghanistan) and similar detention centres abroad. Additionally, terrorist suspects were kidnapped in third States and brought to countries where they were exposed to interrogations involving torture and ill-treatment. European States have been complicit in rendition, e.g. by providing airspace and airports to rendition flights as investigations of the European Union and Council of Europe have revealed.²⁰⁶ The way Western States have dealt with extraordinary renditions is ambiguous. The case of Binyam Mohamed, where investigations into the alleged complicity of British MI5 agents have been initiated, as well as the recent judgment of an Italian court sentencing United States and Italian officials for their involvement in rendition practices go in the right direction. However, no official from the United States has so far been punished for complicity in torture. In the case of Maher Arar, a Canadian-Syrian citizen, who claims to have been sent to Syria by American officials to be tortured, the Canadian Government inquired and confirmed the torture allegations, cleared him of any links to terrorism and settled his case with a 10.5 million Canadian Dollars compensation and an official apology for any contribution by Canadian officials leading to his rendition.²⁰⁷ In contrast, he has received no apology from US authorities and

²⁰⁴ UN Special Rapporteur on Torture, Report to the Commission on Human Rights, E/CN.4/2006/6, 23 December 2005, para 31.

²⁰⁵ Marty, Dick, “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, Doc. 11302 rev., Committee on Legal Affairs and Human Rights/Council of Europe Parliamentary Assembly, 11 June 2007; Fava, Giovanni Claudio, “Extraordinary rendition in US counterterrorism policy: the impact on transatlantic relations”, Briefing before the House Committee on Foreign Affairs, P6-TA-PROV (2007)0032, 17 April 2007; Amnesty International (AI), “Below the Radar: Secret Flights to Torture and ‘Disappearance’”, AI Index AMR 51/051/2006, 05 April 2006. See also the Joint Study on Secret Detention in the Fight against Terrorism, A/HRC/13/42.

²⁰⁶ Council of Europe, “Secretary General’s supplementary report under article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies”, SG/Inf(2006)13, 14 June 2006; EU Network of Independent Experts on Fundamental Rights, “Opinion n°3/2006: The human rights responsibilities of the EU member states in the context of the CIA activities in Europe (“Extraordinary renditions)”, 25 May 2006; European Center for Constitutional and Human Rights (ECCHR)(ed.), CIA- ‘Extraordinary Rendition’ Flights, Torture And Accountability – A European Approach, 2nd ed., Berlin, 2009.

²⁰⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “Report of the Events Relating to Maher Arar: Analysis and Recommendations”, Ottawa, Minister of Public Works and Government Services, 2006; Commission of Inquiry into the Actions of Canadian officials

a US federal appeals court has recently rejected his suit for damages on the basis of the State secrecy privilege invoked by the United States Government.²⁰⁸

245. Extraordinary rendition for the purpose of torturing individuals is to be condemned as a clear violation of international law and the non-refoulement principle in particular. It is crucial to criminalize such methods and investigate and prosecute all cases of extraordinary rendition as complicity in torture in accordance with CAT in order to bring torturers to justice and restore faith in the human rights.²⁰⁹

C. Challenges in the restriction of immigration

246. Another major challenge for the non-refoulement principle is the increasingly restrictive management of migration by industrialised States.

247. As an attempt to prevent the application of the non-refoulement principle in the management of immigration, some States like France and Australia have declared parts of their territories, such as international airports or island territories “international zones”.²¹⁰ The European Court of Human Rights has stated that “despite its name, the international zone does not have extra-territorial status”.²¹¹ Such attempts are not in line with international law and jurisprudence. It is not decisive where the refoulement of an alien takes place but only whether it takes place in the exercise of effective control over the concerned person or territory.

248. In the past, Western States have significantly increased their efforts to combat “illegal immigration”. For this purpose, migration management has been moved further beyond the actual physical State borders into third countries and the high seas. Over the last decades, many Western States have put restrictive interception methods into place to prevent migrants from reaching their territories which have been criticized as an attempt to circumvent their human rights obligations. These interception methods include preventing entry by applying restrictive visa regimes, introducing sanctions for private carriers, installing immigration liaison officers in third countries and preventing entry by intercepting and returning migrant boats at the high seas and territorial waters of third States. Interception methods are applied indiscriminately to all migrants without considering possible entitlements to protection. It has frequently been reported that States have stopped migrant boats and returned them to their country of origin without examining any protection claims, which can effectively lead to persons being returned to face torture. Due to the stringently applied interception methods, it has become largely impossible for persons fleeing from torture to seek protection. As a consequence, the strict border management and inaccessibility of protection has led many migrants to take irregular migration routes, seriously endangering their lives. Despite the repeated calls of UN agencies, including OHCHR and UNHCR, as well as regional organs such as the European Union Commission and the continuous campaigning on the part of human rights NGOs to take into account protection concerns when undertaking border controls, States have so far

in Relation to Maher Arar: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/default.htm.

²⁰⁸ United States District Court for the Eastern District of New York, “Maher Arar v. John Ashcroft, et al.”, C.A. No. 04-CV-249-DGT-VV, 18 January 2005.

²⁰⁹ A/HRC/13/42.

²¹⁰ Human Rights Watch, *Lost in Transit - Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport*, 29 October 2009, http://www.hrw.org/sites/default/files/reports/france1009web_0.pdf.

²¹¹ ECtHR, *Amuur v. France*, 25.06.1996, Application no. 19776/92, para. 52.

refrained from installing effective safeguards. Instead, it has been repeated by Governments that the non-refoulement principle does not apply beyond their territories and on the high seas. By preventing access to protection, the principle of non-refoulement runs the risk of becoming ineffective.

249. It has to be repeated that States are to respect the prohibition of refoulement not only on their territories but on any territory or towards any person they are exercising effective control over. Furthermore, States have to refrain from any act that make the fulfilment of their obligation impossible or frustrates its object and purpose, since this would violate the universally recognized principle of good faith. When controlling their territories, States have to differentiate between ordinary migrants and persons entitled to the protection of the non-refoulement principle. In this respect States should review their migration management strategies and include safeguards for persons fleeing from torture.

V. Conclusions and recommendations

250. **Torture is a global phenomenon. Only very few countries have managed to eradicate torture in practice. In the vast majority of States, torture not only occurs in isolated cases, but is practised in a more regular, widespread or even systematic manner.**

251. **Most victims of torture are not political prisoners or suspected of having committed political “crimes”, but ordinary persons suspected of having committed criminal offences. They usually belong to disadvantaged, discriminated and vulnerable groups, above all those suffering from poverty.**

252. **The most frequent purpose of torture is the extraction of a confession. Since confessions in many contexts are still regarded as the “crown of evidence”, considerable pressure is exerted by politicians, the media, prosecutors and judges on law enforcement bodies to “solve criminal cases” by means of extracting confessions that are later used in courts to convict the suspects.**

253. **The major structural reason for the widespread practice of torture in many countries is the malfunctioning of the administration of justice and, consequently the lack of respect for safeguards. States are not investing sufficient resources in the administration of justice. Judges, prosecutors, police and prison officials are often not well educated, overworked, underpaid and, therefore, corrupt.**

254. **Another important reason for the widespread use of torture, particularly during the last decade, is the extraction of intelligence information in the context of the global fight against terrorism and the deliberate undermining of the absolute prohibition of torture, ill-treatment and the principle of non-refoulement.**

255. **Although 146 States are parties to the UN Convention against Torture, most Governments have failed to effectively implement its provisions. Despite the obligation to criminalize torture and to prosecute perpetrators of torture under different types of jurisdiction, only very few torturers have been brought to justice worldwide. Impunity continues to be one of the main reasons for widespread torture. Despite the obligation to provide victims of torture with an effective remedy and adequate reparation for the harm suffered, only very few victims of torture are able to enjoy this right in the country responsible for the infliction of torture. If they manage to have access to medical, psychological and other forms of rehabilitation, this important form of reparation is usually provided by private organisations in countries in which torture victims are granted asylum. Despite the obligation to effectively investigate every allegation or suspicion of torture and ill-treatment, almost no country has**

established bodies with effective powers of criminal investigation which at the same time are fully independent from the law enforcement officers subject to their investigations. Despite the obligation to take all legislative, administrative, political and other measures necessary to prevent torture, including prompt access of detainees to lawyers, judges, doctors and families, audio- or video-taping of interrogations, the prohibition of using confessions extracted by torture before courts, or regular inspections of all places of detention and interrogation by independent bodies, most of the roughly 10 million detainees around the world can only dream of such measures.

256. In most countries, conditions of detention in police custody, pre-trial detention and other detention facilities, sometimes also in correctional institutions for convicted prisoners, amount to inhuman or degrading treatment. Detainees, whether deprived of their liberty for justified or less justified reasons, belong to the most vulnerable and forgotten sectors of our societies. In practice, they are deprived of most of their liberties and human rights, including the right to an adequate standard of living, to food, water, health, education and privacy.

257. Among detainees, certain groups are subject to double discrimination and vulnerability, including aliens and members of minorities, women, children, the elderly, the sick, persons with disabilities, drug addicts, gays, lesbians and transgender persons.

258. Other forms of widespread cruel, inhuman or degrading treatment or punishment include corporal punishment and excessive police violence during arrest, in reacting to demonstrations and political gatherings, combating riots and similar law enforcement activities. States also do not live up to the standard of due diligence required by the obligation not to commit torture by acquiescence, in combating torture and ill-treatment by private actors, including harmful traditional practices, such as female genital mutilation and honour crimes, domestic violence and trafficking in human beings, above all of women and children.

259. In building upon the General Recommendations developed by my distinguished predecessor, Theo van Boven, in 2003, I wish to particularly stress the following recommendations:

(a) All States should ratify the United Nations Convention against Torture and fully implement its provisions. In particular, they shall criminalize torture, as defined in article 1, with appropriate sanctions taking into account the gravity of the crime of torture; investigate all allegations and suspicions of torture by independent and effective “police-police” bodies; bring perpetrators of torture to justice under the various forms of criminal jurisdiction mentioned in article 5; provide victims of torture with an effective remedy and adequate reparation for the harm suffered, above all medical, psychological and other forms of rehabilitation; and take all measures necessary to prevent torture, including prompt access of all detainees to lawyers, judges, doctors and their families;

(b) All States should ratify the Optional Protocol to the Convention against Torture and establish effective NPMs with the task of carrying out preventive visits to all places of detention. The latter should be fully independent bodies with a pluralistic composition and equipped with the financial and personnel resources necessary to conduct regular and ad hoc visits to all places of detention (police lock-ups, prisons, pre-trial detention facilities, psychiatric hospitals and special detention facilities for women, children, migrants, drug addicts etc.);

(c) All States and the international community are requested to provide the resources necessary to develop national systems for the administration of justice that provide all human beings with equal access to justice and the right to a fair trial at all

stages of criminal proceedings. In particular, judges, prosecutors, lawyers, police and prison officials shall be properly and in sufficient number selected, educated and paid. Effective measures for combating corruption in the administration of justice shall be taken. Judges shall be fully independent from the executive and legislative branches of Government and shall exercise judicial functions with impartiality and professionalism. Pre-trial detention of criminal suspects shall be the exception, not the rule, and shall last for as short as possible. Pre-trial detainees shall be separated from convicted prisoners, children from adults, women from men. The main aim of correctional institutions shall be the rehabilitation of offenders and their reintegration into society. Punitive policies of criminal justice shall be brought in line with this important aim, provided for in article 10 ICCPR, by means of structural reforms of the administration of justice;

(d) The international community should establish a “Global Fund for National Human Rights Protection Systems” which shall assist States in their efforts to improve and reform national criminal justice systems, including the judiciary, prosecutors, police and prisons. That fund shall be financed by States, non-governmental organisations and the corporate sector and shall contribute to the legal empowerment of the poor.

(e) The Human Rights Council should consider drafting a United Nations Convention on the Rights of Detainees to codify all human rights of persons deprived of liberty, as laid down in the Standard Minimum Rules for the Treatment of Prisoners and similar soft law instruments, in a legally binding human rights treaty with effective monitoring and implementation mechanisms.

(f) In the fight against terrorism and other forms of organised crime, states should keep in mind the absolute and non-derogable nature of the prohibition of torture. In particular, detention in secret places of detention, the expulsion or “rendition” of terrorist suspects to countries known for their practice of torture, the use of diplomatic assurances from these Governments not to torture as a means of circumventing the principle of non-refoulement, “enhanced interrogation techniques” aimed at inflicting severe physical or mental pain or suffering on detainees for the purpose of extracting intelligence information, and similar practices in the global fight against terrorism are absolutely prohibited under international law and shall immediately be terminated. After all, torture, as the ultimate form of power exercised by one individual over another individual in a powerless situation, constitutes a direct attack on the personal integrity, dignity and humanity of human beings and is, therefore, with good philosophical and historical reasons, absolutely prohibited under international law even in the most extreme and exceptional circumstances, such as war or terrorism.