

**DEATHS IN CUSTODY**

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## **A. RESPONSIBILITY OF STATES FOR PREVENTION OF DEATHS IN CUSTODY**

### ***Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/14/24, ¶¶48-49):***

48. Communications to Governments and country mission reports often address deaths in custody, which encompass guards killing prisoners, inter-prisoner violence, suicides, death resulting from torture in custody and deaths resulting from prison conditions, including poor health care, overcrowding and inadequate food.

49. I have analysed in detail the nature of the State's responsibility in a custodial setting (A/61/311, paras. 49-54). States have a heightened level of responsibility in protecting the rights of detained individuals. Indeed, when an individual dies in State custody, there is a presumption of State responsibility. The obligation of the State is not only to prohibit and prosecute killings by guards or other officials, but also to prevent deaths and to respond effectively to the causes of the deaths. The specific content of the obligations of the State include: ensuring appropriate prison oversight and monitoring; providing adequate health care to detainees (A/HRC/11/2/Add.5) and appropriate budgets to prisons (A/HRC/14/24/Add.3); stopping practices of prisoners running prisons (A/HRC/8/3); ensuring accurate records of detainees and their sentences (A/HRC/14/24/Add.3); and exercising due diligence to prevent inter-prisoner violence.

### ***Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/61/311, 5 September, 2006, ¶¶ 49-54):***

49. The category "deaths in custody" encompasses a staggering array of abuses. With respect to this issue, my last report to the Commission on Human Rights referred to 25 communications sent to 19 countries regarding more than 185 victims.<sup>1</sup> (Roughly one out of four of the individual cases brought to the attention of this mandate concerns a death in custody.) These communications concerned allegations of prisoners being executed with firearms and, in one case, by immolation; torture or other ill-treatment, often for the purpose of extracting a confession, beatings, and sexual abuse resulting in death; killings by guards to break up riots or demonstrations; detainees being transported or held in containers that were so overcrowded or lacking in ventilation as to lead to the deaths of large numbers of detainees; and guards standing by while persons in custody were killed by private citizens. This catalogue of abuses indicates that the specificity of custodial death as a category of violation is not due to the cause of death. Executions, the use of excessive force, and other abuses resulting in death occur against persons outside of custody as well as in custody.

50. What makes "custodial death" a useful legal category is not the character of the abuse inflicted on the victim but the implications of the custodial context for the State's human rights obligations. These implications concern the State obligations to both prevent deaths and respond to those deaths that occur. When the State detains an individual, it is held to a heightened level of diligence in protecting that individual's rights. When an individual dies in State custody, there is

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<sup>1</sup> E/CN.4/2006/53/Add.1. The communications concerned 185 identified individual cases of death in custody; however, some communications also dealt with larger groups of unidentified persons.

a presumption of State responsibility. These interlocking implications produce the legal specificity of custodial death as a human rights violation.

51. With respect to the prevention of deaths in custody, States have heightened responsibilities for persons within their custody. In all circumstances, States are obligated both to refrain from committing acts that violate individual rights and to take appropriate measures to prevent human rights abuses by private persons. The general obligation assumed by each State party to the International Covenant on Civil and Political Rights (ICCPR) is, thus, “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. ...”<sup>2</sup> This obligation has notably far-reaching implications in the custodial context. With respect to the obligation to respect rights, the controlled character of the custodial environment permits States to exercise unusually comprehensive control over the conduct of government officials — police officers, prison guards, soldiers, etc. — in order to prevent them from committing violations. With respect to the obligation to ensure rights, the controlled character of the custodial environment also permits States to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates’ freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. While the same basic standard applies in custodial and non-custodial settings — the State must exercise “due diligence” in preventing abuse<sup>3</sup> — the level of diligence that is due is considerably higher in the custodial context.

52. States are obligated to take measures to provide mechanisms of strict legal control and full accountability and to take measures to provide safe and humane conditions of detention. Some concrete measures are required by treaty or customary international law. Of particular note are ICCPR, the Convention on the Rights of the Child, and the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). In addition, a number of instruments adopted by United Nations organs have formulated broadly applicable measures conducive to fulfilling general legal obligations to respect and ensure the right to life.<sup>4</sup> In addition there are various other instruments more specifically concerned with the problem of torture, a form of abuse that leads to death in some cases. While many of the provisions contained in these instruments would be best conceptualized as guidelines, they were generally developed with the extensive involvement of both human rights and correctional experts, suggesting that many of the measures they contain will typically be necessary in practice to effectively prevent human rights violations.

53. Another legal consequence of the fact of detention is that, in cases of custodial death, there is a presumption of State responsibility. The rationale for this presumption was illustrated in the

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<sup>2</sup> ICCPR, art. 2 (1).

<sup>3</sup> See E/CN.4/2005/7, paras. 71-75.

<sup>4</sup> See, e.g., Basic Principles for the Treatment of Prisoners; Basic Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Basic Principles on the Use of Force and Firearms; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; United Nations Standard Minimum Rules for the Administration of Juvenile Justice; Standard Minimum Rules for the Treatment of Prisoners; and United Nations Rules for the Protection of Juveniles Deprived of their Liberty. For a detailed study of these instruments, see Rodley, *op. cit.* at note 32.

case of *Dermit Barbato v. Uruguay*.<sup>5</sup> In that case, the Human Rights Committee found that Uruguay had violated the right to life of Hugo Dermit while he was detained at a military barracks. The cause of death found by the autopsy conducted by the State and recorded on his death certificate was not contested: he died of “acute haemorrhage resulting from a cut of the carotid artery”.<sup>6</sup> However, while the State claimed that “he had committed suicide with a razor blade”, the author of the communication claimed that he had been killed by the military through mistreatment and torture.<sup>7</sup> The State offered no evidence in support of its explanation, and the author of the communication was unable to adduce more than circumstantial evidence — mainly, that Dermit had been in good spirits inasmuch as he expected to be released shortly. The Human Rights Committee concluded that:

“While the Committee cannot arrive at a definite conclusion as to whether Hugo Dermit committed suicide, was driven to suicide or was killed by others while in custody; yet, the inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by article 6 (1) of the Covenant.”<sup>8</sup>

54. In other words, the State’s two-fold obligation to ensure and respect the right to life, together with its heightened duty and capacity to fulfil this obligation in the custodial environment, justifies a rebuttable presumption of State responsibility in cases of custodial death.<sup>9</sup> One consequence of this presumption is that the State must affirmatively provide evidence that it lacks responsibility to avoid that inference.<sup>10</sup> Another important consequence of this presumption is that, absent proof that the State is *not* responsible, the State has an obligation to make reparations to the victim’s family. This is the case even if the precise cause of death and the persons responsible cannot be identified.

***Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶ 37-41):***

*The Special Rapporteur visited Guatemala in August 2006 and reported on the violence afflicting Guatemala, including deaths of detainees in custody. Mr. Alston was informed of the following sequence of events that had recently taken place in prisons and detention centers.*

**The State’s Responsibility for Prison Violence**

37. According to information provided by the Dirección General del Sistema Penitenciario (DGSP), there were 3 violent deaths of persons in its custody in 2001, 18 in 2002, 9 in 2003, 4 in

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<sup>5</sup> Communication No. 84/1981, *Dermit Barbato v. Uruguay*, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40), annex IX.

<sup>6</sup> *Ibid.*, paras. 1.4 and 6.1.

<sup>7</sup> *Ibid.*, para. 1.4.

<sup>8</sup> *Ibid.*, para. 9.2.

<sup>9</sup> This conclusion was also reached by the first person to hold this mandate: “A death in any type of custody should be regarded as prima facie a summary or arbitrary execution and appropriate investigations should immediately be made to confirm or rebut the presumption” (E/CN.4/1986/21, para. 209).

<sup>10</sup> The problem of States advancing implausible and unsubstantiated accounts that could not readily be disproved has confronted this mandate since the beginning. See E/CN.4/1983/16, para. 201. Such allegations cannot be resolved without evidence from the State.

2004, 42 in 2005, and there had been 18 in 2006 as of July. The unusually high figure for 2005 is related to the riots that occurred at multiple prisons on 15 August 2005, in which 25 inmates were killed. Statistics were not provided on the identities of the perpetrators or on whether they were inmates or guards. There were also a number of killings in juvenile detention centres, which are subject to the Secretaría de Bienestar Social rather than the DGSP.

38. Many of the violent deaths in custody indicate either actions or omissions that could reasonably be expected to result in death. One such incident occurred shortly before my visit, and I discussed it with both government officials and members of civil society. The killings at the Etapa II juvenile detention centre on 22 June 2006 appear to have been part of a cycle of retaliation. On 6 September 2005, a hand grenade and several firearm shots were fired in the Etapa II youth detention centre in San José Pinula, resulting in the death of 1 detainee and injuries to 13 others. Reports indicate that the perpetrators were members of Mara 18 and attack was directed against members of Mara Salvatrucha. On 19 September 2006, men believed to be associated with Mara Salvatrucha and carrying firearms entered the Etapa II centre and killed 12 detained members of the Mara 18.

39. On 22 June 2006, it was again the turn of the Mara 18 detainees to kill detainees of the rival gang held at Etapa II. This time the attack was particularly brutal, involving not only the use of firearms but also stoning and severing of limbs. It resulted in three dead and six wounded. The attack and its preparation were partially recorded on the closed circuit cameras of the detention centre. The recording has been seized by the PDH, which has shown it at a press conference and published a report on the incident. The report found that some wardens contributed to arming the killers and enabling them to enter the cells of the victims, while the prison authorities and the police failed to intervene to stop the killing. At 5.53 p.m. wardens hung blankets in front of the entry of the section where members of the Mara 18 are detained, obstructing the view for both the closed circuit cameras and the guard on the turret overlooking the wing. During the following 40 minutes until the violence started, nothing was done to remove them. During those 40 minutes, wardens brought several unidentifiable objects into the section holding members of the Mara 18. Ten minutes before the violence started, the guard on the turret had left for his dinner. No colleague replaced him. At 6.36 p.m. three members of the Mara 18 emerged from behind the blankets and entered the area of the Mara Salvatrucha. The report notes that it appears from the video that a warden had unlocked the doors to the Mara Salvatrucha section. During the following 40 minutes the gang members shot and attacked their victims with stones, severing limbs and crushing skulls. Forces of the PNC [Policía Nacional Civil] entered the detention facility when the violence started, but inexplicably withdrew after 2 minutes and returned only 41 minutes later. When investigators of the Ministerio Público recorded the crime scene, they did not inspect the dormitories in which the attack had obviously been prepared. They also left behind skull fragments, stones used as weapons and ammunition shells.

40. The motives of the guards who facilitated the killings are unclear. However, in the days before the incident, members of the Mara 18 detained at Etapa II spoke about a “party” (*fiesta*) they were soon going to have and threatened a warden who was refusing to do them a favour that he might be victimized at their “party”. The problem, however, goes beyond the corruption or intimidation of a few guards. Too much power has been ceded to the gangs in the detention

system, and in some instances this appears to have amounted to an unlawful but de facto delegation of authority from government officials to gang leaders.

41. The human rights law on deaths in custody involves the situation-specific application of the due diligence standard. Many inmates who suffer violent deaths in custody do so at the hands of other inmates. This does not, however, absolve the State of legal responsibility under international law. As discussed above, the State's obligation to respect and ensure the right to life requires exercising due diligence by taking measures to prevent murders. In most contexts, exercising due diligence primarily entails the investigation, prosecution, and punishment of murderers so as to deter future crimes. However, in the custodial context, this obligation has more far-reaching implications. The controlled character of the custodial environment permits the State to exercise unusually comprehensive control over the conduct of government officials - police officers, prison guards, soldiers, etc. - in order to prevent them from committing violations. The controlled character of the custodial environment also permits the State to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates' freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. While the same basic standard applies in custodial and non-custodial settings - the State must exercise "due diligence" in preventing abuse - the level of diligence that is due is considerably higher in the custodial context (A/61/311, para. 51). This obligation to exercise due diligence is breached both when prison officials permit inherently dangerous situations to develop and when they tacitly delegate their powers and responsibilities to gangs or individual inmates.

***Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 41-48, 99-100):***

*Mr. Alston reports on the poor conditions and severe overcrowding of prisons as well as the physical abuse by prison guards and inmates. These conditions have allowed the growth of gangs in prisons, resulting in frequent violence. It has also resulted in the common occurrence of gang leaders running the prisons.*

41. Killings in state detention facilities in Brazil occur primarily in the context of prison riots and gang-related inmate violence, during which the perpetrators are inmates, prison guards, or police sent in to quell the disturbance or rebellion.<sup>11</sup> While the precise trigger for each killing is unique,<sup>12</sup> there are a number of general factors which facilitate excessive violence throughout the prison system. Significantly, these factors not only lead to inmate unrest but have encouraged the growth of a parallel gang power in prisons. The failure of the state to meet basic inmate needs and security encourages the growth of gangs by creating a power vacuum in which gangs are able to present themselves as securing benefits for inmates. This not only results in excessive

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<sup>11</sup> Major prison riots include: In October 1992, 111 prisoners were killed when Military Police attempted to regain control of the Carandiru prison in São Paulo following a riot; one person was convicted in relation to these deaths, but his conviction was overturned in February 2006. In 2001, there were riots in 29 separate facilities simultaneously in São Paulo. In 2002, 10 died and 60 escaped from the Embu das Artes jail in São Paulo. In 2003, 84 prisoners escaped from the Silvio Porto prison in Paraíba. In 2004, 14 inmates were killed and some were mutilated during an uprising at the Urso Branco prison in Rondônia. In 2004, 34 inmates died during a riot at Benfica prison in Rio de Janeiro. In 2007, 25 inmates were burned to death by other inmates at the Ponte Nova prison in Minas Gerais.

<sup>12</sup> For the genesis of the May 2006 riots in São Paulo, see Part III(C)(1). For another example, the August 2007 violence in Minas Gerais was reportedly a result of conflict between gangs.

prison violence, but as the events of May 2006 in São Paulo clearly demonstrate, has effects far beyond the prison walls. Broader crime control efforts must take into account the key role played by prisons in gang growth, and the failure of the prison system to curb the activities of organized crime.

### Analysis of the Factors Facilitating Prison Violence

42. Brazil's poor prison conditions and severe overcrowding are well-documented.<sup>13</sup> The national prison population has risen sharply over the last decade, and the incarceration rate has more than doubled.<sup>14</sup> The dramatic rise - caused by the slowness of the judicial system, poor monitoring of inmate status and release entitlement, increased crime rates, high recidivism rates, and the popularity of tougher law and order approaches favouring longer prison terms over alternative sentences - has resulted in severely overcrowded prisons. The prison system was designed to hold only 60% of the inmates actually detained nationwide,<sup>15</sup> and many individual prisons are two or three times over capacity.<sup>16</sup>

43. Senior Government officials responsible for prison administration affirmed that there are problems with physical abuse and corruption by prison guards. While I was informed by officials at one prison I visited that there were no mistreatment issues and thus no guards had been punished, this picture contrasts with that presented by those with legal authority to monitor the prison, by civil society groups, and by inmates whom I interviewed. The Judge of Penal Execution, for example, has been involved in various legal actions relating to beatings by groups of prison officials against inmates at this facility.<sup>17</sup> Inmates with whom I spoke had witnessed

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<sup>13</sup> See, for example: Report of the Special Rapporteur on Human Rights on the question of torture (20/8 - 12/9/2000), report E/CN.4/2001/66/Add.2.

<sup>14</sup> In 1995, the inmate population was 148,760, or 93 per 100,000. By 2006, it had jumped to 401,236, or 213.8 per 100,000: See Ministério da Justiça; Centro de Estudos de Segurança e Cidadania.

<sup>15</sup> (2006). Ministério da Justiça; Centro de Estudos de Segurança e Cidadania.

<sup>16</sup> The problem in the state of São Paulo is especially acute. São Paulo contains 20% of the nation's population but 40% of its prison population. As of 30 October 2007 there were 140,680 inmates in 143 penitentiaries (currently beyond capacity by 44,807 inmates), and a further 11,073 in police lock-ups. (See Secretaria da Administração Penitenciária Gabinete do Secretário.) A prison I visited in São Paulo which is a provisional detention centre for those awaiting trial or conviction is currently at three times its capacity. At 9 August 2007, it held 1,438 inmates, with a capacity for 512. (See "Relatório referente à visita realizada prisional Centro de Detenção Provisória II de Pinheiros em 9 de agosto de 2007 pelo Conselho da Comunidade da Comarca de São Paulo".) On the day I visited, 6 November 2007, it was holding 1,520 inmates. Cells equipped for eight regularly hold up to 25 inmates, who take turns sleeping on beds or the floor. Although the law provides for access to work and education, nationally, as of December 2004, only about 18% of the total number of those in prison were involved in any form of education. (UNESCO Office (Brazil), *Education for Freedom: Trajectory, Debates and Proposals of a Project for Education in Brazilian Prisons*, (March 2007), p. 34; Constitution of Brazil, Art. 208; Law no 9.394/96 (Bases and Directives for Education - Art 37 § 1), CEB Technical Opinion no 11/2000, Law no 10.172/2001 (National Education Plan), Law no 7.21-/84 (Law of Penal Execution), and CNPCP Resolution no 14/94 (Basic Regulations for the Treatment of Prisoners).) Rates in São Paulo in 2007 remained low: 17.21% of inmates had access to education; 42.34% to work; and 40.45% were involved in no activity whatsoever. (See Secretaria da Administração Penitenciária Gabinete do Secretário.) Given that the inmate population is largely young (over 50% are under 30), poor (95%), and uneducated (over 65% have less than an eighth grade education, 12% are illiterate), the lack of education and work fails to provide inmates with alternatives to crime upon release, and helps to ensure that prisons are a training ground for future criminal activity.

<sup>17</sup> Poder Judiciário São Paulo - 1a Vara das Execuções Criminais da Comarca de São Paulo, Juiz de Direito Titular da 1a Vara das Execuções Criminais da Comarca de São Paulo e Corregedor dos Presídios (18 October 2007).

and received beatings. It is telling that the threat of retaliation for making a complaint against a prison official is so serious that prison monitors consider any such complaints likely to be true. The inmates who I interviewed were afraid to even have it known that they had spoken with me, fearing reprisals from other inmates and prison officials.

44. Delays in processing transfers, together with warden violence and poor general conditions encourage the growth of gangs in prisons, which can justify their existence to the prison population at large by purporting to act on behalf of prisoners to obtain benefits and prevent violence. Poor prison administration and conditions thus facilitate not only riots, but directly contributes to the growth of criminal gangs.<sup>18</sup>

45. In most prisons, the state fails to exert sufficient control over inmates, and lets gangs (or other prisoners in “neutral prisons”) sort out amongst themselves matters of internal prison security. Selected inmates are often given more power over other prisoners’ daily lives than guards. They assume control of (sometimes brutal) internal discipline and the distribution of food, medicine, and hygiene kits.<sup>19</sup> This practice often results in allowing gang-leaders to run prisons.

46. Many prisons throughout Brazil require inmates to designate which gang they belong to when they enter the prison system for the first time. Prison administrations adopted this practice as a way to better control prison populations and to reduce inter-gang conflict in prisons – one particular prison or prison wing will, for example, only hold members of the Red Command gang, while another will only hold members of the Friends of Friends gang. In Rio de Janeiro, even when a new inmate has no gang affiliation whatsoever, he may be required by prison administrators to pick a gang with which to be affiliated. A prisoner who refuses is simply assigned to a gang by the prison administration. The state practice of requiring gang identification essentially amounts to the state recruiting prisoners into gangs. Ultimately, this contributes to the growth of gangs outside prison and elevates crime rates more generally. Given the power that gangs have now established in the prison system, rival gangs must clearly remain separated to avoid prison riots and deaths. But it is important to take all available steps to avoid turning common criminals into committed gang members. While in theory some states have “neutral” prisons in which prisoners without any gang affiliation may be placed, there need to be more of these, and their neutrality needs to be better preserved in practice.

### Prison Oversight

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<sup>18</sup> The movement of inmates through the prison system - from police lock-ups, to provisional detention centres awaiting trial or conviction, to closed prisons, to open prisons, and eventual release - is largely not recorded electronically. (Brazil’s National Penitentiary Department (*Departamento Penitenciário Nacional*) has created software called “Infopen Management”, through which inmates’ details can be electronically stored. At present, approximately 28,000 inmates (about 7% of the total prison population) have been registered in this way.) Together with inadequate monitoring of each inmate’s status, this means that inmates are frequently held in the incorrect facility. For example, inmates can be held in closed detention when the inmate is already entitled to be held in open detention and thus able to work in the community during the day. Prison monitors with whom I spoke noted that it was not uncommon for inmates to be held one year beyond the time they should have been moved or released. One inmate whom I interviewed had been detained over a year, and had already been tried, but knew nothing about his proceedings, or why he was still in provisional detention. Another inmate, arrested in late 2005, had had various hearings but was unaware of the status of the proceedings.

<sup>19</sup> These prisoners are known by various euphemisms, including “*faxinas*” (janitors) and “*chaveiros*” (key-holders).



47. There are many bodies with the legal authority to investigate prison conditions, but they have not provided adequate oversight in practice. This lack of external oversight has permitted poor prison conditions and abuses of power to continue. The law provides for a number of organs to inspect and monitor prisons.<sup>20</sup>

48. However, inmates I interviewed had rarely seen or even heard of a visit by an external prison monitor. They were aware of rare visits by prison internal affairs, but no inmate with whom I spoke knew of a visit by a judge, prison council, or other prison oversight body. It is essential for the effectiveness of complaint mechanisms that monitoring is not only done regularly, but also that it is visible to inmates. The mere existence of an internal oversight office is grossly inadequate in a context where prisoners are too afraid to make any complaint.

[...]

### Recommendations

99. While avoiding steps that would further endanger inmates, the government should take steps to end gang-control of prisons, including:

- (a) All practices that encourage or require new prison inmates to choose a gang affiliation should be discontinued. Inmates should be able to identify as “neutral” and be placed in truly neutral prisons;
- (b) Mobile phones should be eliminated from prisons through the more rigorous use of metal detectors and through the installation of technology that blocks mobile phone signals;
- (c) Prison authorities should reassert day-to-day control of internal prison administration so that prison guards, not inmates, are responsible for internal discipline;
- (d) All inmates’ benefits and location in the prison system should be recorded electronically, and prisoners moved from one type of detention to another when they are so entitled. Inmates and judges of penal execution should be able to access the digital record of prisoner entitlements;
- (e) Overcrowding should be reduced through more use of alternative sentences, open prison regimes, and the construction of new prisons.

100. The Government should ensure that this report is disseminated widely to officials at all levels. The federal Secretariat for Human Rights should take responsibility for monitoring the progress of the implementation of these recommendations.

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<sup>20</sup> Lei de Execução Penal, Lei No. 7.210 (adopted 11 July 1984). In practice, the key actors are the Judges of Penal Execution and the Community Councils. Judges of Penal Execution are required to inspect prisons monthly and have the power to “interdict, in all or in part, any penal establishment that is functioning under inadequate conditions or infringing the provisions of [the law]”. The number of such judges is, however, insufficient to meet their extensive responsibilities. In São Paulo, for example, there is just one Judge of Penal Execution for the capital, who is responsible for monitoring 10,000 inmates in nine prisons. This makes it impossible for the Judge to adequately monitor inmate status and prison conditions.

## B. PRISONER CONTROL OF PRISONS

*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3, May 2008, ¶¶ 68-88):*

68. “There’s a small group that’s in charge within the prison; they beat people; they order killings; they control the drug trafficking.”<sup>21</sup> While this comment was made over a decade ago by a female prisoner in Brazil, it is a phenomenon that is common today in many prisons around the world, in both developed and developing countries.<sup>22</sup> It is also a problem that the Special Rapporteur has encountered first-hand in several country visits. Because extrajudicial killings frequently occur in such circumstances, it is an issue which demands the attention of the Council.

69. From the perspective of the authorities, the logic of handing the control of prisons to gangs is not difficult to understand. The gangs are close to the ground, well informed and provide their services free of charge. They can control trouble-makers, administer brutal punishment and mobilize free labour on a large scale. They might also reduce inter-gang violence, provide a system of rewards that keep some prisoners contented and encourage respect for certain prison facilities. The temptation to rely upon them to carry out the basic functions of maintaining order and imposing discipline is especially appealing to administrators who are grappling with shrinking budgets, staff shortages, overcrowded facilities, demanding gang-based populations and little public or Government support.

70. There are, however, major problems with opting for this choice. First, killings occur regularly and the authorities are poorly placed to do anything to prevent them or to punish the perpetrators. Second, the practice invariably leads to widespread violations of a wide range of other human rights. Third, the supposed benefits of an orderly and disciplined prison population almost always degenerate into a system in which violence rules, drugs dominate, gang-based turf battles are unleashed and various forms of economic, social and sexual coercion or intimidation are facilitated.

### The Process of Abdicating Responsibility

71. How does it come to pass that certain prisoners are placed in the position of maintaining order and imposing discipline on their peers, often arbitrarily and abusively, while the prison authorities stand idly by? The origins of this practice vary. In some cases, staff may have deliberately delegated power to particular prisoners, sometimes beginning by designating “trusties” or individuals who are trusted to behave responsibly, but then losing a degree of control over, or becoming in thrall to, the “trusties”. In other cases, inmates may have coerced the staff into recognizing their power. The extent to which control is surrendered also varies. Sometimes, the guards continue to monitor conditions and retain the capacity to intervene. In a remarkable number of cases, however, the guards have abandoned any attempt at regulating life

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<sup>21</sup> Human Rights Watch, *Behind Bars in Brazil* (1998), at [www.hrw.org/reports98/brazil/Brazil-12.htm](http://www.hrw.org/reports98/brazil/Brazil-12.htm).

<sup>22</sup> See e.g. in relation to the United States, Christian Parenti, *Lockdown America* (1999); and Gerald G. Gaes et al., “The Influence of Prison Gang Affiliation on Violence and Other Prison Misconduct”, 9 March 2001, at [www.bop.gov/news/research\\_projects/published\\_reports/cond\\_envir/oreprcrim\\_2br.pdf](http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprcrim_2br.pdf).

within the prison and, instead, only secure the perimeter, preventing escapes and searching visitors for weapons and other contraband.

72. The violent death of some inmates is an almost invariable consequence of the abdication of authority to prisoners. There are several reasons for this. First, when prisoners run prisons, the “discipline” they impose is typically ruthless. Prisoners who fail to abide by their arbitrary rules risk beating, stabbing and other unlawful violence. Second, when prisoners run prisons, the strength of gangs will increase, as will the likelihood of fights between gangs. Third, when criminals run prisons, it is relatively easy for them to organize riots and uprisings. When guards exercise strong, continuous supervision, grievances can be addressed before they explode, and fights can be broken up before they escalate. However, once a full-blown riot has developed, the usual response is large-scale intervention by a military or police unit that too often resorts to overwhelming force and indiscriminate violence. On various occasions, scores of prisoners have died during the suppression of a single prison riot.

### The Obligations of State

73. The State’s duty to protect the lives of prisoners is clear. In all circumstances, States are obligated to both refrain from committing acts that violate individual rights and take appropriate measures to prevent human rights abuses by private persons. As I have previously observed, this obligation has notably far-reaching implications in the custodial context.<sup>23</sup> In terms of the obligation to respect rights, the controlled character of the custodial environment permits States to exercise unusually comprehensive control over the conduct of government officials - such as police officers, prison guards and soldiers - in order to prevent them from committing violations. In terms of the obligation to ensure rights, the controlled character of the custodial environment also permits States to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates’ freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. It is inconceivable that a State could fulfil this heightened duty of protection while permitting prisoners to run prisons.

74. The problems of prisoner violence and abdication of authority to prisoners have long been recognized by international human rights instruments. The oldest and most venerable among them is the Standard Minimum Rules for the Treatment of Prisoners,<sup>24</sup> which reflect customary international law in many respects and provide authoritative guidance in interpreting many provisions of the International Covenant on Civil and Political Rights and other treaties. When prisoners run prisons, the provision of discipline by prisoners is integral to the practice. Yet the Standard Minimum Rules clearly prohibit this.<sup>25</sup> The broader issue of prisoner-on-prisoner

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<sup>23</sup> A/61/311, paras. 49-54.

<sup>24</sup> Adopted in 1955 and endorsed by the Economic and Social Council in 1957.

<sup>25</sup> Articles 28 and 29 provide that:

(1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.

(2) This rule shall not, however, impede the proper functioning of systems based on self-government, under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment.

29. The following shall always be determined by the law or by the regulation of the competent administrative authority:

(a) Conduct constituting a disciplinary offence;

violence has also been addressed in detail by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment<sup>26</sup> and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>27</sup>

### The Path to Reform

75. States should develop plans to reassert responsible control over their prison populations and to effectively protect prisoners from each other. In some cases, such as when prisoner authorities are also gang-leaders, this is undeniably challenging: if prisoners are segregated according to gang affiliation, the perpetuation of gang control will be encouraged; if prisoners are not segregated, prisoners from rival gangs may kill each other. The complexity of the challenge is significant, and optimal solutions will no doubt vary from country to country. It is possible, however, to identify some of the basic tools Governments have at their disposal, international standards that should guide the use of these tools and underlying factors that must be addressed to enable progress.

76. The Government's legal power to determine which prisoners are confined to which cells, wings and prisons at which times provides one powerful example of the tools Governments have to retake control from prisoner authorities and prevent prisoner-on-prisoner violence. The power to control inmates' movements can be used to disrupt particular circumstances in which inmates attempt to become prisoner authorities, dominating and coercing fellow prisoners. Particularly

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(b) The types and duration of punishment which may be inflicted;

(c) The authority competent to impose such punishment.

*See also* United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113 (14 December 1990)), art. 71: "No juveniles should be responsible for disciplinary functions except in the supervision of specified social, educational or sports activities or in self-government programmes"; European Prison Rules (Committee of Ministers, Council of Europe, Rec (2006) 2 (11 January 2006)), art. 62: "No prisoner shall be employed or given authority in the prison in any disciplinary capacity."

<sup>26</sup> "Countries should take effective measures to prevent prisoner-on-prisoner violence by investigating reports of such violence, prosecuting and punishing those responsible, and offering protective custody to vulnerable individuals, without marginalizing them from the prison population more than necessitated by the needs of protection and without rendering them at further risk of ill-treatment. Training programmes should be considered to sensitize prison officials as to the importance of taking effective steps to prevent and remedy prisoner-on-prisoner abuse and to provide them with the means to do so. In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, prisoners should be segregated along the lines of gender, age and seriousness of the crime, as well as first-time/repeat offenders and pretrial/convicted detainees" A/56/156, para. 39 (i).

<sup>27</sup> The European Committee has reached similar conclusions, although it has placed greater emphasis on the role of supervision by staff:

"Tackling the phenomenon of inter-prisoner violence requires that prison staff be placed in a position, including in terms of staffing levels, to exercise their authority and their supervisory tasks in an appropriate manner. Prison staff must be alert to signs of trouble and be both resolved and properly trained to intervene when necessary. The existence of positive relations between staff and prisoners, based on the notions of secure custody and care, is a decisive factor in this context; this will depend in large measure on staff possessing appropriate interpersonal communication skills. Further, management must be prepared fully to support staff in the exercise of their authority. Specific security measures adapted to the particular characteristics of the situation encountered (including effective search procedures) may well be required; however, such measures can never be more than an adjunct to the above-mentioned basic imperatives. In addition, the prison system needs to address the issue of the appropriate classification and distribution of prisoners." European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *11th General Report on the CPT's activities*, covering the period 1 January to 31 December 2000 (Strasbourg, 3 September 2001), para. 27.

vulnerable individuals, including ones who have been threatened by other prisoners, may be given protective custody. Prisoner authorities may themselves be moved and isolated from the rest of the prison population.<sup>28</sup>

77. In addition to these separation measures, staff can systematically classify and segregate new inmates in such a way as to reduce the opportunities and incentives for inmates to form violent organizations. International human rights treaties require that some groups of inmates be separated, providing that accused persons shall be segregated from convicted persons,<sup>29</sup> juvenile offenders shall be segregated from adults<sup>30</sup> and migrant workers held for migration-related violations shall be segregated from convicted persons or persons awaiting trial.<sup>31</sup> Other criteria for segregation are enumerated in standards instruments adopted by international bodies. These include the separation of men from women and of persons detained for civil offences from those detained for criminal offences.<sup>32</sup> International standards also suggest the importance of classification to encourage rehabilitation and discourage recidivism.<sup>33</sup>

78. These broad categories, however, provide only a starting point for national authorities. While Governments must avoid classifications that would be inconsistent with human rights law prohibitions on discrimination, there are numerous other country-specific criteria that may be relevant, including gang affiliation (whether as a criterion for grouping or separating), past behaviour in prison and the severity and character of the offence committed. To make any such effort effective, it must be approached systematically. First, the Government should develop a precise policy on how the various criteria interact to determine who should be detained together or apart. Thus, as a purely hypothetical example, one might separate inmates into age, sex and other groups required by law; further segregate each such group by the severity of the offence committed; then, among those responsible for violent crimes, separate persons from rival gangs; and finally separate out leaders of gangs. The system of classification and segregation that is required will vary according to the particular challenges facing each prison system, but too often Governments allow these decisions to be made on an ad hoc basis by individual officials; instead, they should be clearly spelled out and made known to all concerned. Second, the institutional means to implement this classification and segregation policy must be put in place. To effectively screen and sort new inmates, there will be a need for staff trained in interviewing new inmates and in reaching out to other law enforcement authorities to obtain and analyse information on the criminal histories and gang affiliations of individuals and on the relationships between gangs. Third, the policy must be continuously evaluated for its effectiveness in, inter alia, preventing prisoner-on-prisoner violence, the establishment of gang control and recidivism.

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<sup>28</sup> Note, however, that sustained and comprehensive isolation can violate human rights law requirements that “persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” and that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (ICCPR, arts. 7, 10 (1)). The “super max” approach of continuous single cell confinement for the worst perpetrators has, in particular, raised serious concerns.

<sup>29</sup> ICCPR, art. 10.

<sup>30</sup> ICCPR, art. 10; Convention on the Rights of the Child, art. 37.

<sup>31</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17.

<sup>32</sup> Standard Minimum Rules, art. 8.

<sup>33</sup> Standard Minimum Rules, arts. 67-69; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, arts. 27-29.

79. This brief discussion of one tool - developing a system for allocating prisoners to cells, wings and prisons - that Governments have for ending the hold of prisoner authorities and preventing prisoner-on-prisoner violence should not be taken to imply that preventing violent gangs from controlling prisons is straightforward. In any such effort, unintended consequences are common. Providing vulnerable prisoners with protective custody in response to gang threats can perpetuate gang control. Attempting to isolate gang leaders from the general population can spark violent riots. However, for all the difficulties of re-establishing Government control, it is clear that the necessary tools are available.

80. Even when prison officials do make serious and sensible efforts to prevent violence and to assert their legitimate disciplinary authority, reform may prove elusive unless certain underlying factors are addressed. Prisons run by prisoners are typically also characterized by understaffing, overcrowding and corruption. Governments that are serious about maintaining the monopoly of violence, which is a function belonging solely to the State, must address these underlying problems in relation to the use of violence in prisons.

81. Understaffing, or an insufficient ratio of staff to prisoners, makes it difficult and often dangerous for staff to supervise inmates effectively. In extreme cases, a small staff has no choice but to prioritize searching visitors and securing the perimeter against escapes while leaving inmates almost entirely unsupervised. However, even in more typical situations, understaffing increases the temptation to engage in corruption and to exercise power indirectly through prisoners.

82. Overcrowding makes it much more difficult to prevent prisoner-on-prisoner violence. Cells are difficult to monitor as effectively as common areas, and this inherent danger is made worse by the tendency for competition for space among a cell's inmates to lead to violence. Overcrowding also makes it more difficult to take other preventive measures. Even in the rare situation in which overcrowding does not lead directly to an insufficient staff-to-prisoner ratio, the direct supervision of inmates is dangerous in a densely packed area. In addition, overcrowding can make it difficult or impossible to find the space for programming or to effectively classify and segregate inmates.

83. There are two basic approaches available to reduce crowding: the first is to build additional prisons; the second is to provide alternatives to incarceration. Bail for persons held on remand and parole for persons serving sentences are particularly useful measures.

84. Corruption by staff routinely subverts other measures for reducing prisoner-on-prisoner violence. The most obvious downside is that prisoners can gain access to weapons. However, corruption also permits prisoners to buy transfers to other cells or prisons, defeating classification and segregation schemes.

85. There are a number of approaches to reducing corruption. In many situations, higher salaries will be essential. However, especially if gang control has already become significant, financial temptation is likely to be accompanied by fear that failing to comply with prisoner demands would result in violent consequences. For this reason, training and discipline are also

key factors. Prison staff should be trained to detect and avoid manipulation by inmates. Disciplinary rules should be rigidly enforced against even petty corruption to forestall the dynamic of escalating manipulation by inmates.

86. These are only preliminary observations which do more to identify the problem than provide a solution. The Special Rapporteur would note, however, that even a preliminary review reveals that the problem is critical and that the tools required to solve it are available. What is lacking is the political will to address violence and repression against an almost universally disdained group (convicted criminals), especially in countries in which the problem has grown to the point of appearing intractable. The other side of the balance sheet is, however, now becoming more apparent to Governments. The consequences for national security of abandoning control of prisons to prisoners are potentially dire. They include (a) turning prisons into training grounds for more effective violence to be unleashed upon the society by inmates when they are released; (b) enhancing gang recruitment by compelling previously unaffiliated prisoners to join and leaving them with no options upon release but to remain loyal to the gang, whose markings they will often have received in prison; and (c) turning prisons into well-protected and effective command centres for individuals running drug dealing, prostitution, extortion and other criminal enterprises or promoting terrorist activities from the security of their prison cells.

87. In summary, the practice of prisoners running prisons amounts to an abdication of the most basic responsibility of Governments to uphold human rights and is an issue that demands urgent attention. Where a Government insists that a regular prison system run by trained, disciplined and humane authorities is beyond its financial means, the alternatives are to revamp the criminal justice system to institute other forms of punishment, to place less reliance upon imprisonment and to instigate a more efficient court system which processes cases more rapidly. The State has no right to imprison a person in order to subject him or her to the caprices and arbitrariness of thugs, whether in the name of necessity, realism or efficiency. The human rights of individuals do not cease to exist when they pass through the prison gates. On the contrary, the State assumes a particular and demanding set of obligations by virtue of its decision to deprive a person of liberty through imprisonment.

88. The gravity and importance of the problem of prisoner-run prisons is one reason why the Human Rights Council should give urgent consideration to the appointment of a Special Rapporteur on the rights of detainees. This area constitutes a major gap in the existing coverage of the special procedures system and is one that should be remedied as soon as possible.<sup>34</sup>

***Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶ 37-41):***

*The Special Rapporteur visited Guatemala in August 2006 and reported on the violence afflicting Guatemala, including deaths of detainees in custody. Mr. Alston was informed of the following sequence of events that had recently taken place in prisons and detention centers.*

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<sup>34</sup> While the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has done excellent work on those aspects of prison conditions which fall within his mandate, this covers only a limited area of the much broader range of problems that need to be addressed. In addition, it is unreasonable to expect a single mandate-holder to cover the entirety of two such broad-ranging and critically important sets of issues.

*There appears to have been an unlawful but de facto delegation of authority from the government to gang leaders, resulting in violence between inmates.*

### The State's Responsibility for Prison Violence

37. According to information provided by the Dirección General del Sistema Penitenciario (DGSP), there were 3 violent deaths of persons in its custody in 2001, 18 in 2002, 9 in 2003, 4 in 2004, 42 in 2005, and there had been 18 in 2006 as of July. The unusually high figure for 2005 is related to the riots that occurred at multiple prisons on 15 August 2005, in which 25 inmates were killed. Statistics were not provided on the identities of the perpetrators or on whether they were inmates or guards. There were also a number of killings in juvenile detention centres, which are subject to the Secretaría de Bienestar Social rather than the DGSP.

38. Many of the violent deaths in custody indicate either actions or omissions that could reasonably be expected to result in death. One such incident occurred shortly before my visit, and I discussed it with both government officials and members of civil society. The killings at the Etapa II juvenile detention centre on 22 June 2006 appear to have been part of a cycle of retaliation. On 6 September 2005, a hand grenade and several firearm shots were fired in the Etapa II youth detention centre in San José Pinula, resulting in the death of 1 detainee and injuries to 13 others. Reports indicate that the perpetrators were members of Mara 18 and attack was directed against members of Mara Salvatrucha. On 19 September 2006, men believed to be associated with Mara Salvatrucha and carrying firearms entered the Etapa II centre and killed 12 detained members of the Mara 18.

39. On 22 June 2006, it was again the turn of the Mara 18 detainees to kill detainees of the rival gang held at Etapa II. This time the attack was particularly brutal, involving not only the use of firearms but also stoning and severing of limbs. It resulted in three dead and six wounded. The attack and its preparation were partially recorded on the closed circuit cameras of the detention centre. The recording has been seized by the PDH, which has shown it at a press conference and published a report on the incident. The report found that some wardens contributed to arming the killers and enabling them to enter the cells of the victims, while the prison authorities and the police failed to intervene to stop the killing. At 5.53 p.m. wardens hung blankets in front of the entry of the section where members of the Mara 18 are detained, obstructing the view for both the closed circuit cameras and the guard on the turret overlooking the wing. During the following 40 minutes until the violence started, nothing was done to remove them. During those 40 minutes, wardens brought several unidentifiable objects into the section holding members of the Mara 18. Ten minutes before the violence started, the guard on the turret had left for his dinner. No colleague replaced him. At 6.36 p.m. three members of the Mara 18 emerged from behind the blankets and entered the area of the Mara Salvatrucha. The report notes that it appears from the video that a warden had unlocked the doors to the Mara Salvatrucha section. During the following 40 minutes the gang members shot and attacked their victims with stones, severing limbs and crushing skulls. Forces of the PNC [Policía Nacional Civil] entered the detention facility when the violence started, but inexplicably withdrew after 2 minutes and returned only 41 minutes later. When investigators of the Ministerio Público recorded the crime scene, they did not inspect the dormitories in which the attack had obviously



been prepared. They also left behind skull fragments, stones used as weapons and ammunition shells.

40. The motives of the guards who facilitated the killings are unclear. However, in the days before the incident, members of the Mara 18 detained at Etapa II spoke about a “party” (*fiesta*) they were soon going to have and threatened a warden who was refusing to do them a favour that he might be victimized at their “party”. The problem, however, goes beyond the corruption or intimidation of a few guards. Too much power has been ceded to the gangs in the detention system, and in some instances this appears to have amounted to an unlawful but de facto delegation of authority from government officials to gang leaders.

41. The human rights law on deaths in custody involves the situation-specific application of the due diligence standard. Many inmates who suffer violent deaths in custody do so at the hands of other inmates. This does not, however, absolve the State of legal responsibility under international law. As discussed above, the State’s obligation to respect and ensure the right to life requires exercising due diligence by taking measures to prevent murders. In most contexts, exercising due diligence primarily entails the investigation, prosecution, and punishment of murderers so as to deter future crimes. However, in the custodial context, this obligation has more far-reaching implications. The controlled character of the custodial environment permits the State to exercise unusually comprehensive control over the conduct of government officials - police officers, prison guards, soldiers, etc. - in order to prevent them from committing violations. The controlled character of the custodial environment also permits the State to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates’ freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. While the same basic standard applies in custodial and non-custodial settings - the State must exercise “due diligence” in preventing abuse - the level of diligence that is due is considerably higher in the custodial context (A/61/311, para. 51). This obligation to exercise due diligence is breached both when prison officials permit inherently dangerous situations to develop and when they tacitly delegate their powers and responsibilities to gangs or individual inmates.

***Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 41-48, 99-100):***

*Mr. Alston reports on the poor conditions and severe overcrowding of prisons as well as the physical abuse by prison guards and inmates. These conditions have allowed the growth of gangs in prisons, resulting in frequent violence. It has also resulted in the common occurrence of gang leaders running the prisons.*

41. Killings in state detention facilities in Brazil occur primarily in the context of prison riots and gang-related inmate violence, during which the perpetrators are inmates, prison guards, or police sent in to quell the disturbance or rebellion.<sup>35</sup> While the precise trigger for each killing is

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<sup>35</sup> Major prison riots include: In October 1992, 111 prisoners were killed when Military Police attempted to regain control of the Carandiru prison in São Paulo following a riot; one person was convicted in relation to these deaths, but his conviction was overturned in February 2006. In 2001, there were riots in 29 separate facilities simultaneously in São Paulo. In 2002, 10 died and 60 escaped from the Embu das Artes jail in São Paulo. In 2003, 84 prisoners escaped from the Silvio Porto prison in Paraíba. In 2004, 14 inmates were killed and some were mutilated during an

unique,<sup>36</sup> there are a number of general factors which facilitate excessive violence throughout the prison system. Significantly, these factors not only lead to inmate unrest but have encouraged the growth of a parallel gang power in prisons. The failure of the state to meet basic inmate needs and security encourages the growth of gangs by creating a power vacuum in which gangs are able to present themselves as securing benefits for inmates. This not only results in excessive prison violence, but as the events of May 2006 in São Paulo clearly demonstrate, has effects far beyond the prison walls. Broader crime control efforts must take into account the key role played by prisons in gang growth, and the failure of the prison system to curb the activities of organized crime.

### Analysis of the Factors Facilitating Prison Violence

42. Brazil's poor prison conditions and severe overcrowding are well-documented.<sup>37</sup> The national prison population has risen sharply over the last decade, and the incarceration rate has more than doubled.<sup>38</sup> The dramatic rise - caused by the slowness of the judicial system, poor monitoring of inmate status and release entitlement, increased crime rates, high recidivism rates, and the popularity of tougher law and order approaches favouring longer prison terms over alternative sentences - has resulted in severely overcrowded prisons. The prison system was designed to hold only 60% of the inmates actually detained nationwide,<sup>39</sup> and many individual prisons are two or three times over capacity.<sup>40</sup>

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uprising at the Urso Branco prison in Rondônia. In 2004, 34 inmates died during a riot at Benfica prison in Rio de Janeiro. In 2007, 25 inmates were burned to death by other inmates at the Ponte Nova prison in Minas Gerais.

<sup>36</sup> For the genesis of the May 2006 riots in São Paulo, see Part III(C)(1). For another example, the August 2007 violence in Minas Gerais was reportedly a result of conflict between gangs.

<sup>37</sup> See, for example: Report of the Special Rapporteur on Human Rights on the question of torture (20/8 - 12/9/2000), report E/CN.4/2001/66/Add.2.

<sup>38</sup> In 1995, the inmate population was 148,760, or 93 per 100,000. By 2006, it had jumped to 401,236, or 213.8 per 100,000: See Ministério da Justiça; Centro de Estudos de Segurança e Cidadania.

<sup>39</sup> (2006). Ministério da Justiça; Centro de Estudos de Segurança e Cidadania.

<sup>40</sup> The problem in the state of São Paulo is especially acute. São Paulo contains 20% of the nation's population but 40% of its prison population. As of 30 October 2007 there were 140,680 inmates in 143 penitentiaries (currently beyond capacity by 44,807 inmates), and a further 11,073 in police lock-ups. (See Secretaria da Administração Penitenciária Gabinete do Secretário.) A prison I visited in São Paulo which is a provisional detention centre for those awaiting trial or conviction is currently at three times its capacity. At 9 August 2007, it held 1,438 inmates, with a capacity for 512. (See "Relatório referente à visita realizada prisional Centro de Detenção Provisória II de Pinheiros em 9 de agosto de 2007 pelo Conselho da Comunidade da Comarca de São Paulo".) On the day I visited, 6 November 2007, it was holding 1,520 inmates. Cells equipped for eight regularly hold up to 25 inmates, who take turns sleeping on beds or the floor. Although the law provides for access to work and education, nationally, as of December 2004, only about 18% of the total number of those in prison were involved in any form of education. (UNESCO Office (Brazil), *Education for Freedom: Trajectory, Debates and Proposals of a Project for Education in Brazilian Prisons*, (March 2007), p. 34; Constitution of Brazil, Art. 208; Law no 9.394/96 (Bases and Directives for Education - Art 37 § 1), CEB Technical Opinion no 11/2000, Law no 10.172/2001 (National Education Plan), Law no 7.21-/84 (Law of Penal Execution), and CNPCP Resolution no 14/94 (Basic Regulations for the Treatment of Prisoners).) Rates in São Paulo in 2007 remained low: 17.21% of inmates had access to education; 42.34% to work; and 40.45% were involved in no activity whatsoever. (See Secretaria da Administração Penitenciária Gabinete do Secretário.) Given that the inmate population is largely young (over 50% are under 30), poor (95%), and uneducated (over 65% have less than an eighth grade education, 12% are illiterate), the lack of education and work fails to provide inmates with alternatives to crime upon release, and helps to ensure that prisons are a training ground for future criminal activity.

43. Senior Government officials responsible for prison administration affirmed that there are problems with physical abuse and corruption by prison guards. While I was informed by officials at one prison I visited that there were no mistreatment issues and thus no guards had been punished, this picture contrasts with that presented by those with legal authority to monitor the prison, by civil society groups, and by inmates whom I interviewed. The Judge of Penal Execution, for example, has been involved in various legal actions relating to beatings by groups of prison officials against inmates at this facility.<sup>41</sup> Inmates with whom I spoke had witnessed and received beatings. It is telling that the threat of retaliation for making a complaint against a prison official is so serious that prison monitors consider any such complaints likely to be true. The inmates who I interviewed were afraid to even have it known that they had spoken with me, fearing reprisals from other inmates and prison officials.

44. Delays in processing transfers, together with warden violence and poor general conditions encourage the growth of gangs in prisons, which can justify their existence to the prison population at large by purporting to act on behalf of prisoners to obtain benefits and prevent violence. Poor prison administration and conditions thus facilitate not only riots, but directly contributes to the growth of criminal gangs.<sup>42</sup>

45. In most prisons, the state fails to exert sufficient control over inmates, and lets gangs (or other prisoners in “neutral prisons”) sort out amongst themselves matters of internal prison security. Selected inmates are often given more power over other prisoners’ daily lives than guards. They assume control of (sometimes brutal) internal discipline and the distribution of food, medicine, and hygiene kits.<sup>43</sup> This practice often results in allowing gang-leaders to run prisons.

46. Many prisons throughout Brazil require inmates to designate which gang they belong to when they enter the prison system for the first time. Prison administrations adopted this practice as a way to better control prison populations and to reduce inter-gang conflict in prisons – one particular prison or prison wing will, for example, only hold members of the Red Command gang, while another will only hold members of the Friends of Friends gang. In Rio de Janeiro, even when a new inmate has no gang affiliation whatsoever, he may be required by prison administrators to pick a gang with which to be affiliated. A prisoner who refuses is simply

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<sup>41</sup> Poder Judiciário São Paulo - 1a Vara das Execuções Criminais da Comarca de São Paulo, Juiz de Direito Titular da 1a Vara das Execuções Criminais da Comarca de São Paulo e Corregedor dos Presídios (18 October 2007).

<sup>42</sup> The movement of inmates through the prison system - from police lock-ups, to provisional detention centres awaiting trial or conviction, to closed prisons, to open prisons, and eventual release - is largely not recorded electronically. (Brazil’s National Penitentiary Department (*Departamento Penitenciário Nacional*) has created software called “Infopen Management”, through which inmates’ details can be electronically stored. At present, approximately 28,000 inmates (about 7% of the total prison population) have been registered in this way.) Together with inadequate monitoring of each inmate’s status, this means that inmates are frequently held in the incorrect facility. For example, inmates can be held in closed detention when the inmate is already entitled to be held in open detention and thus able to work in the community during the day. Prison monitors with whom I spoke noted that it was not uncommon for inmates to be held one year beyond the time they should have been moved or released. One inmate whom I interviewed had been detained over a year, and had already been tried, but knew nothing about his proceedings, or why he was still in provisional detention. Another inmate, arrested in late 2005, had had various hearings but was unaware of the status of the proceedings.

<sup>43</sup> These prisoners are known by various euphemisms, including “*faxinas*” (janitors) and “*chaveiros*” (key-holders).

assigned to a gang by the prison administration. The state practice of requiring gang identification essentially amounts to the state recruiting prisoners into gangs. Ultimately, this contributes to the growth of gangs outside prison and elevates crime rates more generally. Given the power that gangs have now established in the prison system, rival gangs must clearly remain separated to avoid prison riots and deaths. But it is important to take all available steps to avoid turning common criminals into committed gang members. While in theory some states have “neutral” prisons in which prisoners without any gang affiliation may be placed, there need to be more of these, and their neutrality needs to be better preserved in practice.

### Prison Oversight

47. There are many bodies with the legal authority to investigate prison conditions, but they have not provided adequate oversight in practice. This lack of external oversight has permitted poor prison conditions and abuses of power to continue. The law provides for a number of organs to inspect and monitor prisons.<sup>44</sup>

48. However, inmates I interviewed had rarely seen or even heard of a visit by an external prison monitor. They were aware of rare visits by prison internal affairs, but no inmate with whom I spoke knew of a visit by a judge, prison council, or other prison oversight body. It is essential for the effectiveness of complaint mechanisms that monitoring is not only done regularly, but also that it is visible to inmates. The mere existence of an internal oversight office is grossly inadequate in a context where prisoners are too afraid to make any complaint.

[...]

### Recommendations

99. While avoiding steps that would further endanger inmates, the government should take steps to end gang-control of prisons, including:

- (a) All practices that encourage or require new prison inmates to choose a gang affiliation should be discontinued. Inmates should be able to identify as “neutral” and be placed in truly neutral prisons;
- (b) Mobile phones should be eliminated from prisons through the more rigorous use of metal detectors and through the installation of technology that blocks mobile phone signals;
- (c) Prison authorities should reassert day-to-day control of internal prison administration so that prison guards, not inmates, are responsible for internal discipline;

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<sup>44</sup> Lei de Execução Penal, Lei No. 7.210 (adopted 11 July 1984). In practice, the key actors are the Judges of Penal Execution and the Community Councils. Judges of Penal Execution are required to inspect prisons monthly and have the power to “interdict, in all or in part, any penal establishment that is functioning under inadequate conditions or infringing the provisions of [the law]”. The number of such judges is, however, insufficient to meet their extensive responsibilities. In São Paulo, for example, there is just one Judge of Penal Execution for the capital, who is responsible for monitoring 10,000 inmates in nine prisons. This makes it impossible for the Judge to adequately monitor inmate status and prison conditions.

(d) All inmates' benefits and location in the prison system should be recorded electronically, and prisoners moved from one type of detention to another when they are so entitled. Inmates and judges of penal execution should be able to access the digital record of prisoner entitlements;

(e) Overcrowding should be reduced through more use of alternative sentences, open prison regimes, and the construction of new prisons.

100. The Government should ensure that this report is disseminated widely to officials at all levels. The federal Secretariat for Human Rights should take responsibility for monitoring the progress of the implementation of these recommendations.

## C. MONITORING OF PRISONS TO REDUCE KILLINGS

***Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 47, 52, Recommendations):***

*The Special Rapporteur conducted a fact-finding mission in the Central African Republic in February 2008. Killings in police custody and in detention centers are among the common unlawful killings reported in the country. This is largely due to the government's lack of monitoring and inspections in prison facilities.*

47. Third, killings also occur in prisons, after detainees have been convicted, or while they are awaiting trial. Detailed accounts of security guards in prisons torturing inmates to death were provided. These deaths occur in the context of extremely poor prison conditions and nearly non-existent prison oversight. Detainees are sometimes also detained arbitrarily, held without even minimal respect for due process. In Bangui, prosecutors - upon instructions of the Justice Minister - do carry out inspections of detention centres on a weekly basis, and this has led to the release of some prisoners arbitrarily detained. However, at the time of the Special Rapporteur's visit, this practice only occurred in the capital. Detainees legitimately fear reprisals for reporting abuses. In fact, in many areas, there is no external Government prison monitor to whom an inmate *could* report abuses. When deaths in custody are reported, it is simply alleged by prison officials that the prisoner died of an illness, and that is the end of the matter.

### Widespread Impunity for Killings

52. Impunity is pervasive for unlawful killings, regardless of the perpetrator (security forces, rebels, or private persons) or the context (military operations, routine law enforcement, or detention).

### Recommendations

#### Address Deaths in Custody and Killings by Law Enforcement:

- The practice in Bangui of prosecutors carrying out regular inspections of detention centres is a positive development, and should be implemented throughout the country. Reports of killings and other serious human rights abuses in detention centres should be fully investigated.
- The human rights training provided to police in Bangui should be extended to law enforcement officers throughout the country. Such training should in particular focus on the lawful use of force in law enforcement operations, and the proper treatment of detained suspects.

***Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 41-48, 100):***

*Mr. Alston reports on the poor conditions and severe overcrowding of prisons as well as the physical abuse by prison guards and inmates. These conditions have allowed the growth of*

*gangs in prisons, resulting in frequent violence. The state has not provided adequate oversight and monitoring of prisons.*

41. Killings in state detention facilities in Brazil occur primarily in the context of prison riots and gang-related inmate violence, during which the perpetrators are inmates, prison guards, or police sent in to quell the disturbance or rebellion.<sup>45</sup> While the precise trigger for each killing is unique,<sup>46</sup> there are a number of general factors which facilitate excessive violence throughout the prison system. Significantly, these factors not only lead to inmate unrest but have encouraged the growth of a parallel gang power in prisons. The failure of the state to meet basic inmate needs and security encourages the growth of gangs by creating a power vacuum in which gangs are able to present themselves as securing benefits for inmates. This not only results in excessive prison violence, but as the events of May 2006 in São Paulo clearly demonstrate, has effects far beyond the prison walls. Broader crime control efforts must take into account the key role played by prisons in gang growth, and the failure of the prison system to curb the activities of organized crime.

### Analysis of the Factors Facilitating Prison Violence

42. Brazil's poor prison conditions and severe overcrowding are well-documented.<sup>47</sup> The national prison population has risen sharply over the last decade, and the incarceration rate has more than doubled.<sup>48</sup> The dramatic rise - caused by the slowness of the judicial system, poor monitoring of inmate status and release entitlement, increased crime rates, high recidivism rates, and the popularity of tougher law and order approaches favouring longer prison terms over alternative sentences - has resulted in severely overcrowded prisons. The prison system was designed to hold only 60% of the inmates actually detained nationwide,<sup>49</sup> and many individual prisons are two or three times over capacity.<sup>50</sup>

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<sup>45</sup> Major prison riots include: In October 1992, 111 prisoners were killed when Military Police attempted to regain control of the Carandiru prison in São Paulo following a riot; one person was convicted in relation to these deaths, but his conviction was overturned in February 2006. In 2001, there were riots in 29 separate facilities simultaneously in São Paulo. In 2002, 10 died and 60 escaped from the Embu das Artes jail in São Paulo. In 2003, 84 prisoners escaped from the Silvio Porto prison in Paraíba. In 2004, 14 inmates were killed and some were mutilated during an uprising at the Urso Branco prison in Rondônia. In 2004, 34 inmates died during a riot at Benfica prison in Rio de Janeiro. In 2007, 25 inmates were burned to death by other inmates at the Ponte Nova prison in Minas Gerais.

<sup>46</sup> For the genesis of the May 2006 riots in São Paulo, see Part III(C)(1). For another example, the August 2007 violence in Minas Gerais was reportedly a result of conflict between gangs.

<sup>47</sup> See, for example: Report of the Special Rapporteur on Human Rights on the question of torture (20/8 - 12/9/2000), report E/CN.4/2001/66/Add.2.

<sup>48</sup> In 1995, the inmate population was 148,760, or 93 per 100,000. By 2006, it had jumped to 401,236, or 213.8 per 100,000: See Ministério da Justiça; Centro de Estudos de Segurança e Cidadania.

<sup>49</sup> (2006). Ministério da Justiça; Centro de Estudos de Segurança e Cidadania.

<sup>50</sup> The problem in the state of São Paulo is especially acute. São Paulo contains 20% of the nation's population but 40% of its prison population. As of 30 October 2007 there were 140,680 inmates in 143 penitentiaries (currently beyond capacity by 44,807 inmates), and a further 11,073 in police lock-ups. (See Secretaria da Administração Penitenciária Gabinete do Secretário.) A prison I visited in São Paulo which is a provisional detention centre for those awaiting trial or conviction is currently at three times its capacity. At 9 August 2007, it held 1,438 inmates, with a capacity for 512. (See "Relatório referente à visita realizada prisional Centro de Detenção Provisória II de Pinheiros em 9 de agosto de 2007 pelo Conselho da Comunidade da Comarca de São Paulo".) On the day I visited, 6 November 2007, it was holding 1,520 inmates. Cells equipped for eight regularly hold up to 25 inmates, who take turns sleeping on beds or the floor. Although the law provides for access to work and education, nationally, as of

43. Senior Government officials responsible for prison administration affirmed that there are problems with physical abuse and corruption by prison guards. While I was informed by officials at one prison I visited that there were no mistreatment issues and thus no guards had been punished, this picture contrasts with that presented by those with legal authority to monitor the prison, by civil society groups, and by inmates whom I interviewed. The Judge of Penal Execution, for example, has been involved in various legal actions relating to beatings by groups of prison officials against inmates at this facility.<sup>51</sup> Inmates with whom I spoke had witnessed and received beatings. It is telling that the threat of retaliation for making a complaint against a prison official is so serious that prison monitors consider any such complaints likely to be true. The inmates who I interviewed were afraid to even have it known that they had spoken with me, fearing reprisals from other inmates and prison officials.

44. Delays in processing transfers, together with warden violence and poor general conditions encourage the growth of gangs in prisons, which can justify their existence to the prison population at large by purporting to act on behalf of prisoners to obtain benefits and prevent violence. Poor prison administration and conditions thus facilitate not only riots, but directly contributes to the growth of criminal gangs.<sup>52</sup>

45. In most prisons, the state fails to exert sufficient control over inmates, and lets gangs (or other prisoners in “neutral prisons”) sort out amongst themselves matters of internal prison security. Selected inmates are often given more power over other prisoners’ daily lives than guards. They assume control of (sometimes brutal) internal discipline and the distribution of

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December 2004, only about 18% of the total number of those in prison were involved in any form of education. (UNESCO Office (Brazil), *Education for Freedom: Trajectory, Debates and Proposals of a Project for Education in Brazilian Prisons*, (March 2007), p. 34; Constitution of Brazil, Art. 208; Law no 9.394/96 (Bases and Directives for Education - Art 37 § 1), CEB Technical Opinion no 11/2000, Law no 10.172/2001 (National Education Plan), Law no 7.21-/84 (Law of Penal Execution), and CNPCP Resolution no 14/94 (Basic Regulations for the Treatment of Prisoners).) Rates in São Paulo in 2007 remained low: 17.21% of inmates had access to education; 42.34% to work; and 40.45% were involved in no activity whatsoever. (See Secretaria da Administração Penitenciária Gabinete do Secretário.) Given that the inmate population is largely young (over 50% are under 30), poor (95%), and uneducated (over 65% have less than an eighth grade education, 12% are illiterate), the lack of education and work fails to provide inmates with alternatives to crime upon release, and helps to ensure that prisons are a training ground for future criminal activity.

<sup>51</sup> Poder Judiciário São Paulo - 1a Vara das Execuções Criminais da Comarca de São Paulo, Juiz de Direito Titular da 1a Vara das Execuções Criminais da Comarca de São Paulo e Corregedor dos Presídios (18 October 2007).

<sup>52</sup> The movement of inmates through the prison system - from police lock-ups, to provisional detention centres awaiting trial or conviction, to closed prisons, to open prisons, and eventual release - is largely not recorded electronically. (Brazil’s National Penitentiary Department (*Departamento Penitenciário Nacional*) has created software called “Infopen Management”, through which inmates’ details can be electronically stored. At present, approximately 28,000 inmates (about 7% of the total prison population) have been registered in this way.) Together with inadequate monitoring of each inmate’s status, this means that inmates are frequently held in the incorrect facility. For example, inmates can be held in closed detention when the inmate is already entitled to be held in open detention and thus able to work in the community during the day. Prison monitors with whom I spoke noted that it was not uncommon for inmates to be held one year beyond the time they should have been moved or released. One inmate whom I interviewed had been detained over a year, and had already been tried, but knew nothing about his proceedings, or why he was still in provisional detention. Another inmate, arrested in late 2005, had had various hearings but was unaware of the status of the proceedings.



food, medicine, and hygiene kits.<sup>53</sup> This practice often results in allowing gang-leaders to run prisons.

46. Many prisons throughout Brazil require inmates to designate which gang they belong to when they enter the prison system for the first time. Prison administrations adopted this practice as a way to better control prison populations and to reduce inter-gang conflict in prisons – one particular prison or prison wing will, for example, only hold members of the Red Command gang, while another will only hold members of the Friends of Friends gang. In Rio de Janeiro, even when a new inmate has no gang affiliation whatsoever, he may be required by prison administrators to pick a gang with which to be affiliated. A prisoner who refuses is simply assigned to a gang by the prison administration. The state practice of requiring gang identification essentially amounts to the state recruiting prisoners into gangs. Ultimately, this contributes to the growth of gangs outside prison and elevates crime rates more generally. Given the power that gangs have now established in the prison system, rival gangs must clearly remain separated to avoid prison riots and deaths. But it is important to take all available steps to avoid turning common criminals into committed gang members. While in theory some states have “neutral” prisons in which prisoners without any gang affiliation may be placed, there need to be more of these, and their neutrality needs to be better preserved in practice.

### Prison Oversight

47. There are many bodies with the legal authority to investigate prison conditions, but they have not provided adequate oversight in practice. This lack of external oversight has permitted poor prison conditions and abuses of power to continue. The law provides for a number of organs to inspect and monitor prisons.<sup>54</sup>

48. However, inmates I interviewed had rarely seen or even heard of a visit by an external prison monitor. They were aware of rare visits by prison internal affairs, but no inmate with whom I spoke knew of a visit by a judge, prison council, or other prison oversight body. It is essential for the effectiveness of complaint mechanisms that monitoring is not only done regularly, but also that it is visible to inmates. The mere existence of an internal oversight office is grossly inadequate in a context where prisoners are too afraid to make any complaint.

[...]

### Recommendations

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<sup>53</sup> These prisoners are known by various euphemisms, including “*faxinas*” (janitors) and “*chaveiros*” (key-holders).

<sup>54</sup> Lei de Execução Penal, Lei No. 7.210 (adopted 11 July 1984). In practice, the key actors are the Judges of Penal Execution and the Community Councils. Judges of Penal Execution are required to inspect prisons monthly and have the power to “interdict, in all or in part, any penal establishment that is functioning under inadequate conditions or infringing the provisions of [the law]”. The number of such judges is, however, insufficient to meet their extensive responsibilities. In São Paulo, for example, there is just one Judge of Penal Execution for the capital, who is responsible for monitoring 10,000 inmates in nine prisons. This makes it impossible for the Judge to adequately monitor inmate status and prison conditions.

100. The Government should ensure that this report is disseminated widely to officials at all levels. The federal Secretariat for Human Rights should take responsibility for monitoring the progress of the implementation of these recommendations.

***Press Statement on Mission to the Democratic Republic of the Congo (October 2009):***

*The Special Rapporteur visited the Democratic Republic of the Congo from 1-15 October, 2009. There is minimal state control over prisons, leaving internal control to the inmates. Atrocious prison conditions and the lack of state monitoring result in many unlawful deaths in custody.*

Deaths in prisons

My interlocutors, including the Minister of Justice, who is responsible for the penitentiary system, unanimously agreed that prison conditions are atrocious. I visited the Central Prison of Goma and spoke with detainees there. In a prison built to hold 150, over 800 prisoners live in squalor. They receive one inadequate meal per day from the prison authorities, and rely essentially on food brought by their families. Because internal control of the prison is entirely left to the inmates, the stronger prisoners take the lion's share of the provided food. The weaker prisoners and those without family nearby gradually become emaciated, and especially vulnerable to disease. Not surprisingly, many die in prison.

The number of prisons and prisoners in the Congo is unknown. Totally inadequate records of prisoners are kept and many are left rotting in prison even after their sentence has been served. The great majority of prisoners have never been tried before a judge. In essence, the prison system seems to be a depository for the enemies of the state and for those too poor to buy their way out of the justice system. The abominable conditions, together with corruption and minimal state control, mean that escapes are common, thus adding further to impunity.

Recommendations

5. Being imprisoned in a DRC jail is often a fate worse than hell. Far too many detainees are killed by a negligent and callous prison system. The actual number of prisons and prisoners is unknown. Prison over-crowding is shocking, even by the standards of a very poor country. Vast numbers are held without trial for years on end, and many are starved slowly to death. A reasonable budget for every prison should be established, and a census of the prison population undertaken within six months. The amount of time prisoners are kept in pre-trial detention must conform to international human rights standards. Prisoners detained in violation of these standards should be released, and all facilities operated by actors without the lawful authority to do so should be closed.

***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 53-58):***

*The Special Rapporteur visited Sri Lanka from 28 November to 6 December 2005. Extrajudicial killings have played a particular role in the exacerbation of the conflict between the government and the rebel Liberation Tigers of Tamil Eelam (LTTE). In his report, Mr. Alston examines the problem of deaths in police custody, caused by the inadequate training of police in criminal*

*investigation work, the widespread use of torture to extract confessions and the failure to impose effective disciplinary and criminal sanctions against police officers guilty of torture.*

53. The police are now engaged in summary executions, which is an immensely troubling development. Reports, unchallenged by the Government, show that from November 2004 to October 2005 the police shot at least 22 criminal suspects after taking them into custody. It is alleged that the use of force became necessary when, after having been arrested, presumably searched, and (in most cases) handcuffed by the police, the suspects attempted either to escape or to attack the officers. In all cases the shooting was fatal, and in none was a police officer injured. The Government confirmed that in none of these cases had an internal police inquiry been opened. The reason proffered was that no complaints had been received.<sup>55</sup> The pattern of summary executions that emerges demands a systematic official response that brings those responsible to justice and discourages future violations.

54. The other main cause of deaths in police custody is torture.<sup>56</sup> (Deaths are an inevitable side-effect of the widespread use of torture.)<sup>57</sup> Government officials were generally candid in recognizing that torture is widespread. While some officials said that the problem's magnitude had been exaggerated, they did not dispute that in Sri Lanka's police stations physical mistreatment is frequently used to extract confessions from suspects, sometimes resulting in death. However, this recognition of torture's prevalence was often accompanied by a complacent and fundamentally tolerant attitude. One high-ranking official acknowledged to me that torture was widespread and problematic but then proceeded to note that while he could understand why police tortured "in the line of duty", he felt it was completely inexcusable for police to torture in pursuit of private ends. This casual acceptance of torture is highly problematic. It also downplays the systemic nature of the problem. There is a nationwide pattern of custodial torture in Sri Lanka, and the Government has a legal responsibility to take measures to bring that pattern to an end. The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine. It is essential that government officials accept that disrupting this pattern of custodial torture is a necessary step not only in ensuring the human rights of those arrested but of retaining public trust and confidence.

55. Reforms to prevent deaths in custody must take account of the systemic causes. Those include, in particular, the lack of regular police training given to many officers, the credibility

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<sup>55</sup> The Civil Rights Movement of Sri Lanka, a non-governmental organization, has brought these cases to the attention of the Human Rights Commission (HRC), which has entrusted a retired judge with an enquiry into some of the cases. The HRC enquiry is in course at the time of writing.

<sup>56</sup> A number of allegations of torture in police custody in Sri Lanka resulting in the death of the torture victim have been recorded by the Special Rapporteur on extrajudicial, summary or arbitrary executions. See, e.g., E/CN.4/2005/7/Add.1, paras. 649-53, 661-65; E/CN.4/2003/3/Add.1, paras. 461, 462 (response at E/CN.4/2004/7/Add.1, para. 538), 463 (response at E/CN.4/2004/7/Add.1, para. 539). See also the letter of 22 November 2005 included in E/CN.4/2006/53/Add. 1.

<sup>57</sup> During my visit, I was informed that between 1 January and 30 October 2005 the National Police Commission had received 221 complaints concerning assault and torture by the police, six of which resulted in death. The prevalence of custodial torture has been extensively documented by the international human rights system. The Special Rapporteur on Torture recorded 52 allegations in 2003 (E/CN.4/2004/56/Add.1) and the 76 allegations in 2004 (E/CN.4/2005/62/Add.1). And in its Concluding observations on the second periodic report of Sri Lanka (CAT/C/LKA/CO/1/CRP.2) (23 November 2005), § 16, the CAT Committee noted the "continued well-documented allegations of widespread torture and ill-treatment [...] mainly by the State's police forces".

still accorded to coerced confessions, the preference for delivering instant “justice” given the weak investigative capacities and proclivities of the police, and the near-complete failure to prosecute or even discipline police who commit serious human rights violations.<sup>58</sup>

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.<sup>59</sup>

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<sup>58</sup> States have substantial legal obligations in this context. While the primary obligations and corresponding sanctions of international human rights law are placed on *States*, States are also required to impose sanctions on *individuals*. In general terms, the ICCPR obligates States to respect and ensure the right not to be arbitrarily deprived of one’s life. More specifically, the State is required to take all necessary steps, including legislative and other measures, to give effect to the right to life and to provide an effective remedy for violations. One measure that is always required is to criminalize serious violations and to investigate, prosecute, and punish responsible individuals. As the Human Rights Committee has commented, “failure to bring to justice perpetrators of ... violations could in and of itself give rise to a separate breach of the [ICCPR]”. (Human Rights Committee, General Comment 31, “Nature of the Legal Obligation on States Parties to the Covenant” (2004), CCPR/C/21/Rev.1/Add.13; CHR Resolution 2004/37, para. 18.) When an abuse is perpetrated by a private individual, the State is responsible if it failed to exercise “due diligence” in preventing that abuse, but when an abuse is perpetrated by a Government agent, the State is also responsible. (E/CN.4/2005/7, paras. 71-75.) In cases of custodial death, the State’s two-fold obligation - to ensure as well as respect - justifies the presumption that the State, whether by act or by omission, is legally responsible. (*Dermot Barbato v. Uruguay*, HRC, No. 84/1981 (1990), para. 9.2.) When the State is responsible, in addition to its other obligations, it must make reparations to the victim’s family. This legal framework provides not only a yardstick for assessing current practices but also a framework for considering possible reforms.

<sup>59</sup> Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found

58. Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently. Prosecutors must also share the blame for the low conviction rates. The Attorney-General has become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing.<sup>60</sup>

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responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001*, Appendix 1, Table 6.)

<sup>60</sup> I should note that the deficiencies in the system of criminal justice are not mitigated by the more effective process for vindicating the fundamental rights guaranteed by the Constitution, including the right to life and to freedom from torture. In the last two years, the Supreme Court has awarded compensation in a number of such cases. But while reparations are an important component of effective remedies, they are not a substitute for prosecution. In Sri Lanka the Court determines what portion of the compensation shall be paid by the State and what portion by the convicted officer. In one prominent case, involving the killing of WMGM Perera, less than a quarter of the compensation awarded was to be paid by the persons responsible, while the State paid the rest. The State’s contribution undercuts the deterrent effect of the Court’s fundamental rights jurisdiction and further emphasizes the importance of effective prosecution and punishment in cases of official torture and summary execution.

## D. TORTURE AND EXTRA-JUDICIAL EXECUTIONS IN CUSTODY

### *Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 53-58):*

*The Special Rapporteur visited Sri Lanka from 28 November to 6 December 2005. Extrajudicial killings have played a particular role in the exacerbation of the conflict between the government and the rebel Liberation Tigers of Tamil Eelam (LTTE). In his report, Mr. Alston examines the problem of deaths in police custody, caused by the inadequate training of police in criminal investigation work, the widespread use of torture to extract confessions and the failure to impose effective disciplinary and criminal sanctions against police officers guilty of torture.*

53. The police are now engaged in summary executions, which is an immensely troubling development. Reports, unchallenged by the Government, show that from November 2004 to October 2005 the police shot at least 22 criminal suspects after taking them into custody. It is alleged that the use of force became necessary when, after having been arrested, presumably searched, and (in most cases) handcuffed by the police, the suspects attempted either to escape or to attack the officers. In all cases the shooting was fatal, and in none was a police officer injured. The Government confirmed that in none of these cases had an internal police inquiry been opened. The reason proffered was that no complaints had been received.<sup>61</sup> The pattern of summary executions that emerges demands a systematic official response that brings those responsible to justice and discourages future violations.

54. The other main cause of deaths in police custody is torture.<sup>62</sup> (Deaths are an inevitable side-effect of the widespread use of torture.)<sup>63</sup> Government officials were generally candid in recognizing that torture is widespread. While some officials said that the problem's magnitude had been exaggerated, they did not dispute that in Sri Lanka's police stations physical mistreatment is frequently used to extract confessions from suspects, sometimes resulting in death. However, this recognition of torture's prevalence was often accompanied by a complacent and fundamentally tolerant attitude. One high-ranking official acknowledged to me that torture was widespread and problematic but then proceeded to note that while he could understand why police tortured "in the line of duty", he felt it was completely inexcusable for police to torture in pursuit of private ends. This casual acceptance of torture is highly problematic. It also downplays the systemic nature of the problem. There is a nationwide pattern of custodial torture in Sri

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<sup>61</sup> The Civil Rights Movement of Sri Lanka, a non-governmental organization, has brought these cases to the attention of the Human Rights Commission (HRC), which has entrusted a retired judge with an enquiry into some of the cases. The HRC enquiry is in course at the time of writing.

<sup>62</sup> A number of allegations of torture in police custody in Sri Lanka resulting in the death of the torture victim have been recorded by the Special Rapporteur on extrajudicial, summary or arbitrary executions. See, e.g., E/CN.4/2005/7/Add.1, paras. 649-53, 661-65; E/CN.4/2003/3/Add.1, paras. 461, 462 (response at E/CN.4/2004/7/Add.1, para. 538), 463 (response at E/CN.4/2004/7/Add.1, para. 539). See also the letter of 22 November 2005 included in E/CN.4/2006/53/Add. 1.

<sup>63</sup> During my visit, I was informed that between 1 January and 30 October 2005 the National Police Commission had received 221 complaints concerning assault and torture by the police, six of which resulted in death. The prevalence of custodial torture has been extensively documented by the international human rights system. The Special Rapporteur on Torture recorded 52 allegations in 2003 (E/CN.4/2004/56/Add.1) and the 76 allegations in 2004 (E/CN.4/2005/62/Add.1). And in its Concluding observations on the second periodic report of Sri Lanka (CAT/C/LKA/CO/1/CRP.2) (23 November 2005), § 16, the CAT Committee noted the "continued well-documented allegations of widespread torture and ill-treatment [...] mainly by the State's police forces".

Lanka, and the Government has a legal responsibility to take measures to bring that pattern to an end. The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine. It is essential that government officials accept that disrupting this pattern of custodial torture is a necessary step not only in ensuring the human rights of those arrested but of retaining public trust and confidence.

55. Reforms to prevent deaths in custody must take account of the systemic causes. Those include, in particular, the lack of regular police training given to many officers, the credibility still accorded to coerced confessions, the preference for delivering instant “justice” given the weak investigative capacities and proclivities of the police, and the near-complete failure to prosecute or even discipline police who commit serious human rights violations.<sup>64</sup>

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The

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<sup>64</sup> States have substantial legal obligations in this context. While the primary obligations and corresponding sanctions of international human rights law are placed on *States*, States are also required to impose sanctions on *individuals*. In general terms, the ICCPR obligates States to respect and ensure the right not to be arbitrarily deprived of one’s life. More specifically, the State is required to take all necessary steps, including legislative and other measures, to give effect to the right to life and to provide an effective remedy for violations. One measure that is always required is to criminalize serious violations and to investigate, prosecute, and punish responsible individuals. As the Human Rights Committee has commented, “failure to bring to justice perpetrators of ... violations could in and of itself give rise to a separate breach of the [ICCPR]”. (Human Rights Committee, General Comment 31, “Nature of the Legal Obligation on States Parties to the Covenant” (2004), CCPR/C/21/Rev.1/Add.13; CHR Resolution 2004/37, para. 18.) When an abuse is perpetrated by a private individual, the State is responsible if it failed to exercise “due diligence” in preventing that abuse, but when an abuse is perpetrated by a Government agent, the State is also responsible. (E/CN.4/2005/7, paras. 71-75.) In cases of custodial death, the State’s two-fold obligation - to ensure as well as respect - justifies the presumption that the State, whether by act or by omission, is legally responsible. (*Dermot Barbato v. Uruguay*, HRC, No. 84/1981 (1990), para. 9.2.) When the State is responsible, in addition to its other obligations, it must make reparations to the victim’s family. This legal framework provides not only a yardstick for assessing current practices but also a framework for considering possible reforms.

primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.<sup>65</sup>

58. Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently. Prosecutors must also share the blame for the low conviction rates. The Attorney-General has become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing.<sup>66</sup>

***Follow Up on Report on Mission to Sri Lanka (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 53-57):***

#### Policing and Police Accountability

53. During his visit, the Special Rapporteur found that the police failed to respect or ensure the right to life. He noted that the underlying cause was that the police had become a counterinsurgency force. Police officers were accustomed to conducting themselves according to the broad powers provided them under emergency regulations rather than to those provided by the code of criminal procedure. Indeed, most police officers had never received significant training in criminal detection and investigation. The police force also lacked the language skills to effectively police in the Northeast, given that the force was only 1.2 per cent Tamil and 1.5 per cent Muslim with few Sinhala officers speaking Tamil proficiently.

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<sup>65</sup> Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001*, Appendix 1, Table 6.)

<sup>66</sup> I should note that the deficiencies in the system of criminal justice are not mitigated by the more effective process for vindicating the fundamental rights guaranteed by the Constitution, including the right to life and to freedom from torture. In the last two years, the Supreme Court has awarded compensation in a number of such cases. But while reparations are an important component of effective remedies, they are not a substitute for prosecution. In Sri Lanka the Court determines what portion of the compensation shall be paid by the State and what portion by the convicted officer. In one prominent case, involving the killing of WMGM Perera, less than a quarter of the compensation awarded was to be paid by the persons responsible, while the State paid the rest. The State’s contribution undercuts the deterrent effect of the Court’s fundamental rights jurisdiction and further emphasizes the importance of effective prosecution and punishment in cases of official torture and summary execution.



54. The Special Rapporteur observed that these deficiencies in the police force had resulted in failures to respect and ensure the right to life. There were a number of credible reports of police summarily executing suspects, and the widespread use of police torture had resulted in additional deaths. The Government had also failed to effectively investigate most political killings. This was due partly to the police force's general lack of investigative ability and partly to its reluctance to pursue cases that might implicate the ceasefire.

55. The Special Rapporteur found that the Government's response to human rights violations by the police was unsatisfactory. The system for conducting internal police inquiries was structurally flawed and, indeed, inquiries had not been held into the cases the Special Rapporteur presented to the Government. The one relatively bright spot was the National Police Commission (NPC), which had been established in 2001 by a constitutional amendment with a mandate to conduct independent investigations and effective disciplinary procedures for police misconduct. While many actors had favorable impressions of its early efforts to improve accountability, the Special Rapporteur noted that the NPC's long-term effectiveness was threatened by the lack of a strong constituency supporting its independence.

56. More than two years later, the Government has completely failed to implement the Special Rapporteur's recommendations for improving police respect for human rights, police effectiveness in preventing killings, and police accountability. Indeed, there has been significant backward movement.

57. Rather than improving the investigative and crime prevention capacity of the police, the Government has even more completely subordinated the police to the counterinsurgency effort. Since the Special Rapporteur's visit took place, the Government has required the Inspector General of Police to report to the Minister of Defence.

***Press Statement on Mission to the Democratic Republic of the Congo (October 2009):***

*The Special Rapporteur visited the Democratic Republic of the Congo from 1-15 October, 2009. There is minimal state control over prisons, leaving internal control to the inmates. Atrocious prison conditions and the lack of state monitoring result in many unlawful deaths in custody.*

Deaths in prisons

My interlocutors, including the Minister of Justice, who is responsible for the penitentiary system, unanimously agreed that prison conditions are atrocious. I visited the Central Prison of Goma and spoke with detainees there. In a prison built to hold 150, over 800 prisoners live in squalor. They receive one inadequate meal per day from the prison authorities, and rely essentially on food brought by their families. Because internal control of the prison is entirely left to the inmates, the stronger prisoners take the lion's share of the provided food. The weaker prisoners and those without family nearby gradually become emaciated, and especially vulnerable to disease. Not surprisingly, many die in prison.

The number of prisons and prisoners in the Congo is unknown. Totally inadequate records of prisoners are kept and many are left rotting in prison even after their sentence has been served. The great majority of prisoners have never been tried before a judge. In essence, the prison

system seems to be a depository for the enemies of the state and for those too poor to buy their way out of the justice system. The abominable conditions, together with corruption and minimal state control, mean that escapes are common, thus adding further to impunity.

[...]

### Recommendations

5. Being imprisoned in a DRC jail is often a fate worse than hell. Far too many detainees are killed by a negligent and callous prison system. The actual number of prisons and prisoners is unknown. Prison over-crowding is shocking, even by the standards of a very poor country. Vast numbers are held without trial for years on end, and many are starved slowly to death. A reasonable budget for every prison should be established, and a census of the prison population undertaken within six months. The amount of time prisoners are kept in pre-trial detention must conform to international human rights standards. Prisoners detained in violation of these standards should be released, and all facilities operated by actors without the lawful authority to do so should be closed.

### ***Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 50-51, 68-71):***

*The Special Rapporteur visited Nigeria from 27 June to 8 July 2005 and reviewed four case studies relating to extrajudicial executions. The death penalty is administered in Nigeria and the death row conditions are horrendous and unacceptable. In addition, the use of torture while in police custody to extract confessions is common practice.*

### Deaths in custody

50. Numerous prisoners reported being systematically tortured by the police to extract a confession. Techniques include hanging from the ceiling<sup>67</sup> and severe beatings, followed by the denial of food, water and medical care, and being left to die in the cells. The State Intelligence and Investigation Bureaux (SIIBs) and local CIDs were consistently named as places where such events are commonplace. Prison medical staff also confirmed regularly receiving prisoners who had been badly beaten by the police.

51. Police have systematically encouraged a practice whereby medical personnel will not treat individuals reporting with bullet or knife wounds before receiving police authorization. Since permission is often delayed or withheld, many casualties occur.<sup>68</sup>

[...]

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<sup>67</sup> A much favoured technique is to tie the individual's hands behind his back or under his knees and then to hang his entire body from the ceiling for a significant period of time, while at the same time beating him. After several such sessions, confessions miraculously emerge.

<sup>68</sup> One State Police Commissioner strenuously denied that any such rule existed but virtually confirmed the practice by adding that it would be only prudent for a doctor first to seek police advice rather than giving treatment and risk being an accomplice to crime.

## The Prison System and Deaths in Custody

68. Deaths in custody and the many prisoners on death row make the Nigerian prison system highly relevant to this report. On the basis of a largely malfunctioning justice system, Nigeria tolerates an arbitrary and especially harsh form of punishment of alleged criminals. Of approximately 44,000 prisoners, some 25,000, or well over 50 per cent, have yet to face trial.<sup>69</sup> About 75 per cent of the latter have been charged with armed robbery, which is a capital offence. Three-quarters of those were not able to get legal assistance from the Legal Aid Council and a shocking 3.7 per cent remain in prison because of lost case files. Many of the 25,000 with whom the Special Rapporteur spoke are held in seriously health-threatening conditions, some for periods of 10-14 years.

69. Almost no accused with access to money will suffer this fate. Such unconscionable incarceration practices become the “privilege” of the poor. Some State Chief Judges are highly conscientious in carrying out regular visits with a view to ordering the release of those held longer than their alleged crime could possibly warrant,<sup>70</sup> but others are slow and unsystematic and many inmates awaiting trial are rarely visited. One way forward is to resolve that any prisoner held for more than five years without trial should be entitled to an immediate court appearance and benefit from a presumption that s/he should be released. Similarly, any prisoner whose hearing is adjourned more than five times should benefit from the presumption of release. Prisoners whom the Special Rapporteur met who in ten years have been subject to more than 50 adjournments are living testimony to a system which simply does not care about people once they are in prison.

70. Prison conditions in general are not part of the Special Rapporteur’s mandate. However, because of the numbers of individuals on death row and the fact that perhaps a majority of inmates are charged with capital offences (armed robbery or murder), a comment on prison conditions is warranted. The Special Rapporteur heard impressively few accusations of official abuse, but the lack of resources to ensure humane conditions was decried by almost everyone, including senior administrators. Common phenomena included: considerably in excess of 100 prisoners in cells designed to hold 25, unsanitary conditions which breed terrible illnesses, untreated illnesses leading to death, and food which is wholly inadequate. Money to improve prison conditions is never on politicians’ lists of priorities, but it is absolutely essential. While death row conditions are harsh, they are often better than those endured by the vast numbers awaiting trial. Most deaths in custody are due to atrocious conditions rather than intentional ill-treatment.

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<sup>69</sup> Section 35(1) of the Nigerian Constitution provides that “...a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.” This serves to highlight the perversity of making the generic offence of armed robbery a capital offence. The result is that a petty thief can be jailed for ten years or more while (forlornly) awaiting trial.

<sup>70</sup> Section 35(1) of the Nigerian Constitution provides that “...a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.” This serves to highlight the perversity of making the generic offence of armed robbery a capital offence. The result is that a petty thief can be jailed for ten years or more while (forlornly) awaiting trial.

71. Some interlocutors spoke of the need for a Minister for Prisons, a Prison Service Commission, or the need to decentralize control over prisons to the State level. The Special Rapporteur was in no position to choose among the different options but it is clear that an enhanced mechanism for monitoring and public reporting on prison conditions is urgent and indispensable.

***Follow Up on Report on Mission to Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 73, Summary of Follow Up to Each Recommendation):***

73. The Special Rapporteur found during his 2005 visit that torture was routinely used by the police to obtain confessions, and that these forced confessions played an important role in securing convictions. Many defendants on trial for capital offences did not have legal representation. In fact, many of the death row inmates who the Special Rapporteur met were tried when during Nigeria's military era when some constitutional rights were suspended. Some cases were heard by military tribunals, and due process was not observed. He found that the average period spent on death row was 20 years, and that prison conditions were horrendous. Because of the due process concerns, and the cruel and inhuman treatment caused by leaving inmates on death row for so long, the Special Rapporteur recommended that Nigeria commute to life the sentences of those prisoners currently on death row.

[...]

Summary of Follow Up to Each Recommendation

[...]

*(b) Tackling the vigilante problem is especially urgent. The Federal Government should prepare and publish an authoritative inventory of all vigilante groups enjoying any form of official support and playing any role whatsoever in law enforcement. Each state Government concerned should promulgate rules regulating the activities of such groups. And the relevant authorities must investigate and prosecute any illegal vigilante activities involving torture, detention or executions.*

This recommendation has not been implemented.

## **E. DUE DILIGENCE AND HEALTH CARE FOR DETAINEES**

*Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, ¶¶ 82-87, 112):*

82. Prison conditions, per se, do not come within my mandate. But the atrocious state of prisons across the DRC leads to frequent deaths of detainees. The Minister of Justice acknowledged to me that prison conditions are “horrible” and that many people in detention die of hunger. The Government is failing in its duty to ensure even minimum detention conditions. As a result, prisoners die from preventable causes, and there are regular riots and escapes. Almost non-existent records and monitoring mean that it is not known how many deaths in prisons there actually are, although information provided by one source recorded 23 deaths in 2009 at one prison in Kinshasa alone.

83. The central Government provides only one prison in the entire country with a budget. The rest are required to support themselves. Some receive assistance from the provincial authorities, but many rely completely on private support extracted by individual prison directors. Most prisoners survive on food brought to them by their families. Those without family assistance slowly starve.

84. At Goma Central Prison I interviewed authorities and detainees. Like the vast majority of DRC prisons, it is controlled by the prisoners themselves – state authorities only act as guards outside the facility.<sup>71</sup> Internal prison violence is thus predictably common. Independent monitoring is heavily restricted since the security of visiting monitors cannot be assured. In June 2009, there was a mutiny and escape attempt at the prison. Security was so poor that male prisoners broke into the female section of the prison, raped some 20 female detainees, and killed a police officer and a prisoner. Before this incident, François Gacaba, a prisoner who had been convicted of rape by a military tribunal, was freed by sixty armed men who attacked the prison.

85. Prison overcrowding is also endemic across the country. The Goma prison was built for 150, but at the time of my visit there were 793 detainees, including eleven women and eight children. The prison director stated that there was a permanent shortage of food. Detainees reported the complete absence of medical services, leading to frequent preventable deaths due to illnesses such as diarrhea. They also reported significant inter prisoner violence, and stated that while food was received once a week from the director, the strongest prisoners took the bulk of it. Many of the prisoners had never seen a judge or prosecutor.

86. The prison system is in such disarray that even the number of prisons and prisoners in the country is unknown. Accurate records of the prison sentences of convicted criminals are not maintained. As judges from the Supreme Court explained, monitoring and recordkeeping is so poor in the criminal justice system that people can serve years beyond their sentence, simply because the authorities do not know to release them, greatly contributing to over-crowding, resentment, and prison violence.

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<sup>71</sup> My 2008 annual report to the UN Human Rights Council discusses the phenomenon of prisoner control of prisons in detail: A/HRC/8/3.

87. In addition, security and intelligence agencies, including the Republican Guard and Army military intelligence, operate detention facilities, although they have no legal authority to detain. Their goal is to suppress political opposition, and their operations are unchecked.

[...]

112. Far too many prisoners die in a prison system that falls well below even the most basic standards of organization, monitoring, and health:

- The Government, with international support, should immediately conduct a comprehensive census of the prison population. Any prisoners arbitrarily detained should be released.
- The Government should establish a reasonable budget for every prison.
- Prison officials should record the details of any deaths in prisons, and regularly report to the Ministry of Justice.

***Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶ 28-32, 42, 75):***

*The Special Rapporteur recognizes the US' laws and procedures in place for addressing potential unlawful killings. However, the system is not flawless and there are many areas that still require significant improvement. Special attention should be given to promoting transparency and collecting timely and meaningful information regarding deaths in immigration detentions. Mr. Alston reviews the ICE's National Detention Standards, particularly the general medical care provisions.*

### Deaths in Immigration Detention

28. In June 2008, the Government acknowledged there had been at least 74 deaths in immigration detention facilities since 2003.<sup>72</sup> Subsequent newspaper reports indicate a significantly higher number. I received credible reports from various sources that deaths were due to: denial of necessary medical care; inadequate or delayed care; and provision of inappropriate medication.<sup>73</sup>

29. Immigration detention facilities, managed by Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security (DHS), hold immigrants with ongoing immigration legal proceedings, or awaiting removal from the United States. ICE's Office of Detention and Removal Operations (DRO) carries out the detention function.<sup>74</sup> The standards of detention at each of these facilities are set by ICE's National Detention Standards, which include

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<sup>72</sup> There were 74 deaths to June 2008 according to a statement by Julie L Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, Department of Homeland Security (4 June 2008).

<sup>73</sup> In one well-known case, a detainee's request for a biopsy was denied for nearly a year, despite a doctor's statement that it was urgent. During that period, the detainee developed cancer, and died after his release from detention. Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, The New York Times, Aug. 12, 2008.

<sup>74</sup> Immigration detainees can be held in a range of facility types. Across the United States, about 350 facilities operate under Intergovernmental Service Agreements (most are county jails); 8 service processing centres are owned and operated by ICE; and 7 contract detention facilities are operated by private contractors.

general medical care provisions.<sup>75</sup> The details of the medical care to be provided to detainees are in ICE's Division of Immigration Health Services (DIHS) Medical Dental Detainee Covered Services Package. The package states that it primarily covers emergency care, and other care is generally excluded unless it is judged necessary for the detainee to remain healthy enough for deportation.<sup>76</sup> Specialty care and testing believed necessary by the detainee's on-site doctor must be pre-approved by DIHS in Washington, DC. Reliable reports indicate that DIHS often applies an unduly restrictive interpretation in determining the provision of medical care. Officials at various detention centers have themselves reported difficulties in getting approval for medical care.<sup>77</sup> In defense, DIHS and DRO explained that truly urgent care is provided at the discretion of medical personnel at each detention center without the need for prior authorization. However, the care provider will not be reimbursed unless subsequent DIHS authorization is given. Denials of such requests have a chilling effect on medical personnel's subsequent decisions about proceeding without authorization.

30. The ICE standards are merely internal guidelines rather than legally-enforceable regulations. This has insulated ICE policies from the external oversight provided by the normal regulatory process and limits the legal remedies available to detainees when the medical care provided is deficient.<sup>78</sup> DHS should promulgate legally enforceable administrative regulations, and these should be consistent with international standards on the provision of medical care in detention facilities.

31. With respect to detention center conditions, I met with the DHS IG, whose office has prepared some valuable reports. A report on deaths in immigration detention was released shortly after my visit,<sup>79</sup> and made important recommendations,<sup>80</sup> but it reviewed only two deaths in detail. And the accountability system is incomplete by virtue of the fact that internal and external accountability functions are more or less combined. The law enforcement officers who investigate abuses by DHS personnel themselves report to the IG. Existing IG peer review arrangements appear to be an unlikely check on the performance of the IG in relation to sensitive and problematic cases.

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<sup>75</sup> The ICE National Detention Standards require that detainees "have access to medical services that promote detainee health and general well-being."

<sup>76</sup> See DIHS Medical Dental Detainee Covered Services Package, p. 1: "The DIHS Medical Dental Detainee Covered Services Package primarily provides health care services for emergency care. Emergency care is defined as "a condition that is threatening to life, limb, hearing, or sight." Accidental or traumatic injuries incurred while in the custody of ICE or BP and acute illnesses will be reviewed for appropriate care. [...] Other medical conditions which the physician believes, if left untreated during the period of ICE/BP custody, would cause deterioration of the detainee's health or uncontrolled suffering affecting his/her deportation status will be assessed and evaluated for care."

<sup>77</sup> See U.S. Government Accountability Office, "Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance", GAO-07-875 (6 June 2007).

<sup>78</sup> ICE assured me that there are internal grievance procedures. Detainees can also contact the DHS Inspector General (IG) via a dedicated hotline, or in writing, or they can make a complaint to the DHS Office for Civil Rights and Liberties. But detainees and their lawyers regularly report no or delayed responses to complaints, and hotline telephones that do not work.

<sup>79</sup> Department of Homeland Security, Office of Inspector General, "ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities", OIG-08-52 (June 2008).

<sup>80</sup> For example, the IG recommended that ICE be required to report to the IG whenever a death in ICE custody occurs. *Ibid.*, p 14.

32. ICE has no legal reporting requirements when a death occurs in ICE custody. The result has been a clear failure of transparency. Both civil society groups and Congressional staff members told me that for years they were unable to obtain any information at all on the numbers of deaths in ICE custody. ICE's recent public reporting of numbers, and its voluntary undertaking to report future deaths, are encouraging, but insufficient. ICE should be required to promptly and publicly report all deaths in custody, and each of these deaths should be fully investigated.

[...]

### Detainee Deaths in Guantanamo

42. Of the five reported deaths of detainees in U.S. custody at Guantánamo, four were classified by Government officials as suicides,<sup>81</sup> and one was attributed to cancer.<sup>82</sup> In the custodial environment, a state has a heightened duty to ensure and respect the right to life.<sup>83</sup> Thus, there is a rebuttable presumption of state responsibility - whether through acts of commission or omission - for custodial deaths. The state must affirmatively show that it lacks responsibility to avoid this inference,<sup>84</sup> and has an obligation to investigate and publicly report its findings and the evidence supporting them.<sup>85</sup> But until forced to do so through Freedom of Information Act lawsuits, the Department of Defense (DOD) provided little public information about any of the five detainee deaths. Although DOD has now released redacted copies of internal investigation documents and autopsies, it should provide fully unredacted medical records, autopsy files and other investigation records to the families of all the deceased.

[...]

### Recommendations

#### 75. Deaths in immigration detention

- All deaths in immigration detention should be promptly and publicly reported and investigated.

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<sup>81</sup> On 10 June 2006, three detainees reportedly committed suicide by hanging at Camp Delta: Mani Shaman Turki al-Habardi al-Utaybi (Saudi Arabian); Yasser Talal al-Zahrani (Saudi Arabian); Salah Ali Abdullah Ahmed Al-Salami (Yemeni). Al-Zahrani was 17 when he was captured, and 21 when he died. Al-Salami was 37, had been detained over four years, and had been involved in hunger strikes. Al-Utaybi was 30 when he died, and had been cleared to be transferred to the custody of Saudi Arabia before his death. On 30 May 2007, a fourth detainee, Abd ar-Rahman Maadha al-Amry (Saudi Arabian), reportedly committed suicide in Camp 5.

<sup>82</sup> Abdul Razzak Hekmati (Afghan), 68 years old, died on 30 December 2007 of colorectal cancer. He had been held at Guantánamo for five years.

<sup>83</sup> See, e.g., A/61/311, paras 49-54.

<sup>84</sup> A/61/311, para 54. See also Communication No. 84/1981, *Dermi Barbato v Uruguay*, A/38/40, annex IX.

<sup>85</sup> See, e.g., Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E/1989/89 (1989), Principle 17.



- The Department of Homeland Security should promulgate regulations, through the normal administrative rulemaking process, for provision of medical care that are consistent with international standards.

***Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 68, 70-71):***

*The Special Rapporteur visited Nigeria from 27 June to 8 July 2005 and pointed out the horrendous and unacceptable prison conditions. Detainees are held in seriously ill-threatening conditions.*

68. Deaths in custody and the many prisoners on death row make the Nigerian prison system highly relevant to this report. On the basis of a largely malfunctioning justice system, Nigeria tolerates an arbitrary and especially harsh form of punishment of alleged criminals. Of approximately 44,000 prisoners, some 25,000, or well over 50 per cent, have yet to face trial.<sup>86</sup> About 75 per cent of the latter have been charged with armed robbery, which is a capital offence. Three-quarters of those were not able to get legal assistance from the Legal Aid Council and a shocking 3.7 per cent remain in prison because of lost case files. Many of the 25,000 with whom the Special Rapporteur spoke are held in seriously health-threatening conditions, some for periods of 10-14 years.

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70. Prison conditions in general are not part of the Special Rapporteur's mandate. However, because of the numbers of individuals on death row and the fact that perhaps a majority of inmates are charged with capital offences (armed robbery or murder), a comment on prison conditions is warranted. The Special Rapporteur heard impressively few accusations of official abuse, but the lack of resources to ensure humane conditions was decried by almost everyone, including senior administrators. Common phenomena included: considerably in excess of 100 prisoners in cells designed to hold 25, unsanitary conditions which breed terrible illnesses, untreated illnesses leading to death, and food which is wholly inadequate. Money to improve prison conditions is never on politicians' lists of priorities, but it is absolutely essential. While death row conditions are harsh, they are often better than those endured by the vast numbers awaiting trial. Most deaths in custody are due to atrocious conditions rather than intentional ill-treatment.

71. Some interlocutors spoke of the need for a Minister for Prisons, a Prison Service Commission, or the need to decentralize control over prisons to the State level. The Special Rapporteur was in no position to choose among the different options but it is clear that an enhanced mechanism for monitoring and public reporting on prison conditions is urgent and indispensable.

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***Press Statement on Mission to the Democratic Republic of the Congo (October 2009):***

*The Special Rapporteur visited the Democratic Republic of the Congo from 1-15 October, 2009. Atrocious prison conditions and the lack of state monitoring result in many unlawful deaths in custody because of starvation and widespread diseases.*

Deaths in prisons

My interlocutors, including the Minister of Justice, who is responsible for the penitentiary system, unanimously agreed that prison conditions are atrocious. I visited the Central Prison of Goma and spoke with detainees there. In a prison built to hold 150, over 800 prisoners live in squalor. They receive one inadequate meal per day from the prison authorities, and rely essentially on food brought by their families. Because internal control of the prison is entirely left to the inmates, the stronger prisoners take the lion's share of the provided food. The weaker prisoners and those without family nearby gradually become emaciated, and especially vulnerable to disease. Not surprisingly, many die in prison.

The number of prisons and prisoners in the Congo is unknown. Totally inadequate records of prisoners are kept and many are left rotting in prison even after their sentence has been served. The great majority of prisoners have never been tried before a judge. In essence, the prison system seems to be a depository for the enemies of the state and for those too poor to buy their way out of the justice system. The abominable conditions, together with corruption and minimal state control, mean that escapes are common, thus adding further to impunity.

[...]

Recommendations

5. Being imprisoned in a DRC jail is often a fate worse than hell. Far too many detainees are killed by a negligent and callous prison system. The actual number of prisons and prisoners is unknown. Prison over-crowding is shocking, even by the standards of a very poor country. Vast numbers are held without trial for years on end, and many are starved slowly to death. A reasonable budget for every prison should be established, and a census of the prison population undertaken within six months. The amount of time prisoners are kept in pre-trial detention must conform to international human rights standards. Prisoners detained in violation of these standards should be released, and all facilities operated by actors without the lawful authority to do so should be closed.

## F. IMMIGRATION DETENTION

*Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶ 28-32, 75):*

*The Special Rapporteur recognizes the US' laws and procedures in place for addressing potential unlawful killings. However, the system is not flawless and there are many areas that still require significant improvement. Special attention should be given to promoting transparency and collecting timely and meaningful information regarding deaths in immigration detentions.*

### Deaths in Immigration Detention

28. In June 2008, the Government acknowledged there had been at least 74 deaths in immigration detention facilities since 2003.<sup>87</sup> Subsequent newspaper reports indicate a significantly higher number. I received credible reports from various sources that deaths were due to: denial of necessary medical care; inadequate or delayed care; and provision of inappropriate medication.<sup>88</sup>

29. Immigration detention facilities, managed by Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security (DHS), hold immigrants with ongoing immigration legal proceedings, or awaiting removal from the United States. ICE's Office of Detention and Removal Operations (DRO) carries out the detention function.<sup>89</sup> The standards of detention at each of these facilities are set by ICE's National Detention Standards, which include general medical care provisions.<sup>90</sup> The details of the medical care to be provided to detainees are in ICE's Division of Immigration Health Services (DIHS) Medical Dental Detainee Covered Services Package. The package states that it primarily covers emergency care, and other care is generally excluded unless it is judged necessary for the detainee to remain healthy enough for deportation.<sup>91</sup> Specialty care and testing believed necessary by the detainee's on-site doctor must be pre-approved by DIHS in Washington, DC. Reliable reports indicate that DIHS often applies an unduly restrictive interpretation in determining the provision of medical care. Officials at

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<sup>89</sup> Immigration detainees can be held in a range of facility types. Across the United States, about 350 facilities operate under Intergovernmental Service Agreements (most are county jails); 8 service processing centres are owned and operated by ICE; and 7 contract detention facilities are operated by private contractors.

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various detention centers have themselves reported difficulties in getting approval for medical care.<sup>92</sup> In defense, DIHS and DRO explained that truly urgent care is provided at the discretion of medical personnel at each detention center without the need for prior authorization. However, the care provider will not be reimbursed unless subsequent DIHS authorization is given. Denials of such requests have a chilling effect on medical personnel's subsequent decisions about proceeding without authorization.

30. The ICE standards are merely internal guidelines rather than legally-enforceable regulations. This has insulated ICE policies from the external oversight provided by the normal regulatory process and limits the legal remedies available to detainees when the medical care provided is deficient.<sup>93</sup> DHS should promulgate legally enforceable administrative regulations, and these should be consistent with international standards on the provision of medical care in detention facilities.

31. With respect to detention center conditions, I met with the DHS IG, whose office has prepared some valuable reports. A report on deaths in immigration detention was released shortly after my visit,<sup>94</sup> and made important recommendations,<sup>95</sup> but it reviewed only two deaths in detail. And the accountability system is incomplete by virtue of the fact that internal and external accountability functions are more or less combined. The law enforcement officers who investigate abuses by DHS personnel themselves report to the IG. Existing IG peer review arrangements appear to be an unlikely check on the performance of the IG in relation to sensitive and problematic cases.

32. ICE has no legal reporting requirements when a death occurs in ICE custody. The result has been a clear failure of transparency. Both civil society groups and Congressional staff members told me that for years they were unable to obtain any information at all on the numbers of deaths in ICE custody. ICE's recent public reporting of numbers, and its voluntary undertaking to report future deaths, are encouraging, but insufficient. ICE should be required to promptly and publicly report all deaths in custody, and each of these deaths should be fully investigated.

[...]

## Recommendations

### 75. Deaths in immigration detention

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<sup>92</sup> See U.S. Government Accountability Office, "Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance", GAO-07-875 (6 June 2007).

<sup>93</sup> ICE assured me that there are internal grievance procedures. Detainees can also contact the DHS Inspector General (IG) via a dedicated hotline, or in writing, or they can make a complaint to the DHS Office for Civil Rights and Liberties. But detainees and their lawyers regularly report no or delayed responses to complaints, and hotline telephones that do not work.

<sup>94</sup> Department of Homeland Security, Office of Inspector General, "ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities", OIG-08-52 (June 2008).

<sup>95</sup> For example, the IG recommended that ICE be required to report to the IG whenever a death in ICE custody occurs. *Ibid.*, p 14.

- All deaths in immigration detention should be promptly and publicly reported and investigated.
- The Department of Homeland Security should promulgate regulations, through the normal administrative rulemaking process, for provision of medical care that are consistent with international standards.

## G. GUANTANAMO DEATHS IN CUSTODY

*Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶ 38-42):*

*The Special Rapporteur recognizes the US' laws and procedures in place for addressing potential unlawful killings. However, the system is not flawless and there are many areas that still require significant improvement. Mr. Alston is concerned that the death penalty could be imposed under the Military Commissions Act of 2006, the provisions of which violate the due process requirements of international human rights and humanitarian law. There are detainees at Guantanamo who have been charged with capital offenses under the MCA. There should no longer be prosecutions under the Act. Special attention should also be given to promoting transparency and collecting timely and meaningful information regarding deaths in immigration detentions.*

### Death Penalty under the Military Commissions Act (MCA)

38. Five men detained at the U.S. Naval Station at Guantánamo Bay, Cuba, have been charged with capital offences under the Military Commissions Act (MCA) and a number of other Guantanamo detainees face charges that may carry the death penalty.<sup>96</sup> I welcome the President's decision to seek a stay of all commission proceedings and to order a review of whether, and in what forum, individual detainees may be prosecuted.<sup>97</sup> Such steps send a strong signal that the United States is restoring its commitment to the rule of law in its treatment, detention and prosecution of Guantanamo detainees. However, the President's order appears to leave open the possibility that detainees may still be prosecuted - and subjected to the death penalty - under the MCA. Any such prosecution would be a violation of the United States' obligations under international human rights and humanitarian law because the MCA does not comport with fundamental fair trial principles.

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<sup>96</sup> Five men were arraigned on 5 June 2008: Khalid Sheik Mohammed; Ramzi bin al-Shibh; Ali Abd al-Aziz Ali; Mustafa Ahmed al-Hawsawi; and Walid bin 'Attash. The five will be tried at a joint trial. They were charged with: conspiracy; attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violence of the law of war; hijacking or hazarding a vessel or aircraft; terrorism; and providing material support for terrorism (see: *United States of America v Khalid Sheikh Mohammed et al*, Charge Sheet, 9 May 2008).

Two other men faced charges for capital offenses, but the charges were either dismissed or have been withdrawn without prejudice and could be reinstated. On 11 February 2008, U.S. military officials announced charges against Mohammed al-Qahtani for his alleged role in the 11 September 2001 attack, but those charges were dismissed on 9 May 2008. According to the official responsible for approving military commission charges, the charges were dismissed because al-Qahtani had been subjected to torture by U.S. officials over a prolonged period, which had resulted in a negative impact on his health. Bob Woodward, *Detainee Tortured, Says U.S. Official*, Washington Post, Jan. 14, 2009. On 30 June 2008, prosecutors charged Abd al-Rahim Hussein Muhammed Abdu al-Nashiri, for his alleged role in the October 2000 USS Cole attack (see: *United States of America v Abd al-Rahim Hussein Muhammed Abdu al-Nashiri*, Charge sheet, 30 June 2008). Charges against him were withdrawn without prejudice on 5 February 2009. CIA Director Michael Hayden has publicly stated that al-Nashiri was one of three people subjected to waterboarding by the CIA.

<sup>97</sup> Executive Order directing the Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 4899 (22 Jan. 2009).

39. The United States has an obligation under international law to provide detainees with fair trials that afford all essential judicial guarantees. No State may derogate from this obligation, regardless of whether persons are to be tried for crimes allegedly committed during peace or armed conflict.<sup>98</sup> But the text of the MCA and the experiences of those involved in the military commission process with whom I met indicate that commission proceedings utterly fail to meet basic due process standards. I highlight just a few of the more egregious evidentiary due process flaws.<sup>99</sup>

40. There is now no doubt that detainees at Guantanamo were subjected to torture and coercion; senior Government officials have publicly admitted as much, and non-governmental organizations and counsel for individual detainees have provided credible accounts of cruelty and mistreatment. Contrary to international law, the MCA permits the taint of such coercion to pollute the U.S. justice system because it explicitly allows statements coerced by means such as cruel, inhuman, or degrading treatment to be admitted into evidence.<sup>100</sup> Also deeply problematic are the MCA provisions on classified information, which permit the Government to withhold from the defense the sources and methods by which evidence was acquired, and permits the accused to be convicted on the basis of evidence he has never seen.<sup>101</sup> The MCA also presumptively permits second and third hand hearsay evidence.<sup>102</sup> Together, the provisions on coerced evidence, classified evidence, and hearsay make it likely that evidence obtained through torture, although formally prohibited,<sup>103</sup> may in practice be admitted.

41. The MCA's provisions constitute a gross infringement on the right to a fair trial and it would violate international law to execute someone under this statute.

### Detainee Deaths in Guantanamo

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<sup>98</sup> See, e.g., International Covenant on Civil and Political Rights, Article 14; UN Human Rights Committee, General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), paras 11, 16; Geneva Conventions, Common Article 3; International Committee of the Red Cross, *Customary International Humanitarian Law*, Volume 1: Rules, Rule 100.

<sup>99</sup> The jurisdictional flaws are equally troubling. For example, the MCA's definition of an "alien unlawful enemy combatant" who may be subjected to military commission jurisdiction does not comport with international humanitarian law. The definition elides the fundamental distinctions humanitarian law makes between combatants and non-combatants and between types of armed conflict. MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948a(1) Thus, civilians who have never directly participated in hostilities against the United States and even those without any connection to armed conflict could be militarily prosecuted under the MCA. The MCA's subject matter jurisdiction provisions are also inconsistent with international humanitarian law because they include offenses that are not recognized as war crimes. See, e.g., MCA section 3, amending Subtitle A of Title 10 U.S.C. §950v(b)(25) (offense of "providing material support for terrorism") and §950v(b)(28)(conspiracy).

<sup>100</sup> Statements obtained by cruel, inhuman or degrading treatment may be used, if they were obtained before December 2005 and the military judge finds that they are reliable, possess probative value and to do so would be in the interests of justice. See MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948r(c) and (d).

<sup>101</sup> MCA, section 3, amending Subtitle A of Title 10 U.S.C. §949d(f) and Title 10 U.S.C. §949d(b)(2)(B). Classified information can be privileged from disclosure. Also see §949j(c). Such secrecy impedes the defense's ability to answer accusations, and particularly inhibits the accused's ability to investigate whether specific evidence was acquired through torture or other coercion.

<sup>102</sup> MCA, section 3, amending Subtitle A of Title 10 U.S.C. §949a(b)(2)(e).

<sup>103</sup> MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948r(b).

42. Of the five reported deaths of detainees in U.S. custody at Guantánamo, four were classified by Government officials as suicides,<sup>104</sup> and one was attributed to cancer.<sup>105</sup> In the custodial environment, a state has a heightened duty to ensure and respect the right to life.<sup>106</sup> Thus, there is a rebuttable presumption of state responsibility - whether through acts of commission or omission - for custodial deaths. The state must affirmatively show that it lacks responsibility to avoid this inference,<sup>107</sup> and has an obligation to investigate and publicly report its findings and the evidence supporting them.<sup>108</sup> But until forced to do so through Freedom of Information Act lawsuits, the Department of Defense (DOD) provided little public information about any of the five detainee deaths. Although DOD has now released redacted copies of internal investigation documents and autopsies, it should provide fully unredacted medical records, autopsy files and other investigation records to the families of all the deceased.

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<sup>104</sup> On 10 June 2006, three detainees reportedly committed suicide by hanging at Camp Delta: Mani Shaman Turki al-Habardi al-Utaybi (Saudi Arabian); Yasser Talal al-Zahrani (Saudi Arabian); Salah Ali Abdullah Ahmed Al-Salami (Yemeni). Al-Zahrani was 17 when he was captured, and 21 when he died. Al-Salami was 37, had been detained over four years, and had been involved in hunger strikes. Al-Utaybi was 30 when he died, and had been cleared to be transferred to the custody of Saudi Arabia before his death. On 30 May 2007, a fourth detainee, Abd ar-Rahman Maadha al-Amry (Saudi Arabian), reportedly committed suicide in Camp 5.

<sup>105</sup> Abdul Razzak Hekmati (Afghan), 68 years old, died on 30 December 2007 of colorectal cancer. He had been held at Guantánamo for five years.

<sup>106</sup> See, e.g., A/61/311, paras 49-54.

<sup>107</sup> A/61/311, para 54. See also Communication No. 84/1981, *Dermit Barbato v Uruguay*, A/38/40, annex IX.

<sup>108</sup> See, e.g., Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E/1989/89 (1989), Principle 17.