

CHAPTER IV

DEATHS IN CUSTODY

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A. INTRODUCTION

This chapter sets out how the Special Rapporteurs responded to custodial deaths—deaths of individuals arrested, detained, or incarcerated by state agents. Custodial deaths are not defined by the identity or category of the perpetrator or victim, or by the method of killing, but rather by the context of official custody. Custodial deaths encompass a wide range of incidents, including killings by police of an arrested suspect, lethal torture by investigators, killings by inmates or other prisoners, killings by prison guards, and deaths caused by poor prison conditions such as unsanitary facilities or a lack of medical care.

B. DEFINITION AND LEGAL FRAMEWORK

Special Rapporteur Alston set out the definition of deaths in custody and explained the importance of this category of extrajudicial execution in his 2006 report to the General Assembly. In his report, he also analysed the content and basis of the state's legal responsibility for custodial deaths, and explained the heightened responsibility of states to protect and respect the rights of detained individuals:

Report to the General Assembly (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 [2006] report to the Commission on Human Rights referred to 25 communications sent to 19 countries regarding more than 185 victims.¹ (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 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 recognised in the present Covenant. ...”² 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

1 Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53/Add.1, 27 March 2006. The communications concerned 185 identified individual cases of death in custody; however, some communications also dealt with larger groups of unidentified persons.

2 ICCPR, art. 2 (1).

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 abuse³ – 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.⁴ 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 conceptualised 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 case of *Dermit Barbato v. Uruguay*.⁵ 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.”⁶ 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.⁷ 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:

3 See Report of the Special Rapporteur, Philip Alston, E/CN.4/2005/7, 22 December 2004, paras. 71-75.

4 See, e.g., *Basic Principles for the Treatment of Prisoners*, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“*The Beijing Rules*”), adopted by General Assembly resolution 40/33 of 29 November 1985; *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955; and *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by General Assembly resolution 45/113 of 14 December 1990. For a detailed study of these instruments, see Nigel S. Rodley, *The Treatment of Prisoners Under International Law* (2nd ed., 1999).

5 Human Rights Committee, *Dermit Barbato v. Uruguay*, (Comm. No. 84/1981), CCPR/C/OP/2 at 112 (1990).

6 *Ibid.*, paras. 1.4 and 6.1.

7 *Ibid.*, para. 1.4.

“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.”⁸

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.⁹ One consequence of this presumption is that the State must affirmatively provide evidence that it lacks responsibility to avoid that inference.¹⁰ 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.

In his report on Guatemala, Special Rapporteur Alston highlighted the fact that not all deaths in custody occur at the hands of police or prison authorities, and examined the heightened legal obligations of protection and due diligence:

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

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. ... 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.

Due to the fact that most of the Special Rapporteurs’ reporting on this issue related to custodial deaths that had already occurred, it became important to highlight accountability and transparency obligations. In 2006, Special Rapporteur Alston addressed the principle of transparency in a report to the Commission on

8 Ibid., para. 9.2.

9 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” (Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1986/21, 7 February 1986, para. 209).

10 The problem of States advancing implausible and unsubstantiated accounts that could not readily be disproved has confronted this mandate since the beginning. See Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1983/16, 31 January 1983, para. 201. Such allegations cannot be resolved without evidence from the State.

Human Rights. He discussed commissions of inquiry as a specific application of this principle and one that is often deployed in relation to deaths in custody:

Report to the Commission on Human Rights (E/CN.4/2006/53, 8 March 2006, ¶¶25-26)

B. Transparency in investigating violations: commissions of inquiry

25. One of the recommendations contained in the Special Rapporteur's report to the Commission in 2005 was that national-level investigations of alleged violations of international law by the armed or security forces are indispensable. To be credible and acceptable, however, the results must be made public, including details of how and by whom the investigation was carried out, the findings, and any prosecutions subsequently undertaken.

26. This recommendation is closely related to the question of impunity which has long been a major focus of the work of the Special Rapporteur on extrajudicial executions. The problem is typically manifested by a failure to investigate, a failure to report effectively and openly following investigations, or a failure to punish (commensurately) those responsible. An important role in this regard has been played by commissions of inquiry established at the national level. When such initiatives are launched, which is frequently the case following massacres, deaths in custody, police or military shootings, or other extrajudicial forms of execution, they are all too often designed mainly to blunt outrage rather than to establish the truth. Some such commissions are undertaken in good faith and result in published reports which contribute significantly to the promotion of respect for human rights. An excellent example is that established in 2005 by the Government of Nigeria to investigate the killing of the so-called Apo 6. In other cases, however, the procedures, results and responses are much less satisfactory. Some commissions are close to being pro forma activities, in others they are undertaken in good faith but the results are never released, and in still others Governments do eventually release the reports but there is no follow-up of any type.

In his 2009 report on the United States of America, Special Rapporteur Alston further emphasised the State's obligation to investigate deaths in custody, publicly report findings, and effectively punish violations:

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

B. Detainee deaths at Guantánamo

42. Of the five reported deaths of detainees in U.S. custody at Guantánamo, four were classified by Government officials as suicides,¹¹ and one was attributed to cancer.¹² In the custodial environment, a state has a heightened duty to ensure and respect the right to life.¹³ 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,¹⁴ and has an obligation to investigate and publicly report its findings and the evidence

11 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.

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

13 See, e.g., Report of the Special Rapporteur, Philip Alston, A/61/311, 5 April 2006, paras 49-54.

14 Ibid., para 54. See *Barbato v Uruguay*, *supra* note 5

supporting them.¹⁵ 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.

[...]

52. The legal obligation to effectively punish violations is as vital to the rule of law in war as in peace. It is thus alarming when States either fail to investigate or permit lenient punishment of crimes committed against civilians and combatants. The legal duty to investigate and punish violations of the right to life is not a formality. Effective investigation and prosecution vindicates the rights of the victims and prevents impunity for the perpetrators. Yet, based on the military's own documents, one study of almost 100 detainee deaths in U.S. custody between August 2002 and February 2006 found that investigations were fundamentally flawed, often violated the military's own regulations for investigations, and resulted in impunity and a lack of transparency into the policies and practices that may have contributed to the deaths.¹⁶

One of the key questions about accountability for custodial deaths is: who carries the onus of proof concerning the legality of the death in cases of uncertainty? Human rights law is clear, as emphasized in the *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, that any death in custody is a potentially unlawful death, and triggers the state's duty to investigate (the general duty to investigate is discussed fully in Chapter 9). There is a presumption of state responsibility when someone dies in custody, which means the state must submit evidence to show it was not at fault.

*Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016):
The Revised United Nations Manual on the Effective Prevention and Investigation of
Extra-legal, Arbitrary and Summary Executions (2017, ¶17)*

C. The Triggering and Scope of the Duty to Investigate

[...]

17. Where a State agent has caused the death of a detainee, or where a person has died in custody, this must be reported, without delay, to a judicial or other competent authority that is independent of the detaining authority and mandated to conduct prompt, impartial and effective investigations into the circumstances and causes of such a death.¹⁷ This responsibility extends to persons detained in prisons, in other places of detention (official or otherwise) and to persons in other facilities where the State exercises heightened control over their life. Owing to the control exercised by the State over those it holds in custody, there is a general presumption of state responsibility in such cases.¹⁸ Without prejudice to the obligations of the State, the same presumption of responsibility will apply to the authorities managing private prisons. Particular circumstances in which the State will be held responsible for the death, unless it is proven to the contrary, include, for example, cases where the person suffered injury while in custody or where the deceased was, prior to his or her death, a political opponent of the government or a human rights defender; was known to be suffering from mental health issues; or committed suicide in unexplained circumstances. In any

15 See, e.g., *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 4, Principle 17.

16 Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (2006).

17 A/61/311, *supra* note 13, paras 49-54. See also *UN Standard Minimum Rules for the Treatment of Prisoners (the "Nelson Mandela Rules")*, adopted by UN General Assembly Resolution 70/175 of 17 December 2015.

18 *Barbato v Uruguay*, *supra* note 5, para. 9.2

event, the State is under the obligation to provide all relevant documentation to the family of the deceased, including the death certificate, medical report and reports on the investigation held into the circumstances surrounding the death.¹⁹

C. TYPES, CAUSES, AND REFORMS

1. Introduction

This section examines the work of the Rapporteurs on killings and lethal torture, and deaths due to poor prison conditions. It also analyses in detail the phenomenon of prisoners running prisons, which in some countries is a major cause of prison violence. Central to preventing and reducing custodial deaths of all forms is effective prison oversight, detention monitoring, accessible complaint mechanisms for prisoners, and accurate record keeping in the prison system.

2. Torture and killings in custody

The country mission report extracts below explain the specific links between the context of custody and lethal torture and other killings:

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶50, 53-55)

50. Significant levels of police brutality and impunity were reported to me by a wide range of sources. The underlying causes are not difficult to discern. In the course of more than three decades of civil strife and violence, the police force has been transformed into a counter-insurgency force. More than two thirds of today's police officers belong to the "reserve" rather than the regular force and most of these have never received significant training in criminal detection and investigation. One government official told me bluntly, "Police officers holding positions today were recruited as manpower – they do not do or know how to do police work." To make matters worse, police operations during the armed conflict were subject to "emergency" legislation that permitted prolonged detention without habeas corpus, the admission into evidence of confessions which would be inadmissible under the ordinary law of evidence, and the disposal of the bodies of persons killed by the armed forces or the police without a formal inquest. It is regrettable that many of these provisions are now back in force in emergency regulations promulgated since the assassination of Foreign Minister Kadirgamar. Today, too many police officers are accustomed to "investigating" by forcibly extracting confessions and to operating without meaningful disciplinary procedures or judicial review.

[...]

B. Deaths in police custody

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.^[1] The pattern of summary executions that emerges demands a systematic official response that brings those responsible to justice and discourages future violations.

¹⁹ ECtHR, *Opuz v. Turkey*, Judgment, 9 June 2009, para. 150.

54. The other main cause of deaths in police custody is torture.²⁰ (Deaths are an inevitable side-effect of the widespread use of torture.)²¹ 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 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.¹

Special Rapporteur Alston was also made aware of torture at the hands of law enforcement officials in custodial settings during his missions to Nigeria and to the Central African Republic:

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

Deaths in custody

50. Numerous prisoners reported being systematically tortured by the police to extract a confession. Techniques include hanging from the ceiling²² 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.

20 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.

21 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".

22 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.

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.²³

Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶45, 47)

45. [D]eaths in police or [army or Republic Guard] custody appear to be widespread. One Government official stated frankly that the torture and murder of arrested suspects was “routine”. By way of example, he recounted in detail two cases in which he witnessed how FACA soldiers tortured to death persons in their custody in 2007. The official feared, at best, inaction, and at worst, retaliation, if he reported these cases. Representatives of civil society in Bossangoa reported a number of killings by law enforcement officials in which the circumstances were contested, but no real investigation followed any of the deaths.

[...]

47. [K]illings 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.

[...]

[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.

A significant proportion of the communications sent by the Special Rapporteurs concerned cases of death in custody. In such cases, much detail was often known about the victim, usually supplied by the family or lawyers. For example:

23 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.

Allegation letter sent to the Government of Egypt (17 November 2009) (with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment), A/HRC/14/24/Add.1, pp.69-71

According to information received

On 28 April 2008, Mr Yusuf Hamdane Awad (Abu Zahri) was arrested at the Egyptian-Palestine Border by the Egyptian State Security Intelligence (SSI). He was then held at the SSI headquarters in Al Arish for a period of two weeks before being transferred to the SSI headquarters in Nasr City, Cairo. Forty-five days later, he was moved to Burj al Arab Prison near Alexandria. During his detention he was frequently moved between the regional SSI building in Kom Dekka and the SSI headquarters in Nasr city for questioning. It is alleged that, while in custody, he was subjected to beatings, electrocution and sleep deprivation.

On 15 September 2009, he was taken to Kom Dekka for questioning and on 19 September 2009, he was returned to Burj Al Arab prison. By this time his health had deteriorated, and he was sent to Alexandria University hospital for medical treatment. He was diagnosed with massive internal bleeding in his head and was kept at the intensive care unit for a period of two weeks. On 8 October 2009, he was taken back to Burj Al Arab Prison although he had not fully recovered.

On 10 October 2009 Mr Yusuf Hamdane Awad (Abu Zahri) was pronounced dead. The Egyptian authorities stated publicly that he had died of a heart and kidney failure due to a pre-existing condition. However, the permit for his burial issued by the Egyptian Ministry of Health and Population indicated that the cause of death was under investigation. His body was sent to his family in Gaza, where an autopsy was conducted which indicated that the cause of death was a massive internal haemorrhage in the head.

It is alleged that the deceased was a brother of Mr Sami Abu Zahri, the spokesman for the Harakat al-Muqā wamat al-Islā miya (HAMAS) and that he may have been detained because of his brother's political affiliation.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the fundamental principles under international law applicable to this case. Article 6 of the International Covenant for Civil and Political Rights (ICCPR), to which Egypt is a party, states that no one shall be arbitrarily deprived of his or her life. Article 7 of the same Covenant provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

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 as a consequence of injuries sustained while in State custody, there is a presumption of State responsibility. In this respect we would like to recall the conclusion of the Human Rights Committee in a custodial death case (*Dermit Barbato v. Uruguay*, communication no. 84/1981(21/10/1982), paragraph 9.2) ...

[...]

In order to overcome the presumption of State responsibility for a death resulting from injuries sustained in custody, there must be a "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances" (Principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions). This principle was reiterated by the Human Rights Council at its 8th Session in Resolution 8/3 on the "Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions" (OP 4), stating that all States have "to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions".

The Council added that this obligation includes the obligation “to identify and bring to justice those responsible, ..., to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and prevent the recurrence of such executions”. These obligations to investigate, identify those responsible and bring them to justice arise also under Articles 7 and 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Egypt is a Party.

We urge your Excellency’s Government to carry out inquiries into the circumstances surrounding the death of Mr Yusuf Hamdane Awad (Abu Zahri) expeditiously, impartially and transparently, also with a view to taking all appropriate disciplinary and prosecutorial action and ensuring accountability of any person guilty of the alleged violations, as well as to compensate his family. Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention.

Special Rapporteur Heyns also made extensive use of local civil society documentation to highlight the problem of custodial deaths resulting from police torture during his country visit to India:

Report on the Mission to India (A/HRC/23/47/Add.1, 26 April 2013, ¶¶29-32)

29. According to the NCRB [National Crime Records Bureau] data for 2011, over 100 deaths occurred in police custody in India.²⁴ In this regard, formal accusations were brought against a total of 14 police officers; none of them have been convicted.

30. A report released by the Asian Centre for Human Rights (ACHR)²⁵ presented statistics gathered by the NHRC [National Human Rights Commission] on deaths in custody in terms of which 1,504 cases of deaths in police custody and 12,727 cases of deaths in judicial custody were reported from 2001 to 2010.²⁶ ACHR suggested that in the majority of deaths in police custody, the death was preceded by torture and occurred within the first 48 hours of arrest. These statistics may not reflect the full extent of custodial deaths in India, given that not all deaths may be reported to the NHRC. The Armed Forces are, for instance, not required to convey such information to the NHRC.

31. During confidential interviews held throughout the visit, the Special Rapporteur was informed of several cases of individuals unlawfully taken into custody, severely beaten and taken to hospital where they subsequently died. He was informed that no steps had been taken to bring perpetrators of these acts to account.²⁷

32. The Special Rapporteur, however, welcomes a series of steps undertaken in India to regulate the treatment of persons in custody with the aim of ensuring their rights. In this regard, in 1997 the Supreme Court of India elaborated directives on arrest and detention, following its judgement in the *D.K. Basu vs. State of West Bengal* case. The NHRC has also laid down Guidelines on Custodial Deaths and Rapes, including on the period within which a death is to be reported, the procedure to be followed and the methods to conduct autopsies. The guidelines also provide that a magisterial inquiry must be held in cases of deaths in custody, and, should a police officer be found responsible, prompt prosecution and disciplinary action must be taken. Judicial inquiries in cases of custodial deaths have been made mandatory through the adoption of the Code of Criminal Procedure (Amendment) Act in 2005. The Special Rapporteur found, however, that the mentioned

24 NCRB MHA, “Crime in India 2011 – Statistics”, p. 551–553.

25 ACHR, “Torture in India 2011”, 21 November 2011.

26 The Government of India commented that, according to NCRB data, 1,048 persons were killed in police custody from 2001 to 2011.

27 In addition to information received during confidential interviews held, see ACHR, “Torture in India 2011”, 21 November 2011, pp. 9–16.

provisions are not sufficiently complied with in practice. He heard that relatives are not informed immediately of the death, representatives of human rights organizations may not be present during the autopsy, and relatives are pressured to cremate the body, thereby destroying valuable evidence. In addition, autopsies are carried out by executive rather than judicial magistrates, who are not qualified to oversee such inquiries.

Following up on his visit to Turkey in 2013, Special Rapporteur Heyns noted the improvements that had been made to prison conditions, including the provision of cameras to reduce the incidence of abuse, but highlighted that there were still shortcomings with respect to investigations:

Follow-up Report on Mission to Turkey (A/HRC/29/37/Add.4, 6 May 2015, ¶¶25-28)

25. During his visit, the Special Rapporteur noted the positive measures taken to improve prison conditions and surveillance, which had contributed to a significant decrease in deaths in custody. Nonetheless, deaths in custody continue to occur, the majority after instances of torture or ill-treatment.

26. The Special Rapporteur recommended the establishment of a national preventive mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, without delay (see A/HRC/23/47/Add.2, para. 104). The Government stated that the Turkish Human Rights Institution was the designated national preventive mechanism pursuant to Decree no. 2013/5711 which was published in the Official Gazette on 28 January 2014.¹⁹ While this may be seen as a positive measure, concerns have been raised about the independence of the Institution and its capacity, in terms of sufficient and trained staff and the budget to fulfil its mandate.

27. The Special Rapporteur called for prompt reporting of deaths in custody and independent and public investigations into such deaths. He urged Turkey to ensure that surveillance cameras in security and detention facilities were fully operational and that footage from the cameras was available immediately and in its entirety (ibid., paras. 103 and 105). In its response, the Government of Turkey stated that surveillance cameras had been installed in 97 per cent of detention facilities, in all the common areas, including interview rooms. It also indicated that juvenile detention centres were being equipped with individual self-locking cells and centrally monitored camera systems.

28. The Special Rapporteur notes with concern reports that installed surveillance cameras are not always fully operational.

During his mission to The Gambia (which was conducted alongside the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), Special Rapporteur Heyns was not allowed by the Government of then President Jammeh to have unrestricted access to places of detention (see Chapter 2 above) and was stopped at the gates of the Mile 2 prison. Because the government would not allow full access, the Special Rapporteur then suspended visits to other prisons; restricted prison visits risk producing misleading information about prison conditions because the government can control what the investigator can see and may hide evidence of abuse. Nonetheless, he included within his report references to information he had received with respect to deaths in custody in the country:

Report on Mission to The Gambia (A/HRC/29/37/Add.2, 11 May 2015, ¶¶41, 48)

C. Use of force by law enforcement agencies and activities of paramilitary groups

[...]

1. Gambian Police Force

[...]

41. According to Gambian law, the police are required to obtain a warrant before arresting a person,²⁸ and the suspect must be informed of the reason for the arrest within three hours, and be either charged or released within 72 hours.²⁹ However, the Special Rapporteur has received reports that the police sometimes extend the 72-hour limit on detention without charge and seldom conduct arrests pursuant to a warrant. Other deficient arrest procedures include delays in informing detainees of the charges being laid against them, and delays in facilitating access to lawyers and to family members. Several allegations were made about the police using excessive force against suspects during arrest, interrogation and pretrial detention. With regard to the practice of torture or ill-treatment, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that, while in some individual cases ill-treatment does occur in police stations and during arrest or transfer to police stations, he has not found evidence that such abuses are part of a widespread pattern or systemic practice.³⁰ The Special Rapporteur on extrajudicial, summary or arbitrary executions recalls that States are held to a heightened level of diligence in protecting the lives of detainees and must take adequate measures to protect their lives.³¹

[...]

3. Prison Service

48. The Special Rapporteur received reports of cases of excessive use of force and cases of denial of medical care by prison officials that had occasionally led to deaths in custody, which were not adequately examined by forensic experts due to negligence and a lack of in-house forensic expertise.³² The Government did not provide statistics but advised that all deaths in custody were from natural causes.

During his 2015 mission to Ukraine, Special Rapporteur Heyns focused on detention in the context of the conflict-affected areas in the east, highlighting that the problems often seemed to occur before detainees arrived at the formal detention facilities. However, he took the opportunity to comment more broadly on conditions across the country, and particularly the very high rate of communicable disease (specifically tuberculosis) in detainee populations. With respect to those facilities he visited (or attempted to visit), he also commented on the problem of limited transparency:

28 However, section 15 of the Criminal Procedure Code and other laws allow arrests without a warrant in certain instances.

29 Article 19 of the Constitution.

30 See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, Mission to The Gambia, A/HRC/28/68/Add.4, 16 March 2015.

31 *Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (the "Luanda Guidelines")*, adopted by the African Commission on Human and Peoples' Rights during its 55th Ordinary Session in Luanda, Angola, 28 April to 12 May 2014.

32 The lack of trained forensic expertise to carry out autopsies appears to be replicated in the police and the judiciary. For further details about forensic services in the Gambia, see A/HRC/28/68/Add.4.

Report on Mission to Ukraine (A/HRC/32/39/Add.1, 4 May 2016, ¶¶46-49, 67-69)

B. Securing the right to life in the context of detention

46. Though issues concerning the treatment of detainees fall more directly within the mandate of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, violence or other threats to life within detention facilities can lead directly to deaths for which the State has a heightened responsibility. For this reason, wherever possible, the Special Rapporteur visits places of detention during his country visits, to assess these threats first-hand.

47. It seems that the Office of the Ombudsperson and the national preventive mechanism created within it are relatively free to exercise their responsibilities to conduct unannounced visits to both pretrial detention facilities (SIZO) and penal colonies, and that this access provides an effective system of protection of the rights of detainees. [...]

48. Detainees with whom the Special Rapporteur spoke had few complaints about conditions in the pretrial detention facilities. However, several made allegations of ill-treatment during earlier stages of their detention. There is a systematic pattern of complaints about ill-treatment at the hands of agents identified as members of the Security Service of Ukraine, whom one interlocutor described as “untouchable”.

49. The Special Rapporteur found it very difficult to establish from any officials he met the locations at which it was possible that such abuses might have taken place, whether police temporary detention facilities or other sites. He could find no evidence of a system of oversight that could effectively investigate any abuses that might occur or protect detainees against them. The consequence of such a lack of oversight was that officials could operate with impunity up until the time that detainees were handed over to the SIZO.

[...]

67. The Special Rapporteur received several allegations of secret detention, in which individuals claimed to have been detained for varying periods of time before being transferred to formal detention facilities. In some cases, this initial detention had taken place in undisclosed locations at the hands of officials thought to be of the Security Service of Ukraine; in other cases, individuals had been apprehended by members of the army or former volunteer battalions.

68. One facility that was mentioned frequently in that regard was the military base at Mariupol airport. During his visit to Mariupol, the Special Rapporteur attempted to conduct a pre-announced visit to this base; however, he regrets that, despite the advance notice, he was denied access to the facility. Other such detention facilities reportedly include the premises of the Security Service of Ukraine in Kharkhiv and Kramatorsk.

69. The existence of unacknowledged, secret detention facilities undermines the effective work being conducted by the national preventive mechanism and the Office of the Ombudsperson to ensure accountability with regard to violations against persons deprived of their liberty. It is disappointing that judges and prosecutors, who are in many cases presented with detainees who bear evidence or account of clear *prima facie* cases of ill-treatment do not respond more robustly to uphold the rights of detainees. The impunity that exists for acts of violence in such conditions poses a clear and direct threat to the right to life.

3. Prison Conditions

Investigating prison conditions *per se* does not fall within the mandate of the Special Rapporteur. However, because poor conditions can be a prime cause of or a contributing factor in custodial deaths, investigation of

conditions is often an important element in the Special Rapporteurs' country fact-finding missions. In many countries visited by the Special Rapporteurs, prison conditions have been so abysmal that prisoners have died from preventable or treatable illness and malnutrition. Common conditions contributing to custodial deaths covered in the Special Rapporteurs' reports and extracted below include extreme overcrowding, unsanitary conditions, poor maintenance of hygiene, lack of adequate medical care or denial of available care, insufficient or contaminated food, and non-potable water.³³ In addition to being a primary cause of death, poor prison conditions can also contribute to riots and to inter-prisoner violence, discussed further below.

In his report on his mission to Nigeria in 2005, Special Rapporteur Alston discussed prison conditions in conjunction with the practice of extensive pre-trial detention:

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

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.³⁴ [...]

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,³⁵ 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.

33 For international guidance on minimum prison conditions, see: *Standard Minimum Rules supra* note 4. See also: *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Adopted by General Assembly resolution 43/173 of 9 December 1988).

34 O. Ezigbo, "25,000 Inmates Awaiting Trial", *This Day*, (2 September 2005).

35 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 decentralise 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.

In his report on his country visit to the United States of America in 2008, Special Rapporteur Alston highlighted that, as in many other parts of the world, immigration detention brings with it a host of human rights concerns:

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

B. Deaths in immigration detention

28. In June 2008, the Government acknowledged there had been at least 74 deaths in immigration detention facilities since 2003.³⁶ 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.³⁷

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.³⁸ The standards of detention at each of these facilities are set by ICE's National Detention Standards, which include general medical care provisions.³⁹ 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.⁴⁰ 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.⁴¹ In defense, DIHS and DRO explained that truly urgent care is provided at the discretion of medical personnel at each

36 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).

37 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,' *New York Times*, Aug. 12, 2008.

38 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.

39 The ICE National Detention Standards require that detainees "have access to medical services that promote detainee health and general well-being."

40 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."

41 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).

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.⁴² 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,⁴³ and made important recommendations, 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

- 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.

In his 2009 report on the Democratic Republic of the Congo, Special Rapporteur Alston noted the extent to which prisoners were only able to survive due to the support of their families:

Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, 14 June 2010, ¶¶82-86, 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

42 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.

43 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).

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.¹¹ 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 diarrhoea. 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.

[...]

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.

In his report on his 2015 mission to Ukraine, Special Rapporteur Heyns commented more broadly on conditions across the country, and particularly the very high rate of communicable disease (specifically tuberculosis) in detainee populations:

Report on Mission to Ukraine (A/HRC/32/39/Add.1, 4 May 2016, ¶47)

B. Securing the right to life in the context of detention

[...]

47. [...] Among the principal threats to life for detained persons in Ukraine are diseases such as tuberculosis and HIV. In the Donetsk region, for example, the rate of tuberculosis is allegedly 10 times higher in the prison population than in the general population. The Special Rapporteur welcomes the partnership between the Penitentiary Service and *Médecins Sans Frontières*, which provides specialised care to detainees with tuberculosis.

4. Prison riots, inter-prisoner violence, and prisoner control of prisons

Prison riots and inter-prisoner violence are frequent causes of custodial deaths. During riots, prisoners may be killed by guards attempting to quell the violence, or simply because they are caught between prisoner-guard fighting, or because the rioters caused fires that inmates were unable to escape.

In a detailed 2008 report to the Human Rights Council, Special Rapporteur Alston examined this phenomenon – whereby prison officials delegate (whether by choice or neglect) authority to prisoners to control internal prison management and operations. His report indicates that prisoner control is the dangerous culmination of deficiencies at many levels of the prison system, and can be a significant cause of custodial deaths, inter-prisoner violence, and serious human rights violations. His report examined the phenomenon's causes and dynamics, and proposed reforms to address the problem.

Report to the Human Rights Council (A/HRC/8/3, 2 May 2008, ¶¶68-88)

C. Prisoners running prisons

68. “There’s a small group that’s in charge within the prison; they beat people; they order killings; they control the drug trafficking.”⁴⁴ 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.⁴⁵ 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 mobilise 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

44 Human Rights Watch, *Behind Bars in Brazil* (1998), available at: www.hrw.org/reports98/brazil/Brazil-12.htm.

45 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, available at: www.bop.gov/news/research_projects/published_reports/cond_envir/oreprcrim_2br.pdf.

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 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 organise 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 States

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.⁴⁶ 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 recognised by international human rights instruments. The oldest and most venerable among them is the Standard Minimum Rules for the Treatment of Prisoners,⁴⁷ 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

46 A/61/311, *supra* note 13, paras. 49-54.

47 *Standard Minimum Rules*, *supra* note 4.

Standard Minimum Rules clearly prohibit this.⁴⁸ The broader issue of prisoner-on-prisoner violence has also been addressed in detail by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment⁴⁹ and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁵⁰

48 Ibid. Articles 28 and 29 provide that:

28. (1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.
(2) This rule shall not, however, impede the proper functioning of systems based on self-government, under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment.
29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
 - (a) Conduct constituting a disciplinary offence;
 - (b) The types and duration of punishment which may be inflicted;
 - (c) The authority competent to impose such punishment.

See also, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, *supra* note 4, 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.”

Editors’ Note: The UN Standard Minimum Rules were updated in 2015 to become the Nelson Mandela Rules, (*supra* note 17). Similar, but slightly expanded content can be found in Rules 40 & 41:

40. 1. No prisoner shall be employed, in the service of the prison, 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.
 41. 1. Any allegation of a disciplinary offence by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.
2. Prisoners shall be informed, without delay and in a language that they understand, of the nature of the accusations against them and shall be given adequate time and facilities for the preparation of their defence.
3. Prisoners shall be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges. If the prisoners do not understand or speak the language used at a disciplinary hearing, they shall be assisted by a competent interpreter free of charge.
4. Prisoners shall have an opportunity to seek judicial review of disciplinary sanctions imposed against them.
5. In the event that a breach of discipline is prosecuted as a crime, prisoners shall be entitled to all due process guarantees applicable to criminal proceedings, including unimpeded access to a legal adviser.
- 49 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley. A/56/156, 3 July 2001, para. 39 (i):
- “Countries should take effective measures to prevent prisoner-on-prisoner violence by investigating reports of such violence, prosecuting and punishing those responsible, and offering protective custody to vulnerable individuals, without marginalizing them from the prison population more than necessitated by the needs of protection and without rendering them at further risk of ill-treatment. Training programmes should be considered to sensitise 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”.
- 50 The European Committee has reached similar conclusions, although it has placed greater emphasis on the role of supervision by staff, see 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:
- “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

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 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.⁵¹

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,⁵² juvenile offenders shall be segregated from adults⁵³ and migrant workers held for migration-related violations shall be segregated from convicted persons or persons awaiting trial.⁵⁴ 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.⁵⁵ International standards also suggest the importance of classification to encourage rehabilitation and discourage recidivism.⁵⁶

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

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."

51 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.

52 ICCPR, art. 10.

53 ICCPR, art. 10; Convention on the Rights of the Child, art. 37.

54 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17.

55 *Standard Minimum Rules*, *supra* note 4, art. 8.

56 *Ibid.*, arts. 67-69; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, *supra* note 4, arts. 27-29.

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.

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 characterised 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 prioritise 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.⁵⁷

57 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.

The issues of prison riots, prisoner violence, and prisoner control of prisons have also been addressed by the Special Rapporteurs in specific country reports.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶37-40)

F. 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 victimised 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.

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

IV. PRISONS AND EXTRAJUDICIAL EXECUTIONS IN DETENTION

A. Introduction

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.⁵⁸ While the precise trigger for each killing is unique, [] 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 organised crime.

B. Analysis of the factors facilitating prison violence

42. Brazil's poor prison conditions and severe overcrowding are well-documented.⁵⁹ The national prison population has risen sharply over the last decade, and the incarceration rate has more than doubled.⁶⁰ The dramatic rise – caused by the slowness of the judicial system, poor monitoring of inmate status and release entitlement, increased crime rates, high recidivism rates, and the popularity of tougher law and order approaches favouring longer prison terms over alternative sentences – has resulted in severely overcrowded prisons. The prison system was designed to hold only 60% of the inmates actually detained nationwide, [] and many individual prisons are two or three times over capacity.⁶¹

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

58 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.

59 See, for example: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley – Visit to Brazil, E/CN.4/2001/66/Add.2, 30 March 2001.

60 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.

61 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.

against inmates at this facility.⁶² 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.⁶³

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.⁶⁴ 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.

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.⁶⁵

62 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).

63 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. 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.

64 These prisoners are known by various euphemisms, including “*faxinas*” (janitors) and “*chaveiros*” (key-holders).

65 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,

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.

Report on Mission to Mexico (A/HRC/26/36/Add.1, 28 April 2014, ¶¶82-84)

E. Inmates and detainees

82. The Special Rapporteur notes with concern the total lack of comprehensive and reliable information on deaths in prisons and other places of detention, either as wilful homicides or suspicious suicides. According to CNDH (National Human Rights Commission), 545 inmates have been killed since 2010.⁶⁶ During the course of the Special Rapporteur’s visit, 13 inmates died in a prison in the state of San Luis Potosí.

83. The frequency of prison riots has increased over the last few years. The Special Rapporteur was informed that in the state of Nuevo León, a violent confrontation in the prison in Apodaca led to the deaths of at least 44 people in February 2012. In larger prisons, deaths often result from prison riots, mass escapes and targeted assassinations of inmates due to cartel activities, corruption of guards, and self-rule within the prisons. During his visit, the Special Rapporteur was informed of cases of persons who had been arbitrarily detained and had been tortured, resulting in their deaths. Similarly, the Special Rapporteur learned of cases of persons who were tortured and subsequently found dead in prisons.

84. Mexican authorities have failed to address adequately the problem of self-rule and appear to stand by, out of fear or complicity, while inmates resort to using deadly weapons and violence. In some cases the authorities are directly complicit. Concerns have been raised that in many prisons the warden will not actually enter the prison ward. The Special Rapporteur recommends addressing the lack of accountability at various levels. If the right to life of inmates and detainees

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.

66 See www.cndh.org.mx/sites/all/fuentes/documentos/Comunicados/2013/COM_2013_114.pdf.

is to be protected, it is imperative that authorities act upon their responsibility to protect the rights of those detained.

In his report to the Council on his 2016 mission to Honduras, Special Rapporteur Heyns noted that authorities had in some cases assigned military officers to manage prisons, and moved some prisoners to detention facilities established within military camps. This, he noted, led to a range of concerns:

Report on Mission to Honduras (A/HRC/35/23/Add.1, 11 April 2017, ¶¶102-104)

102. Very poor conditions, including overcrowding, inadequate nutrition and poor sanitation, are widespread in Honduran prisons, as was witnessed by the Rapporteur during his visit to the National Penitentiary and the detention centre of the Second Tactical Infantry Battalion, both in Tegucigalpa. Corruption among prison officials is reported to be rife. A main concern with respect to the right to life is the effective relinquishment to inmates of authority and discipline, which has led to abuses, extortion and intra-prison violence and killings. Under inmate control, prisons are run by “coordinators” who direct activities essential to the lives of most of the prison population without control or criteria decided by the prison administration. Inmates are placed in a position of subordination and vulnerability. Coordinators are known to have beaten, removed from cells and punished prisoners with the acquiescence of prison authorities. Inmates have described situations of internal shootings among members of opposing gangs and grenade explosions that resulted in the death of several inmates, which were facilitated by the tolerated stock of all types of weaponry within prison walls.

103. Faced with this critical situation, the authorities assigned military officers to manage most of the countries prisons, in breach of articles 39 and 60 of the Law on the National Penitentiary System. In addition, they established detention centres in three military battalions where they have transferred reportedly dangerous inmates, such as gang leaders. The militarization of the country’s penitentiary service has brought up numerous concerns, as military training is not fit for purpose and could lead to an array of human rights violations.

104. The national preventive mechanism plays an essential role in this context and needs to be strengthened.

5. Private security providers running prisons

In his 2016 report to the Council on the use of force by private security providers in a law enforcement context, Special Rapporteur Heyns included a brief section on the role of private security in custodial settings:

Report to the Human Rights Council (A/HRC/32/39, 6 May 2016, ¶¶95-99)

1. Private security providers and detention

95. States are increasingly making use of private security providers as part of their correctional services. A 2013 report found that in at least 11 countries, there was some form of prison privatization, with detention services provided by private security providers for 8 per cent of the prison population in the United States and 19 per cent in Australia.⁶⁷

⁶⁷ See C. Mason, *International growth trends in prison privatization* (Washington, DC, The Sentencing Project, 2013) available at: http://sentencingproject.org/doc/publications/inc_International%20Growth%20Trends%20in%20Prison%20Privatization.pdf.

96. In 2001, the Bureau of Justice Assistance of the United States identified the use of force as a potential reason not to privatise detention facilities, owing to the uncertainties around the deprivation of liberty and the preservation of the rights of inmates when private entities are involved.⁶⁸

97. In a recent incident in the United Kingdom, at a juvenile detention centre managed by G4S, private security personnel improperly used force on several of the young inmates.⁶⁹ Undercover film footage appears to show that the guards tried to conceal their behaviour by ensuring that the incidents took place in areas where the surveillance equipment in the detention centre could not film them. That raises concerns about potential undocumented and underreported abuses of the same nature. Following the incident, the Chief Inspector of Prisons of the United Kingdom announced that all prison officers dealing with children should wear cameras in order to monitor behaviour.⁷⁰

98. In 2015, in Australia a bill was tabled before Parliament giving Serco, a private security company contracted by the Australian Department of Immigration and Border Protection to run the country's immigration detention facilities, greater discretion and power to use force in the management of the facilities. The Australian Human Rights Commission raised concerns, citing several incidents about which it had received complaints in relation to the conduct of private security providers in the management of detention centres.⁷¹ As part of their responses to the significantly higher flow of refugees into Europe over the previous year, several European States have also been making use of public-private partnerships to manage temporary asylum facilities. In September 2014, the German press published images exposing abuse in one such facility, raising questions about how staff had been recruited and trained.⁷²

99. In the context of detention it is worth re-emphasizing that any serious injury or death that occurs in custody merits a full investigation. When the State deprives an individual of liberty, its control of the situation, directly or indirectly, yields a heightened level of responsibility to protect that individual's rights. That includes a positive obligation to protect all detained persons from violence, as well as to provide food, water, adequate ventilation, an environment free from disease, and adequate health care.⁷³ Where a person dies or suffers serious injury in custody, there is a presumption of State responsibility, and the burden of proof rests upon the State to prove otherwise through a prompt, impartial, thorough and transparent investigation carried out by an independent body.⁷⁴

68 See J. Austin and G. Coventry, "Emerging issues on privatised prisons", Bureau of Justice Assistance, February 2001, available at: www.ncjrs.gov/pdffiles1/bja/181249.pdf.

69 See BBC News, "G4S Medway young offenders centre staff suspended over abuse claims", 8 January 2016, available at: www.bbc.com/news/uk-england-kent-35260927.

70 See D. Barrett, "All child jailers should have body-worn cameras after G4S Medway scandal, says watchdog", *Telegraph*, 26 January 2016, available at: www.telegraph.co.uk/news/uknews/law-and-order/12121948/All-child-jailers-should-have-body-worn-cameras-after-G4S-Medway-scandal-says-watchdog.html.

71 See Australian Human Rights Commission, "Use of force in immigration detention facilities", August 2015, available at: www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention-facilities.

72 See "Asylum seekers abused in German shelter by security contractors", *Deutsche Welle*, 28 September 2014, available at: www.dw.com/en/asylum-seekers-abused-in-german-shelter-by-security-contractors/a-17960732. See also "Systemic shame", *Der Spiegel*, 6 October 2014, available at: www.spiegel.de/international/germany/abuse-case-reveals-terrible-state-of-refugee-homes-in-germany-a-995537.html.

73 See African Commission on Human and Peoples' Rights, General comment No. 3 on the African Charter on Human and Peoples' Rights: the right to life (article 4), 2015, para. 36.

74 *Ibid.*, para. 37. See also the Nelson Mandela Rules, *supra* note 17, rule 71, and African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), paras. 20-21.