



# INCOMMUNICADO, UNACKNOWLEDGED, AND SECRET DETENTION under International Law

2 March 2006

## INTRODUCTION

International, regional and national mechanisms are investigating allegations that individuals have been transferred from locations around the world to secret detention and interrogation sites controlled by one State but physically located in the territory of one or more other States.<sup>1</sup> This paper explains why such activities would constitute a violation of international law, entailing international legal responsibility both for States engaging directly in such detentions and transfers and for those that assist, tolerate, or fail to adequately investigate or prevent such actions on their territory.

At the outset, it is worth recognizing that the situation of a given individual deprived of liberty may vary widely along different axes of openness and accountability:

- the degree of contact with legal counsel, family and others;
- the degree of publicity or secrecy concerning the arrest and detention, current health, and whereabouts of the detainee;
- the type of place a person is held (official or unofficial place of detention);
- the nature of any judicial supervision processes (existence, independence, in-person or not, public or secret).

International law provides a framework for assessing the legality of a detention that involves any combination of these characteristics, and the legality of one State transferring a person to such detention in the territory of another State. In describing what is permitted and what is prohibited by this framework, this paper will apply the following definitions:

“Incommunicado detention” means that the detainee cannot communicate with anyone other than his or her captors and perhaps his co-detainees. In other words, an incommunicado detainee is permitted no contact with the world

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<sup>1</sup> See, e.g., Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, “Alleged secret detention centres in Council of Europe member States, Information Memorandum II”, Doc. AS/Jur (2006) 03, 22 January 2006; European Parliament, “Investigation into transport and illegal detention of prisoners in Europe by CIA - committee membership approved”, 19 January 2006; All Party Parliamentary Group on Extraordinary Rendition, [www.extraordinaryrendition.org](http://www.extraordinaryrendition.org) <accessed 20 January 2006>.

outside the place of detention or incarceration. Some commentators imply that detention is not completely incommunicado if the detainee has some direct contact with truly independent judicial authorities.<sup>2</sup> For the purposes of this paper, we will use the broader definition which includes situations where the detainee has some contact with judicial authorities but cannot communicate with family, friends, independent lawyers or doctors.<sup>3</sup>

“Unannounced detention” means that in addition to holding the individual incommunicado (thereby preventing him from notifying family, friends, or his ordinary legal counsel that he has been detained), the government does not itself proactively inform family, friends or the individual’s ordinary legal counsel of the detention.

“Unacknowledged detention” means that in response to inquiries from family, friends, legal counsel, or anyone else, the government denies, refuses to confirm or deny, or actively conceals the fact that the person is detained.

“Secret detention” means the individual is held in a place that is not an officially recognized place of detention, such as a private home or apartment, military camp, secret prison, or a hidden section of a larger facility,<sup>4</sup> and that the current whereabouts (and often the fate) of the individual are not revealed.

International law prohibits all of the following:

- Any form of secret detention;
- Any detention that involves concealment of the whereabouts of the person, even if located in an official place of detention, that persists for more than a week or two or otherwise has the purpose or effect of placing a person outside the protection of the law;
- Any announced but incommunicado detention without continuous and effective supervision by an independent judicial authority and private access to independent counsel;
- Any unannounced or unacknowledged detention that lasts for more than a “matter of days”;
- Any unannounced or unacknowledged detention where the failure to announce or acknowledge the detention is not demonstrably necessary to the

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<sup>2</sup> See, e.g., Nigel Rodley, *Treatment of Prisoners under International Law 2<sup>nd</sup> edn.* (Oxford University Press, 1999), p.334.

<sup>3</sup> See, e.g., Human Rights Watch, *Setting an Example: Counter-terrorism Measures* (January 2005), p. 23; Amnesty International, *Rights at risk: Amnesty International’s concerns regarding security legislation and law enforcement measures* (18 January 2002); UN Committee against Torture, “Conclusions and recommendations of the Committee against Torture: Spain 23/12/2002”, CAT/C/CR/29/3, paragraph 10; and the usage in the Spanish Code of Criminal Procedure.

<sup>4</sup> See Amnesty International, *Combating Torture* (London, 2003), p. 96.

investigation of a suspected crime or to protecting individuals from a specific and imminent threat to life or health.

The allegations mentioned in the opening paragraph of this paper, if established in whole or in part, would fall within one or another of these categories of detention.

The following sections of this paper will: first, introduce the relevant international law (primarily the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and security of the person, and the prohibition of enforced disappearances);<sup>5</sup> second, apply the law to each of the situations described above; third, describe the relevant rules of State responsibility for such internationally wrongful acts.

## INTERNATIONAL LAW

### Torture and Other Cruel, Inhuman or Degrading Treatment

The prohibition of torture and all other forms of cruel, inhuman or degrading treatment or punishment is specifically codified in all relevant international human rights and humanitarian treaties.<sup>6</sup> It also is a rule of customary international law, binding on every State whether or not it has agreed to any particular treaty.<sup>7</sup>

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<sup>5</sup> The paper includes references to international humanitarian law (the international law of armed conflicts). However, the paper should not be taken to accept the argument that international humanitarian law applies to the exclusion of international human rights law, or applies at all, to the transfers and detentions under investigation. It is well-established that international human rights law continues to apply in all situations of armed conflict. Few States or experts would accept that international humanitarian law is directly relevant to actions taken outside of traditional active battlefield situations, i.e. as part of domestic or third-state counter-terrorism activities in the name of the so-called “war on terror”. Consequently, references to international humanitarian law are included in this paper solely in order to present a fuller picture of international law on incommunicado, unacknowledged and secret detention, and to demonstrate the consistency of relevant restrictions and prohibitions across different bodies of potentially applicable international law.

<sup>6</sup> *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, articles 3(1)(a) and (c), 27, 29, 31, 32, 147; *International Covenant on Civil and Political Rights* (“ICCPR”), Article 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 3; *American Convention on Human Rights* article 5(2); *African Charter on Human and Peoples’ Rights*, article 5; *Rome Statute of the International Criminal Court*, articles 7(1)(f) and (k), and 8(2)(a)(ii), (b)(xxi) and (c); *Statute of the International Criminal Tribunal for the Former Yugoslavia*, articles 2(b) and (c), and 5(f) and (i); *Statute of the International Tribunal for Rwanda*, articles 3(f) and (i), 4(a) and (e).

<sup>7</sup> See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 315-317. This rule applies to all persons who do not take a direct part in hostilities, including any person who was taking a direct part in hostilities but who has been removed from active fighting through injury, arrest, detention, etc: see Henckaerts and Doswald-Beck, p. 299. See also *UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“UN Declaration against Torture”), General Assembly Resolution 3452 (1975), article 3; UN Human Rights Committee, General Comment 24 (Reservations and Declarations), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), paragraph 8; *Restatement (3d) of the Foreign Relations Law of the U.S.*, § 702. See also International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v. Furundzija* (10 December 1998), paragraph 137; ICTY, *Prosecutor v. Delalić and others* (16 November 1998), paragraphs 454, 517; European Court of Human Rights, *Al-Adsani v. UK*, [2001] ECHR 35763/97, paragraph 61; Inter-American Court

The prohibition of torture and other forms of ill-treatment is absolute: no act of torture or other ill-treatment can be justified in any circumstances, including war or other public emergency or any form of anti-terrorism measure.<sup>8</sup> The prohibition is non-derogable: treaties that codify the prohibition specifically exclude it from general “derogations” clauses that otherwise allow temporary limitation of some rights in extreme circumstances.<sup>9</sup>

The prohibition of torture, and possibly also the prohibition of all other forms of cruel, inhuman or degrading treatment or punishment, is also a “peremptory norm of international law” or “jus cogens” rule: any objection, reservation, treaty provision, declaration of interpretation or understanding, or any other customary rule, that is inconsistent with the prohibition is invalid to the extent of the inconsistency.<sup>10</sup>

The prohibition of torture and other ill-treatment is comprehensive, and includes the following aspects (among others):

- State officials, and other persons acting in an official capacity, must not themselves inflict, instigate, consent to, acquiesce in, or authorize, any act of torture or other ill-treatment.<sup>11</sup>

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of Human Rights, *Caesar v. Trinidad and Tobago* (11 March 2005), paragraph 70. See also *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, [2000] AC 147 (H.L.); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980) at 881-884; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp 2d. 1345, 1361 (S.D. Fla. 2001), affirmed (11th Cir. 14 March 2005); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

<sup>8</sup> Human Rights Committee, General Comment 20 (Prohibition of Torture), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), paragraph 3; *Convention against Torture*, articles 2(2) and (3); UN Declaration against Torture, articles 2, 3 and 7; General Assembly *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Resolution 43/173, 9 December 1988, Principle 6; European Court of Human Rights, *Chahal v. United Kingdom*, Judgment, 15 November 1996, paragraphs 76-80; UN Human Rights Committee, “Concluding Observations on the 5<sup>th</sup> Periodic Report of Canada” (2 November 2005), UN Doc. CCPR/C/CAN/CO/5, paragraph 15; UN Committee against Torture, *Paez v. Sweden* (1997), Communication No. 63/1997, paragraph 14.5; Supreme Court of Israel, *Judgment concerning the legality of the General Security Service’s interrogation methods*, (6 September 1999), paragraph 23; European Court of Human Rights, *Aksoy v. Turkey* (1996), paragraph 62. See also N. Rodley, *The Treatment of Prisoners Under International Law*, pp. 54-55, 64-65, 73-74, 78-84; Committee against Torture, *Agiza v. Sweden* (2005), paragraph 13.8; Inter-American Commission on Human Rights, Report on Canada (2000), paragraph 154.

<sup>9</sup> ICCPR, article 4(2); American Convention on Human Rights article 27(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, article 15(2). The African Charter has no derogation provision. See also Human Rights Committee, General Comment 20, paragraph 3.

<sup>10</sup> Human Rights Committee, General Comment 24 (Reservations and Declarations), paragraph 8; ICTY, *Prosecutor v. Furundzija* (10 December 1998), paragraphs 144-154; European Court of Human Rights, *Al-Adsani v. UK*, [2001] ECHR 35763/97, at paragraph 61; Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago* (11 March 2005), paragraph 70; UK House of Lords, *A and Ors* [2005] UKHL 71, paragraph 33.

<sup>11</sup> See *Convention against Torture*, Preamble, articles 1 and 16; UN Declaration against Torture, articles 2, 3 and 5.

- States must criminalize all acts of torture under their domestic law, including attempts to commit torture, complicity in an act of torture, incitement to torture, and participation in an act of torture.<sup>12</sup>
- States are prohibited from enforced exposure of a given individual to a real or substantial risk of torture. One manifestation of this requirement is the rule that a State may not transfer a person to the territory or physical or legal custody of another State, if the person would face a real risk of torture or other ill-treatment in the receiving or intermediary State.<sup>13</sup> Another manifestation is the prohibition of enforced disappearances (described in greater detail below).
- States must enact laws and undertake practical and effective measures to prevent public officials and others within their territory or under their jurisdiction from engaging in prohibited treatment.<sup>14</sup>
- A State is responsible for torture or other ill-treatment perpetrated in its territory or jurisdiction by persons unconnected with the State, if it was aware of the risk, or ought to have been aware of the risk, and did not take reasonable steps to prevent the ill-treatment.<sup>15</sup>
- Anyone who claims to have been subjected to torture or other ill-treatment has the right to have his or her claim promptly, effectively, and impartially investigated.<sup>16</sup> Even if there is no official complaint, if public officials receive information suggesting that such treatment may have taken place, they must investigate.<sup>17</sup>

Because these specific obligations derive from the general prohibition,<sup>18</sup> they too are part of customary international law binding all States and are absolute and non-

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<sup>12</sup> See *Convention against Torture*, article 4. UN Declaration against Torture, article 7.

<sup>13</sup> Human Rights Committee, General Comment 20 (Prohibition of Torture), paragraph 9; Human Rights Committee, General Comment 31 (General Legal Obligation), paragraph 12; *Convention against Torture*, article 3; European Court of Human Rights, *Chahal v. United Kingdom*, Judgment, 15 November 1996; IACHR, Report on Canada (2000), paragraph 154.

<sup>14</sup> Human Rights Committee, General Comment 31 (General Legal Obligation), 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragraph 8. European Court of Human Rights, *A. v. U.K.* (23 September 1998), paragraphs 19-24. ICTY, *Prosecutor v. Furundzija*, (10 December 1998), Case No. IT-95-17/I-T, at paragraph 148. *Convention against Torture*, article 2. UN Declaration against Torture, article 4. *A and Ors*, [2005] UKHL 71, paragraph 34.

<sup>15</sup> Human Rights Committee, General Comment 31 (General Legal Obligation), paragraph 8. European Court on Human Rights, *Mahmut Kaya v. Turkey*, paragraph 115. European Court of Human Rights, *Z. and others v. U.K.* (10 May 2001), paragraphs 70, 74-75. Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, paragraphs 166, 172.

<sup>16</sup> *Convention against Torture*, article 13. UN Declaration against Torture, article 8.

<sup>17</sup> *Convention against Torture*, article 12. UN Declaration against Torture, article 9. Committee against Torture, *PE v France*, 19 December 2003, CAT/C/29/D/193/2001, para. 5.3, 6.3, and *GK v. Switzerland*, 12 May 2003, CAT/C/30/D/219/2002, para. 6.10.

<sup>18</sup> See, e.g., UN Human Rights Committee, General Comment 20 (Prohibition of Torture), at paragraphs 9, 12; Human Rights Committee, *Chitat Ng v. Canada*, Communication No.469/1991, 5 November 1993; European Court of Human Rights, *Loizidou v. Turkey*, Series A No. 310; European

derogable in their application, applying to terrorists with the same force as to any other individual.<sup>19</sup>

Closely connected and complementary to the prohibition of torture and other ill-treatment is the further positive obligation on States to treat all persons deprived of their liberty humanely, with humanity and respect for the inherent dignity of the human person.<sup>20</sup> Again, the UN Human Rights Committee has stated that this requirement is not subject to derogation under any circumstances.<sup>21</sup> The Committee has found that incommunicado detention of fifteen days constitutes a violation of this obligation, though shorter time periods may also be prohibited.<sup>22</sup>

## Liberty and Security of the Person

Article 9 of the International Covenant on Civil and Political Rights affirms “the right to liberty and security of person” and prohibits “arbitrary arrest and detention.” In cases involving criminal investigations, the right to liberty and security of the person means that the detainee must promptly be brought before a judge or other similarly independent judicial officer.<sup>23</sup> In this context, promptly means that any delay must be explained and in no case can exceed a few days.<sup>24</sup>

These rights are complemented by the right to take proceedings before a court for a determination of the lawfulness of the detention and an order of release if the detention is not lawful, which applies to any form of detention (including so-called administrative or preventive detention), and reflects remedies variously known as

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Court of Human Rights, *Soering v. United Kingdom*, 7 July 1989, Series A, Vol.161; European Court of Human Rights, *Chahal v. The United Kingdom*, 15 November 1996, 1996-V, no. 22; African Commission on Human and Peoples’ Rights, *Modisse v. Botswana*, Communication 97/93 (AHG/229XXXVII), paragraph 91; UN Committee against Torture, *P.E. v. France*, CAT/C/29/D/193/2001 at paragraph 6.3; Committee against Torture, *G.K. v. Switzerland*, CAT/C/30/D/219/2002 at paragraph 6.10.

<sup>19</sup> See, e.g., regarding the right not to be transferred to a real risk of torture, UN Committee against Torture, *Agiza v. Sweden* (2005, para. 13.8); see also other sources cited under note 7 above.

<sup>20</sup> ICCPR, article 10(1). See also Human Rights Committee, General Comment 21 (Humane Treatment), 10 April 1992, paragraph 3. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 306-308. This rule applies to all persons who do not take a direct part in hostilities, including any person who was taking a direct part in hostilities but who has been removed from active fighting through injury, arrest, detention, etc: see Henckaerts and Doswald-Beck, p. 299.

<sup>21</sup> Human Rights Committee, General Comment 29 (States of Emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, Paragraph 13(a).

<sup>22</sup> See *Arzuaga Gilboa v. Uruguay* (147/1983), 1985; Rodley, *Treatment of Prisoners*, *supra*, p. 337.

<sup>23</sup> ICCPR, article 10(3).

<sup>24</sup> Human Rights Committee, General Comment 8 (Right to Liberty and Security of Persons), paragraph 2. In *Teran Jijon v. Ecuador* (277/1988), the Human Rights Committee found that keeping the victim “incommunicado for five days without being brought before a judge and without having access to counsel ... entails a violation of article 9, paragraph 3.”

*habeas corpus* and *amparo*.<sup>25</sup> Such procedures should involve bringing the detained person before a competent judicial authority, even in situations of public emergency including anti-terrorism measures.<sup>26</sup> The rights are further reinforced by the right to legal counsel.<sup>27</sup>

Arbitrary deprivation of liberty is also prohibited under international humanitarian law applicable to all armed conflicts.<sup>28</sup> “Unlawful deportation or transfer or unlawful confinement of a protected person” constitutes a “grave breach” of the Geneva Conventions.<sup>29</sup> International humanitarian law also generally does not permit incommunicado or unacknowledged detention. It requires that every person who is detained be registered, that they be given an effective opportunity to immediately inform their family and a centralized information bureau of their detention and any subsequent transfer, and that they be permitted ongoing contact with family members and others outside the place of detention.<sup>30</sup>

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<sup>25</sup> ICCPR, article 9(4); European Convention on Human Rights, article 5. See European Court of Human Rights, *Al-Nashif v. Bulgaria*, 20 June 2002, paragraphs 94, 123-124; European Court of Human Rights, *Filiz and Kalkan v. Turkey*, 20 June 2002, paragraphs 25-26.

<sup>26</sup> See UN Human Rights Committee, General Comment No. 29 (States of Emergency), *supra*, paragraph 16; Inter-American Court of Human Rights, *Advisory Opinion on Habeas Corpus in Emergency Situations*, January 30, 1987 (Opinion OC-8/87), paragraphs 35-36, 40. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 349-352.

<sup>27</sup> See e.g., UN *Basic Principles on the Role of Lawyers*, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), principle 1; UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 17(1).

<sup>28</sup> See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 344-352. This rule applies to all persons who do not take a direct part in hostilities, including any person who was taking a direct part in hostilities but who has been removed from active fighting through injury, arrest, detention, etc: see Henckaerts and Doswald-Beck, p. 299.

<sup>29</sup> Geneva Convention IV (1949), Article 147.

<sup>30</sup> See, e.g., Geneva Convention III (1949): Article 48, Article 70, Article 122. Geneva Convention IV (1949): Article 25, Article 26, Article 41, Article 78, Article 79, Article 106, Article 107, Article 116, 128, 136. The Commentary to Article 106 emphasizes that security internment “is not a measure of punishment and so the persons interned must not be held incommunicado.” <ICRC Commentaries online at: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>> See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 421-427, stating the rule that parties to a conflict “must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”, at pp. 439-449 regarding mandatory recording of personal details of detainees, the right to communicate with families, and the right to receive visitors, and at pp. 340-343 regarding the prohibition of enforced disappearances. Article 5 of the Fourth Geneva Convention, 1949, contemplates, at most, time-limited unannounced detention, where absolutely necessary to State security, of only two categories of individuals: first, individual persons found physically in the State’s own territory, where the individual is “definitely suspected of or engaged in activities hostile to the security of the State”; second, individual persons found in occupied territory as a spy or saboteur, or as “a person under definite suspicion of activity hostile to the security of the Occupying Power”. However, see the ICRC Commentary, which concludes: “It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow.” The duration of any such detentions must also be of a duration limited to a week or two; otherwise, any such detention would become an enforced disappearance, which is absolutely prohibited in all situations of armed conflict in respect of all individuals: see Henckaerts and Doswald-Beck at pp. 299,340-343. Further, it might be argued that in respect of such detentions, at least outside of active battlefield situations, international human rights law, and not international humanitarian law, is the particular *lex*

At most, international law may permit incommunicado or unacknowledged detention in extremely limited circumstances, i.e. only where all of the following criteria are met:

- The incommunicado or unacknowledged nature of the detention is specifically authorized by national legislation;
- the incommunicado or unacknowledged period of the detention is demonstrably necessary and proportionate to a specified and limited set of purposes (such as investigation of a crime);<sup>31</sup>
- the incommunicado or unacknowledged period of the detention is of a very short duration, i.e. “a matter of days”<sup>32</sup> (certainly less than a week and likely no longer than 48 hours);<sup>33</sup>
- the incommunicado or unacknowledged nature of the detention was not for the purpose of placing the person outside the protection of the law (which would constitute an enforced disappearance, see below);

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*specialis* that applies, especially regarding the permissible length of the incommunicado or unacknowledged period. Particularly as regards general anti-terrorism measures, international human rights law already fully takes issues of state security into account in a much more detailed and operational way than does Article 5 of the Geneva Conventions. Any detainees to whom Article 5 restrictions could apply, arrested in occupied territory, would additionally remain subject to the prohibition on international transfers, as specified in Article 49 (Geneva IV).

<sup>31</sup> See, e.g., UN *Standard Minimum Rules for the Treatment of Prisoners*, ECOSOC resolution 663 C (XXIV), 31 July 1957, and resolution 2076 (LXII), 13 May 1977, rules 91, 92, 93 and 95; UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 16(4) and 15.

<sup>32</sup> UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 15, 16, 17, 18. Article 76 of the Geneva Convention III and Article 112 of the Geneva Convention IV state that “Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.” However, notification of the detention and any subsequent transfers cannot be prohibited under any circumstances, and Articles 76 and 112 contemplate geographic population-wide suspension rather than individual-specific or detainee-type specific incommunicado detention: see, e.g., Commentary to article 71 of the Geneva Convention III. <ICRC Commentaries online at: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>> Therefore, Articles 76 and 112 could not be relevant to the types of detentions and transfers presently under investigation in any event.

<sup>33</sup> In the context of a regime of judicially-supervised unacknowledged detention on suspicion of extremely threatening crimes, the European Committee for the Prevention of Torture (“ECPT”) found that a maximum period of 5 days was too long and recommended that a statutory maximum of 48 hours should be imposed: see CPT/Inf (2000) 5, 13 April 2000, paragraphs 22 and 23; CPT/Inf (2003) 22, 13 March 2003, paragraphs 13 and 14; and CPT/Inf (2003) 30, 30 June 2003, paragraphs 34-43. The European Court of Human Rights held that four days’ delay in bringing them before a judge, even where a formal derogation of rights had been made pursuant to the fight against terrorism, violated detainees’ rights in *Brogan v. UK*, (1988). In another case, the ECHR found that a seven-day detention without automatic judicial review, was permissible as an anti-terrorism measure, but solely on the basis of immediate availability of habeas corpus coupled with a right to consult a solicitor 48 hours after arrest: *Brannigan and McBride v. UK* (1993). The absence of similar provisions, coupled with an incommunicado detention of at least fourteen days, in a subsequent case, was held to violate the articles prohibiting torture and other ill-treatment and the right to judicial supervision of deprivation of liberty: *Aksoy v. Turkey* (1996). See also note 30 above.



- the detainee is physically brought before a judge or other independent judicial official immediately after detention;
- the detainee has prompt and regular access to independent legal counsel from the outset of detention, the lawyer must be present during the interrogation and the detainee must have the right to talk to the lawyer in private;<sup>34</sup> and
- the detainee has access to and receives independent professional and ethical medical treatment.<sup>35</sup>

The usual rationale for permitting such short-term incommunicado or unacknowledged detention is that the detainee would otherwise alert co-conspirators allowing destruction of evidence, flight of accomplices, or other interference that will thwart the criminal investigation. On principle, it might be argued that only where there is a demonstrable imminent, specific and serious threat to human life or health that can be avoided through such secrecy, can the State justify overriding the normal rights of the individual detainee in this regard, especially since detainees will not, at the time, have been proven to be involved in terrorism and may very well be entirely innocent.

It is very difficult to see how a State could ever justify a period of exclusion of judicial supervision as strictly necessary to any valid objective. In what way could excluding judicial supervision facilitate interrogation or investigation, other than through providing the opportunity for prohibited treatment of the detainee to occur?<sup>36</sup> The fact that the measures relate to the fight against terrorism generally, or even pursuant to specific derogations on the basis of immediate public emergency, do not allow for prolonged incommunicado detention or restrictions on access to legal counsel or the judiciary.<sup>37</sup>

## **Enforced Disappearances**

### Definition

“Enforced disappearance” means

...the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups acting with the authorization, support or acquiescence of the State, followed by a refusal to

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<sup>34</sup> In this context, an “independent” lawyer is a lawyer who is appointed by an independent body such as a bar association and who acts independently in practice (in particular, who can communicate with the detainee in private and is not bound to disclose to the government any communications with the detainee). See also Reports of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002 - paragraph 26 (g), and UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, paragraph 41; and ECPT, *The CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2004, pages 6, 9, 12.

<sup>35</sup> ECPT, *The CPT Standards*, pages 6, 13, 37-38.

<sup>36</sup> See Rodley, *Treatment of Prisoners*, *supra*, at p. 344.

<sup>37</sup> Rodley, *Treatment of Prisoners*, *supra*, at p. 344.

acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>38</sup>

An unannounced detention, where the State does not immediately proactively notify family or legal counsel, of very short length would not generally fall within the definition of enforced disappearance (though it may be illegal as an arbitrary detention). On the other hand, if in response to inquiries from family, lawyers or others, the State does not acknowledge the detention (either because it does not effectively respond to the inquires or because it denies the detention), this brings it within the realm of a possible disappearance. Even if the initial detention is acknowledged, subsequent concealment of the fate or current whereabouts of the individual can of itself give rise to an enforced disappearance. The State is obliged to provide family members and other interested persons with *all three items of information*: whether the person is in custody, whether they are alive or dead, and their current location. A failure to reveal any *one* of these items of information is an element of an enforced disappearance.

The international definition of “enforced disappearance” does not explicitly require that the *intent* or *purpose* of the secrecy was to place the person outside the protection of the law. Some States advocate such a requirement on the basis that their domestic criminal law requires a clearly-defined intentional element in the definition of offences.<sup>39</sup> However, the definition for State responsibility under international law is broad enough to cover situations where the *effect* is to place the person outside the protection of the law, though the precise purpose is not known or some different purpose is claimed for the secrecy. It could also be read as declaring that a deprivation of liberty followed by a denial or concealment of the person’s detention, whereabouts, or fate, has the *inherent* consequence of placing the person outside the protection of the law.<sup>40</sup> The potential ambiguity of the definition in this respect may be intentional.<sup>41</sup>

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<sup>38</sup> This definition is that contained in the final draft *International Convention for the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/2005/WG.22/WP.1/Rev.4 (23 September 2005), Article 2. While that convention has not yet been formally adopted, the definition is “entirely consonant” with that used in the preamble to the 1992 UN *Declaration on the Protection of All Persons from Enforced Disappearance* (“UN Declaration against Disappearances”), UN General Assembly, resolution 47/133 of 18 December 1992: see UN Working Group on Enforced or Involuntary Disappearances, Press Release, 23 September 2005. There is no substantial difference from the definition in article 2 of the *Inter-American Convention on Forced Disappearance of Persons*, adopted 9 June 1994.

<sup>39</sup> See, e.g., UN Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, Draft Report of the Fifth Session, UN Doc. E/CN.4/2005/WG.22/CRP.12/Rev.1, 22 September 2005, paragraph 7. See also Rodley, *Treatment of Prisoners*, *supra* at p. 248

<sup>40</sup> This interpretation might be based on the fact that such refusals or concealment are in fact almost always combined with an absence of judicial supervision, and given that the inherently secretive nature of enforced disappearances makes collection of evidence of intent or purpose particularly difficult, for purposes of State responsibility the purpose should be assumed where the objective elements are established.

<sup>41</sup> See UN Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance: Report of the Third and Fourth Sessions, UN Doc. E/CN.4/2005/66, 10 March 2005, paragraphs 23 to 25, and Draft Report of the Fifth Session, UN Doc. E/CN.4/2005/WG.22/CRP.12/Rev.1, 22 September 2005, paragraphs 7 to

Under any interpretation of the definition, where there is circumstantial or direct evidence of a general purpose or individual intent to place the person outside the protection of the law, the conduct clearly constitutes an enforced disappearance. However, given that the context of State responsibility for internationally wrongful acts such as violations of human rights is very different from the context of determining individual criminal responsibility for domestic punishment,<sup>42</sup> and that the very nature of the problem of enforced disappearances makes it difficult to prove individual intentions,<sup>43</sup> the definition should be interpreted and applied more broadly in respect of State responsibility. In particular, if the whereabouts and fate of a person remain unknown more than a week or two after the person was arrested or detained by a State, at the very least it would not be unreasonable to *presume* that the purpose was to remove the person from the protection of the law.<sup>44</sup> Of course, on the broadest reading of the definition, if removal from protection of the law is an *inherent* consequence of detention followed by secrecy, then questions of purpose and intent are simply irrelevant to determinations of state responsibility.

### State Obligations

Any State that practices, permits, or tolerates an enforced disappearance violates a number of fundamental human rights, including the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.<sup>45</sup> The UN Human Rights Committee has held that “the disappearance of persons is inseparably linked to treatment that amounts to a violation of Article 7” of the ICCPR, the prohibition of torture and other ill-treatment.<sup>46</sup> The European Court of Human Rights has stated:

The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective

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10. See also comments in Rodley, *Treatment of Prisoners, supra*, at p. 247, concerning the drafting of the UN Declaration against Disappearances,

<sup>42</sup> In particular, there is no general rule that the intention of individual actors must be established to attribute State responsibility: see Commentaries to the Articles on State Responsibility, Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 73, paragraph 10.

<sup>43</sup> See Rodley, *Treatment of Prisoners, supra* at p. 248.

<sup>44</sup> A similar approach was adopted by the European Court of Human Rights in relation to the enforced disappearance considered in *Kurt v. Turkey* (25 May 1998), paragraphs 118 to 129.

<sup>45</sup> UN Declaration against Disappearances, articles 1(2) and 2(1). Other rights engaged include the right to recognition as a person before the law, and the right to life. See also UN Human Rights Committee, *Bleier v. Uruguay* (30/1978) and *Quinteros v. Uruguay* (107/1981); Inter-American Court of Human Rights, *Velasquez Rodriguez* case, 29 July 1988; European Court of Human Rights, *Kurt v. Turkey* (25 May 1998), paragraph 129.

<sup>46</sup> See Human Rights Committee, *Mojica v. Dominican Republic* (449/1991), and *Celis Laureano v. Peru*, (540/1993), paragraph 8.5.

measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.<sup>47</sup>

Although, as described above, limited restrictions on the general right to liberty may be permitted in extreme circumstances, enforced disappearances are never permitted.<sup>48</sup> As with torture and other ill-treatment, the prohibition is absolute: “No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.”<sup>49</sup> The prohibition of enforced disappearance is, like the prohibition of torture, a rule of customary international humanitarian law applicable in all situations of armed conflict.<sup>50</sup>

A range of further specific obligations form part of the prohibition of enforced disappearances:<sup>51</sup>

- States are obliged to take effective measures to prevent and terminate acts of enforced disappearance on its territory;
- States must criminalize all acts of enforced disappearance;
- States are prohibited from transferring a person to another State where there are substantial grounds to believe the person would be in danger of enforced disappearance;
- States must promptly, effectively, and impartially investigate following any complaint or other information to suggest an enforced disappearance has occurred;<sup>52</sup>
- States must provide a prompt and effective judicial remedy to determine the whereabouts or state of health of anyone deprived of their liberty, and ensure that investigating authorities have unrestricted access to all parts of all places

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<sup>47</sup> European Court of Human Rights, *Kurt v. Turkey*, 25 May 1998, paragraphs 122-124.

<sup>48</sup> See N. Rodley, *supra*, p. 257; Working Group on Enforced and Involuntary Disappearances, UN doc. E/CN.4/1984/21, paragraph 172; UN Declaration against Disappearances, Article 7. UN Human Rights Committee, General Comment 29 (States of Emergency), *supra*, paragraph 13(b), stating “The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.”

<sup>49</sup> UN Declaration against Disappearances, Article 7.

<sup>50</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 340-343. This rule applies to all persons who do not take a direct part in hostilities, including any person who was taking a direct part in hostilities but who has been removed from active fighting through injury, arrest, detention, etc: see Henckaerts and Doswald-Beck, p. 299.

<sup>51</sup> UN Declaration against Disappearances, Articles 3, 4, 8, 9, 10 and 13. See also Human Rights Committee, *Bleier and Quinteros* cases, *supra*; Inter-American Court of Human Rights, *Velasquez Rodriguez*, *supra*, paragraph 174.

<sup>52</sup> See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at p. 343.

where persons are deprived of liberty, including in situations of war or other public emergency;

- All persons deprived of liberty may only be held in officially recognized places of detention, and must be brought before a judicial authority promptly after detention;
- The State must provide family members and others with accurate information about the detention and place of detention.<sup>53</sup>

In addition to the rights of the person who is “disappeared”, the rights of other individuals closely connected with the disappeared person are often also violated: in particular, the suffering caused to family members of a disappeared person may amount to torture or other ill-treatment.<sup>54</sup>

### **Extraterritorial Application of International Human Rights Obligations**

States sometimes argue that obligations under particular human rights treaties are limited to actions undertaken on the State’s own territory: the actions of State officials acting beyond the State’s borders, they claim, are not regulated by international human rights law, or are exclusively the responsibility of the State on whose territory they act.

From the outset such an argument fails to take account of customary international human rights law. Territorial limits to customary law obligations cannot be assumed on the basis of restrictive readings of particular treaty texts. To the extent that a given rule of customary international law prohibits state agents from actively engaging in a particular activity – torture or disappearances, for example – there is no basis for exempting particular acts from the rule on geographic grounds. Attempts to impose such territorial limits uniformly rely on technical readings of particular treaty texts rather than State practice or expressed opinion, or legal reasoning.

Moreover, under both global and regional human rights treaties, the obligations of each State are not, in fact, limited to its own territory. At the very least, international

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<sup>53</sup> In addition to the UN Declaration against Disappearances, Principle 16(1) of the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* requires that every detainee be entitled to notify, or to have the competent authority notify, members of his family or other persons of his choice of his arrest, detention, or imprisonment or of any subsequent transfer, with identification of the place where he is kept in custody. See also Amnesty International, *Combating Torture: A manual for action* (London, 2003), pp. 93-94. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, 2005), at pp. 421-427, stating the rule that parties to a conflict “must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”, and at pp. 439-449 regarding mandatory recording of personal details of detainees, the right to communicate with families, and the right to receive visitors. See also the provisions of the Geneva Conventions discussed under note 30 above.

<sup>54</sup> See, e.g., Human Rights Committee, *Quinteros v. Uruguay* (107/1981); European Court of Human Rights, *Kurt v. Turkey*, 25 May 1998, para 134; and *Tanis and others v. Turkey*, 2 August 2005, at paragraph 219.

human rights law and international humanitarian law applies to actions taken by or at the instance of a State's official or unofficial agents in relation to any individual or territory that is under the effective custody or control of the State anywhere in the world.<sup>55</sup>

## ANALYSIS OF DIFFERENT FORMS OF DETENTION

Drawing on the general elements of the law concerning torture, enforced disappearances, and arbitrary detention described above, and specific jurisprudence, this section considers the legality of a variety of forms of detention.

### Secret Detention

The UN General Assembly and UN Commission on Human Rights have both declared that “detention in secret places” can “facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment” and that it can “in itself constitute a form of such treatment.”<sup>56</sup>

For more than a decade, the standing general recommendations of the UN Special Rapporteur on Torture have included the following:

Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.<sup>57</sup>

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<sup>55</sup> International Court of Justice, *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paragraphs 109-111. UN Human Rights Committee, *Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 88 (1984). UN Human Rights Committee, General Comment 31 (General Legal Obligation), *supra*, paragraph 10. See also European Court of Human Rights, *Issa v. Turkey*, Application no. 31821/96, 6 November 2004, paragraphs 71, 74. UK, High Court of Justice, [2004] EWHC 2911 (Admin), paragraph 287, this point conceded by the Government at the Court of Appeal, *Al-Skeini v. Secretary of State for Defence*, [2005] EWCA Civ 1609, paragraph 6. See also the judgment of the Inter-American Commission on Human Rights, *Coard v. United States*, Case 10.951, Report No. 109/99, September 29, 1999, paragraph 37, and *Alejandro v. Cuba*, Case 11.589, Report No. 86/99, September 29, 1999. For arguments in support of even broader extraterritorial application, see also Matt Pollard, “Rotten Fruit: State Solicitation, Acceptance, and Use of Information Obtained through Torture by Another State” (2005), 23 N.Q.H.R. 349 at 360-371. The *Al-Skeini* judgments also illustrate that even if the concept of “territory under effective control” in the European Convention on Human Rights, as a specific regional treaty, were to extend only to “territories geographically inside the European region, control over a particular detention facility outside of European territory could still bring with it obligations under the treaty. Such questions of geographic limitations to regionally-based treaty systems do not arise, in any event, under globally applicable obligations such as universal customary international law, the ICCPR, and the UN Convention against Torture.

<sup>56</sup> UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11; UN Commission on Human Rights, UN Doc. E/CN.4/RES/2005/39, 19 April 2005, article 9.

<sup>57</sup> Originally in UN Doc. E/CN.4/1995/34, paragraphs 923, 926(b) and (d); current version at <http://www.ohchr.org/english/issues/docs/recommendations.doc>, paragraphs (e) and (g) <accessed 19 January 2006>. See also Report of the Special Rapporteur to the General Assembly, 1 September 2004, UN Doc. A/59/324, paragraphs 22 and 44. See also “Minimum Interrogation Standards” in

The Human Rights Committee has held that the absolute and non-derogable prohibition of torture and other ill-treatment under the ICCPR requires States to, among other things, hold detainees only in officially-recognized places of detention, and for the names of the detainees and their location of detention “to be kept in registers readily available to those concerned, including relatives and friends.”<sup>58</sup> In effect, then, Article 7 of ICCPR itself prohibits secret detention in all cases.<sup>59</sup> The draft *UN Convention for the Protection of All Persons from Enforced Disappearance* states that “No one shall be held in secret detention”.<sup>60</sup>

All of these legal obligations apply with equal force to individuals suspected of terrorism or otherwise representing a threat to “national security”.<sup>61</sup> The UN Working Group on Arbitrary Detention has highlighted “secret prisons” as an issue of particular concern in the “global war on terror.”<sup>62</sup> It has found such transfers to constitute arbitrary detention, without precluding that they may also constitute “more gross” violations of detainee’s rights including enforced disappearance or torture.<sup>63</sup>

Further, secret detention constitutes an enforced disappearance where it persists for more than a week or two or otherwise contains indications that its purpose or effect is to place the individual outside the protection of the law (such as evidence that persons have been transferred to another State territory for the specific purpose of secret detention or interrogation, or to exclude the possibility of review by the domestic courts of the State having custody of the detainee). The UN Working Group on Enforced or Involuntary Disappearances has stated that “people disappear” as a result of the use of “extraordinary rendition” “to transport terrorist suspects to other States for aggressive interrogation”, and “the existence of secret detention centres where terrorist suspects are held in complete isolation from the outside world”, adding that “disappearance is often a precursor to torture and even to extrajudicial execution.”<sup>64</sup>

Consequently, every secret detention violates international law.

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Advisory Council of Jurists of the Asia Pacific Forum of National Human Rights Institutions, *Reference on Torture – Final Report*, December 2005, including commentary at pp. 55-56.

<sup>58</sup> Human Rights Committee, General Comment 20 (Prohibition of Torture), paragraph 11.

<sup>59</sup> See also Human Rights Committee, *El-Megreisi v. Libya*, Communication 440/1990; *Shaw v. Jamaica*, Communication 704/96; *Angella Estrella v. Uruguay*, Communication 74/80, paragraph 9.2.

<sup>60</sup> Article 17(1). See also article 20.

<sup>61</sup> E.g., Council of Europe Parliamentary Assembly, resolution 1400 (“Challenge of terrorism in Council of Europe member States”), 6 October 2004, paragraphs 4 and 12; United Nations Security Council resolution 1456, 20 January 2003, Declaration on the Issue of Combating Terrorism, paragraph 6; Nations Security Council resolution 1566, 8 October 2004, Preamble.

<sup>62</sup> See UN Working Group on Arbitrary Detention, Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/7, paragraphs 53 to 59.

<sup>63</sup> UN Working Group on Arbitrary Detention, Report to the Commission on Human Rights, Doc. E/CN.4/2006/7, paragraph 58, and Opinion in the case of Walid Muhammad Shahir Muhammad al-Qadasi and others (Opinion No. 48/2005).

<sup>64</sup> UN Working Group on Enforced or Involuntary Disappearances, Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/56, 27 December 2005, paragraph 22.

## **Prolonged unacknowledged detention in an official place of detention**

For similar reasons, any detention that involves concealment of the whereabouts of the person, even if located in an official place of detention, that persists for more than a week or two or otherwise has the presumed purpose or effect of placing a person outside the protection of the law, constitutes an enforced disappearance in violation of international law.

## **Incommunicado detention without judicial supervision and access to counsel**

The UN General Assembly and UN Commission on Human Rights have declared that “prolonged incommunicado detention”, like “detention in secret places”, facilitates the perpetration of torture and other ill-treatment and can in itself constitute a form of such treatment.<sup>65</sup> The general recommendations of the UN Special Rapporteur on Torture similarly state:

Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay.<sup>66</sup>

International experts agree that “it is in the period immediately following deprivation of liberty that the risk of intimidation and physical ill-treatment is the greatest.”<sup>67</sup> Access to a lawyer immediately after detention is therefore a fundamental safeguard against torture and other ill-treatment.<sup>68</sup> This should normally be a lawyer of the detainee’s own choice, but in exceptional circumstances where demonstrably necessary substitution of another independent lawyer for a short initial period of investigation may be permissible.<sup>69</sup> In no case is it permitted to deny altogether access independent legal counsel, including the opportunity to speak in private.<sup>70</sup>

The UN General Assembly has also stated that “ensuring that any individual arrested or detained is promptly brought before a judge or other independent judicial officer in person and permitting prompt and regular medical care and legal counsel as well as visits by family members and independent monitoring mechanisms can be effective measures for the prevention of torture and other cruel, inhuman or degrading treatment and punishment.”<sup>71</sup>

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<sup>65</sup> UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11; UN Commission on Human Rights, UN Doc. E/CN.4/RES/2005/39, 19 April 2005, article 9.

<sup>66</sup> See *supra* note 57.

<sup>67</sup> See UN Special Rapporteur on Torture, Report UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, paragraph 60; and ECPT, *The CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2004, pages 9, 12, 63.

<sup>68</sup> ECPT, *The CPT Standards*, p. 12.

<sup>69</sup> ECPT, *The CPT Standards*, p. 12.

<sup>70</sup> ECPT, *The CPT Standards*, p. 12. See also APT, Statement to the OSCE Supplementary Human Dimension Meeting, *The Role of Defence Lawyers in Guaranteeing a Fair Trial*, Tbilisi, Georgia, 3-4 November 2005, at [http://www.apr.ch/europe/OSCE\\_Tbilisi\\_Statement2.pdf](http://www.apr.ch/europe/OSCE_Tbilisi_Statement2.pdf).

<sup>71</sup> UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11.



Even where an incommunicado detention is appropriately judicially supervised and not concealed from family and friends, there are limits to the length of time such detention can persist. The Inter-American Court of Human Rights has held that “the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person.”<sup>72</sup>

Consequently, any announced but incommunicado detention without continuous and effective supervision by an independent judicial authority and private access to independent counsel violates international law as a breach of the obligations to prevent torture and other ill-treatment and of the right to liberty and security of the person and freedom from arbitrary detention.

### **Unannounced or unacknowledged detention for more than a “matter of days”**

The UN Human Rights Committee has emphasized that:

The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.<sup>73</sup>

Any unannounced or unacknowledged detention that lasts for more than a “matter of days” but less than a week or two constitutes an “arbitrary detention” that violates the right to liberty and security of the person.<sup>74</sup> If the individual is additionally not brought before an independent and effective judicial authority during the period, the consequent exposure of the individual to the inherent risk of torture or other ill-treatment is a further violation of international law.

### **Unnecessarily unannounced or unacknowledged detention**

Any unannounced or unacknowledged detention where the failure to announce or acknowledge the detention is not demonstrably necessary to the investigation of a suspected crime or to protecting individuals from a specific and imminent threat to life or health, is an arbitrary violation of the right to liberty and security of the person.

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<sup>72</sup> Inter-American Court of Human Rights, *Velasquez Rodriguez case*, 29 July 1988, paragraph 187 and *Suarez Rosero Case*, 12 November 1997, paragraphs 90-91. See also UN Human Rights Committee, *Polay Campos v. Peru*, Communication 577/1994, 6 November 1997, paragraphs 8.4, 8.6 and 8.7; European Court of Human Rights, *Ocalan v. Turkey*, 12 March 2003, paragraphs 231-232.

<sup>73</sup> Human Rights Committee, General Comment 29 (States of Emergency), *supra*, paragraph 13(b).

<sup>74</sup> See Rodley, *Treatment of Prisoners*, *supra*, at pp. 245-246; and UN Working Group on Arbitrary Detention, Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/7, paragraphs 53 to 59.

## STATE RESPONSIBILITY

If actors on behalf of a State (official or otherwise) engage in arrests, transfers, detentions or interrogations that violate international law, then that State is internationally legally responsible for the acts in question.

However, other States may also be internationally responsible in respect of such activities. There are a variety of routes to such responsibility. States permitting the establishment or operation of unofficial places of detention and interrogation, or tolerating or assisting in secret abduction from or transfer through their territory of individuals destined for such places, may be responsible for violations of their international obligations under the prohibition of torture and other ill-treatment, and the prohibition of enforced disappearances, as described in greater detail above, for instance where:

- The State's officials or other persons acting in an official capacity
  - consented to,
  - acquiesced in,
  - authorized,
  - were complicit in
  - participated in, or
  - failed to prevent,the establishment or operation of the facility or a given transfer to the facility;
- The State was aware of the risk of torture and ill-treatment, or ought to have been aware of the risk, inherently associated with the establishment or operation of such a facility or a given transfer to the facility, and did not take reasonable steps to prevent it;
- The State received claims that someone was subjected to torture or other ill-treatment, or an enforced disappearance, or otherwise received information suggesting that such acts may have taken place, but failed to have the claims impartially investigated.

Such a State could also be internationally responsible under general rules of attribution of State responsibility for internationally wrongful acts, by knowingly providing aid or assistance to another State that carries out the wrongful acts.<sup>75</sup>

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<sup>75</sup> See, e.g., the rules codified in articles 16, 17, 40 and 41 of the International Law Commission Articles on State Responsibility, G.A.O.R., Supplement No. 10 (A/56/10), chp.IV.E.1, and Commentaries, chp.IV.E.2.

## CONCLUSION

For the reasons set out above, the operation and tolerance of secret detention and interrogation centres would constitute a violation of the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and a violation of the international prohibition of enforced or involuntary disappearances.

States engaging in any of the following activities would bear international legal responsibility in relation to any such grave violations of international human rights and humanitarian law:

- any State that operates such a place or allows such a place to operate on its territory,
- any State that exercises custody or control over the detention or interrogation of an individual at such a place,
- any State that knowingly transfers an individual to such a place,
- any State that knowingly assists another State in any of the above actions,
- any State that fails to undertake reasonable investigations on receiving a complaint or other information indicating that any of the above actions have occurred on its territory, or to take reasonable steps to prevent such actions on its territory.