

## International Human Rights Law and Prisoners – An Outline

Presentation to PILON 2009

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### 1. The Use of Imprisonment in the Pacific

The International Centre for Prison Studies at King's College, London<sup>1</sup>, issues a World Prison Population List: the most recent edition is from January 2009. It reveals that approximately 10 million people in the World were imprisoned (though this becomes well over 10 million if the 850,000 administrative detainees in China, in addition to its sentenced prisoners, are added). The highest rates per 100,000 of population were the US and Russia, 756 and 629 respectively. The average rate is 145 per 100,000 (or 158 if Chinese administrative detainees are added). The figures for the Pacific are as follows:

OCEANIA	Prison population total (no. in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Australia	27,615	30/06/08	21.37m	129	Australian Bureau of Statistics
Fiji	892	/08	844,000	106	National Prison Administration
Kiribati	88	31/05/07	107,600	82	National Prison Administration
Marshall Islands	47	/06	60,400	78	US State Dep't Human Rights Report
Micronesia, Fed States of	72	/05	108,100	67	Micronesia Statistical Yearbook
Nauru	3	30/4/05	13,000	23	National Prison Administration
New Zealand	7,887	30/06/08	4.27m	185	National Prison Administration

<sup>1</sup> <http://www.kcl.ac.uk/schools/law/research/icps>. The Centre's publications also include a handbook on human rights and prison management, written by its director, Prof Coyle (a former prison governor). This can be downloaded from the publications tab at the website. Also to be noted is "Human Rights and Prisons: A Manual on Human Rights Training for Prison Officials", a 2005 publication of the UN High Commissioner for Human Rights.

Palau	97	30/4/05	20,300	478	National Prison Administration
Papua New Guinea	4,056	30/04/05	5.9m	69	National Prison Administration
Samoa	186	26/09/07	187,000	99	National Prison Administration
Solomon Islands	211	7/06/07	501,000	42	National Prison Administration
Tonga	86	mid-07	117,000	74	National Prison Administration, Asia-Pacific annual conference
Tuvalu	3	26/07/07	12,000	25	National Prison Administration
Vanuatu	117	21/06/07	219,000	53	National Prison Administration
American Samoa (US)	236	31/12/07	57,580	410	US Bureau of Justice Statistics
Cook Islands (NZ)	27	4-May	21,400	126	National Prison Administration
French Polynesia (France)	404	1/10/07	264,500	153	French Ministry of Justice
Guam (US)	559	29/07/08	176,000	318	National Prison Administration
New Caledonia (France)	326	1/10/07	245,000	133	French Ministry of Justice
Northern Mariana Is. (US)	131	10/07/08	86,600	151	National Prison Administration

## 2. The International Human Rights Framework

### (a) Background

The international human rights framework can be summarised briefly. First, it is worth having a reminder of what international law is: it consists of treaties that are binding when countries sign up to them (multilateral or bilateral), which can be seen as express international law; but also customary international law, namely state practice and *opinio iuris*. The importance of the latter is that there may be arguments that provisions that are the

equivalent in scope to treaty provisions exist as a matter of customary international law: in other words, the fact that a state has not signed and ratified an international convention does not necessarily mean that it is not obliged to meet a standard set out in a convention if that standard is also a part of customary international law. To give an example in the human rights field: the main worldwide international human rights convention is the International Covenant on Civil and Political Rights 1966 (discussed below), to which some but not all PILON members are parties; but the ICCPR builds upon the Universal Declaration of Human Rights 1948, a declaration by the United Nations which arguably represents customary international law.

Secondly, the role of international law in the domestic legal framework is a matter for the individual nation state. There are monist and dualist traditions: the former views international and domestic law as one whole, and so international law is part of the law enforced by the domestic courts; the dualist view has international law as a matter for international adjudication and enforcement whereas domestic courts are concerned with domestic law. Most (if not all) common law countries adopt a dualist model. This means that international law is not part of the domestic legal system unless a statute (or other legislative statement) makes a particular part of it something that counts as domestic law as well: and so international law cannot be relied on directly in domestic law unless there is this domestic statute. However, it does not mean that international law is irrelevant in the dualist tradition, because the common law judiciary has accepted that international law may be admissible to assist the interpretation of domestic law. (This is done differently in different countries: in England and Wales, for example, this requires an ambiguity in the domestic statute being construed<sup>2</sup>; in New Zealand, however, there is no such requirement, and instead domestic statutes should be construed so as to comply with international law so far as the statutory wording allows<sup>3</sup>.)

Thirdly, international law consists of hard and soft law: the former is provisions that are binding as a matter of international law (eg convention terms that set particular requirements). Soft international law is found in standards issued by international bodies that amount to good practice rather than law, but which merit being called "law" because they may assist the interpretation of what a binding provision actually requires in practice or because it may be adopted by states and so become customary international law. An example of this soft law is the use made by the European Court of Human Rights of standards set by the European Committee on the Prevention of Torture as to space requirements for prisoners in cells in determining whether cramped conditions breach the European Convention on Human Rights' prohibition on inhuman or degrading treatment<sup>4</sup>. (The ECHR is the

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<sup>2</sup> R v Secretary of State ex p Brind [1991] 1 AC 696

<sup>3</sup> Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA) and New Zealand Air Line Pilots' Association Inc v Attorney-General [1997] 3 NZLR 269 (CA), 289

<sup>4</sup> See further below.

Council of Europe's regional equivalent to the ICCPR, which was signed in 1950: many of its provisions match the ICCPR in substantive terms, and so jurisprudence from the ECtHR – which is particularly well-developed, which is why there is reference to that Convention in this paper - is of persuasive value in interpreting the ICCPR. There are also regional equivalents for the Americas, Africa and the Arab Countries, but not for the Asia-Pacific Region.)

Also worth noting as a preliminary point is that the common law also has enunciated a number of fundamental human rights, which may match the requirements of international human rights law.

### **(b) The main international human rights documents as they impact on prisoners**

The following provisions are the main ones that give rise to duties imposed by international law on how prisoners should be treated (and the converse rights of prisoners): the obvious areas are the rights to liberty, dignity and family and private life; fair trial rights may also apply in relation to alleged transgressions against disciplinary codes in prison. They are set out in brief, and then there is a further discussion of some of the main, recurring themes.

The main international convention is the ICCPR, but it is supplemented by a number of other conventions that are obviously relevant, such as the UN Convention Against Torture 1984. There are potentially relevant provisions in relation to children in the Convention on the Rights of the Child (UN 1989) and people with disabilities in the Convention on the Rights of Persons with Disabilities 2006: for example, there may be special requirements for children both in relation to conditions of detention if they are detained but also in relation to access to a detained family member, and the special needs of disabled prisoners may raise additional questions and concerns.

#### (i) No torture, inhuman or degrading treatment; dignity in detention

There is a fundamental prohibition on treatment that amounts to torture: but this extends to treatment that counts as inhuman and degrading as well. The language in the ICCPR is as follows:

ICCPR - Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

This language reflects the provisions of the Universal Declaration, with the addition of the language relating to experimentation: so Article 5 of the Universal Declaration provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." There is equivalent

language in the ECHR, Article 3 of which provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>5</sup>

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) provide additional material. (There is also an Inter-American Convention of 1985.) An attempt to define torture, for example, is contained in the 1984 Convention rather than in the ICCPR. The main purpose of these additional treaties, however, is to establish supplemental mechanisms to guard against ill-treatment, in the form of committees that investigate conditions in detention facilities and so on. The relevant Committees have also formulated guidance as to recurring themes, including in relation to conditions of detention.

However, there is additional language in the ICCPR that is relevant to the question of conditions in detention, both generally and also in relation to juvenile detainees, namely Article 10, which is as follows:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
  
- 2.(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
  
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### (ii) No arbitrariness in detention

There is a right to liberty in international law<sup>6</sup>. In the Universal Declaration, this is linked with the right to life: Article 3 notes that “Everyone has the right to life, liberty and the security of person.” There is also Article 9, which

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<sup>5</sup> The common law is also able to take some action against torture. Certainly, evidence obtained by torture is inadmissible in court proceedings: see *R v A (No 2)* [2006] 2 AC 221, as such evidence is inherently unreliable but also offensive to humanity and so incompatible with the basis on which courts should act to admit evidence obtained by torture

<sup>6</sup> There is a continuum between deprivation of liberty and restrictions on freedom of movement, with an area where it is a question of judgment as to whether it is a loss of liberty or not – eg house arrest/curfew provisions may be so extensive as to amount to a loss of liberty. Rights to freedom of movement are provided in Article 12 ICCPR and Article 2 of the Fourth Protocol of the ECHR.

provides that “No one shall be subjected to arbitrary arrest, detention or exile.”

These two provisions have been merged in Article 9 of the ICCPR (and also supplemented by rights to reasons for detention, rights to consideration of bail pre-trial, habeas corpus and compensation for wrongful detention). So, Article 9(1) provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

There is also the specific provision in Article 11 that “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

The ECHR provides similar substantive rights, though the general prohibition on arbitrariness in detention is replaced by a list of circumstances in which detention is permissible. So Article 5 provides:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.<sup>7</sup>

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<sup>7</sup> It also sets out rights to reasons for detention, rights to consideration of bail pre-trial, habeas corpus and compensation for wrongful detention; and Article 1 of the Fourth Protocol prevents detention for debt.

The case law of the ECtHR has made it plain that the general aim of these provisions is to prevent arbitrariness of detention: in essence, the requirement for detention to be "lawful" – which is contained in each of the specific heads of detention – imports requirements as to detention being both a proportional response to the situation and also safeguards to prevent arbitrariness.

The habeas corpus right set out in Article 9(4) ICCPR (and Article 5(4) ECHR) is also worth specific mention<sup>8</sup>. If a prisoner's sentence is based on a feature that may change over time – for example, a life sentence based on a finding that the prisoner is dangerous – then there is a right to a review of whether dangerousness remains. (Typically, such a sentence will have a minimum period fixed for punitive purposes and then the preventive element: the right to a review will arise once the punitive period has expired, and then at reasonable intervals if there is a finding of ongoing risk so as to justify detention.) There is, however, no international human rights standard that requires parole regimes to be put in place: but if such a regime is in place, features such as recall from parole must conform with the requirements set out as to loss of liberty.

### (iii) Privacy and Family Rights

Article 17 of the ICCPR, building on Article 12 of the Universal Declaration, provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Similar provisions are included in the regional Conventions, eg Article 8 ECHR. The important point of the language to note is the reference to the "protection of the law", which in essence imposes a positive obligation to have laws in place to that ensure there is no arbitrary interference<sup>9</sup>. These are provisions that have been interpreted widely in giving rise to a right to autonomy and personal integrity<sup>10</sup>, but they are also clearly important in

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<sup>8</sup> Article 9(4) ICCPR: 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

<sup>9</sup> There is an important doctrine, namely the doctrine of horizontal effect, which means that when the impact of one private actor on another allows an interference with the latter's rights because there is no law in place to prevent it, the failure to have such a law amounts to a breach of the state's duty to have proper legal regulation.

<sup>10</sup> See also such matters as the right to freedom of thought, conscience and religion in Article 18 ICCPR: the right to manifest religion – which includes participation in religious ceremonies – may be subject to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"

relation to such matters as the maintenance of family contacts and also in relation to censorship of correspondence from prisoners<sup>11</sup>. There is also Article 23 of the ICCPR, the obligation to provide protection to the family:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

This reinforces the obligation to provide assistance to family links.

#### (iv) Other Rights of Relevance

A number of other fundamental rights are also relevant. The right to life in Article 6 of the ICCPR<sup>12</sup> is phrased as a duty on the state to protect life: this includes a requirement to ensure safety within prisons. If there are disciplinary adjudications which might lead to additional detention (eg loss of remission), then they may be counted as criminal in nature (as a domestic classification of the process as disciplinary cannot prevent it being classified as criminal as a matter of international law) and so bring with it the rights that must be provided to criminal defendants, which are set out in Article 14 of the ICCPR<sup>13</sup>. The right to a fair trial, which is the starting point of Article 14, also means that there must be a right to access courts: since this may make it necessary to contact lawyers, the right to a fair trial may also incorporate the right to unfettered correspondence with lawyers.

In addition, issues such as the right to vote (Article 25 of the ICCPR, including rights to elections based on universal suffrage) may provide room for argument if all prisoners are automatically excluded irrespective of length of sentence.

#### (v) A General Note About International Human Rights Law

There is a general point to note about international human rights law. The documents that form the basis of the law have been the subject of extensive interpretation. Under the ICCPR, this is done by the UN Human Rights Committee, a body of experts appointed to consider both documents prepared by countries that have signed up to the ICCPR and make recommendations on them, but also able to consider individual complaints if

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(Article 18.3) – the necessity test means that some accommodation of religious views and practices in prison is required. See also the right to freedom of expression, including the right to impart and receive opinions in Article 19.

<sup>11</sup> The rights relating to freedom of movement, mentioned above, are also relevant here also: a prisoner's freedom of residence is obviously compromised, but needs to maintain contact with families may impact on locations in which someone is detained.

<sup>12</sup> ICCPR Article 6.1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<sup>13</sup> ICCPR Article 14 is the right to a fair trial, including in relation to criminal trials the presumption of innocence (Article 14(2)) and various specific rights set out in Article 14.3.

the country involved has signed up to the First Optional Protocol to the ICCPR. The ECHR has the European Court of Human Rights, which has been considering individual complaints for many years and has built up a considerable body of jurisprudence, from which it is possible to ascertain a number of themes as to the approach to interpretation, which are expansive. (The HRC has less jurisprudence, but there is no real basis for suggesting that it is less expansive in its impact.)

These themes can be summarised as follows:

(i) human rights conventions are not meant to be exhortatory: but to provide practical and effective solutions (on the basis that a right is not a right unless it can be enforced); this may mean that additional rights have to be implied and issues such as resources cannot provide a barrier<sup>14</sup>.

(ii) Human rights conventions are living instruments that have to be reinterpreted to reflect modern conditions (and so do not operate under a strict concept of precedent).

(iii) They are "designed to maintain and promote the ideals and values of a democratic society"<sup>15</sup>, such as "pluralism, tolerance and broad-mindedness"<sup>16</sup> and the "rule of law"<sup>17</sup>. This in turn requires a broad and purposive interpretation of human rights provisions to achieve these aims.

(iv) Human rights are often in competition: eg, the right to privacy may prevent the police obtaining evidence needed to prosecute a serious crime (which is part of the duty to protect society arising under, for example, the right to life); or the freedom of expression rights of the media or of parties to a court case may conflict with the right to a fair trial. In such a situation, it is usual to assess whether the action taken which breaches one right was a proportionate action to support the competing right.

(v) In assessing how to give effect to human rights obligations, including the weight to be given to competing rights, the task primarily falls to national governments. They are given a "margin of appreciation"<sup>18</sup> in how they approach things, including the measures put in place. This also means that the nature of a society can be reflected in the balance: so, for example, protection of religious sensibilities was held to justify interference with the freedom of speech in showing a film that might have been found blasphemous by the majority - Otto-Preminger Insitute v Austria (1994) 19 EHRR 34. The

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<sup>14</sup> So in Airey v Ireland 2 EHRR 305, it was held that the right to a fair trial meant that legal aid had to be available in judicial separation proceedings, even though the text of the ECHR (as with the ICCPR) mentions legal aid only in relation to criminal trials.

<sup>15</sup> Kjeldsen and others v Denmark 1 EHRR 711 at para 53

<sup>16</sup> Handyside v UK 1 EHRR 737, at para 49; Dudgeon v UK 4 EHRR 149, at para 53

<sup>17</sup> Golder v UK 1 EHRR 524 at para 34; Klass v Germany, 2 EHRR 214, at para 55

<sup>18</sup> Handyside v UK 1 EHRR 737, at paras 48-50

aim of international human rights law is not to impose uniformity save in relation to ensuring that basic minimum rights are upheld.

(vi) The rights guaranteed by international conventions must have an "autonomous meaning" – ie a meaning which applies in all countries in which the Convention is valid. For example, the question of what is "criminal" may differ between countries (eg, when does a civil penalty become a criminal matter, what is the difference between disciplinary and criminal): but the rights set out in ICCPR Art 14.3 or ECHR Art 6.3 (minimum rights in criminal trials) have to apply to what is viewed as criminal for the purposes of the ICCPR or ECHR irrespective of how it is treated in domestic law, since otherwise a country could effectively opt out of a convention obligation by seeking to interpret it away.

(vii) This could be seen as one of the basic features of democratic society, but it appears in various places in the ICCPR and other documents and so merits its own place, namely, the key requirement that there be compliance with the requirements of legality. There are references to steps being taken in accordance with a procedure prescribed by law, or similar language. This means that the action taken by the state must have a basis in domestic law, and that the domestic law is accessible and sufficiently precise to be foreseeable: this is the concept of "legality". It does not go so far as to require certainty, and a law may be adequately foreseeable if it is necessary to obtain legal advice (and perhaps even to be engaged in litigation to clarify a situation). But the concept of legality calls into question leaving too much discretion to decision makers.

### **3. Some Recurring Themes Involving Prisoners**

It is not possible to do more than scratch the surface of issues that have arisen in litigation involving prisoners and their rights, but there are a number of more important recurring themes, including conditions of detention and the treatment of privacy matters.

#### (i) Conditions of Detention and Treatment in Detention

The European Court of Human Rights has recently seen a significant shift in its workload because of the accession to the ECHR of a large number of states from Eastern Europe: one of the frequent complaints arising has been the conditions of detention (often in old prisons with multi-occupancy cells – sometimes with more prisoners than beds – and very poor light, ventilation and hygiene). The ECtHR has frequently found breaches of Article 3 ECHR. But the question of prison conditions has also been raised in relation to the Caribbean: in Mathew v Netherlands [2006] 2 Prison Law Reports 1, the complaint related to conditions in prison in Aruba. A breach of Article 3 was found in relation to a prisoner whose recalcitrant attitude and behaviour meant that he spent a significant part of his time in a solitary confinement

cell: it had a hole in the roof and so leaked, was very hot and without any cooling system, and was up two flights of stairs, which caused problems for the prisoner because of an injury that affected his mobility. The test for whether this breached Article 3 was whether it subjected the prisoner to distress and hardship of an intensity considerably exceeding the unavoidable level of suffering inherent in detention: as it did, it was "inhuman treatment" in breach of Art 3.

There is a significant body of soft international law in relation to prison conditions. The UN has issued a Body of Principles for detainees (approved by a General Assembly resolution<sup>19</sup>), which largely reflects the requirements of international human rights law, and the UN Economic and Social Council has issued detailed Standard Minimum Rules for the Treatment of Prisoners<sup>20</sup>. The latter has detailed rules setting out the need for adequate accommodation and conditions of detention. (It would also be easy to argue in a standard common law framework that it was irrational for a government to operate prison conditions in such a manner as to amount to inhuman and degrading treatment unless the legislature has specifically addressed and set the conditions.)

Another recurrent issue in the context of prison conditions is the adequacy of health care. The basic principle is that imprisonment does not deprive a person of access to healthcare, though security concerns may impose limitations on the method of its delivery. Another of the arguments raised in the case of Mathew v Netherlands was based on an allegation that he needed specialist treatment in a civil hospital and so should have been released for that: the ECtHR rejected the idea that there is a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment, but did note that appropriate steps had to be taken. The Standard Minimum Rules, it should be noted, do suggest that specialist treatment needs should be met in either specialist prison facilities or civilian hospitals (rule 22). Particularly important in relation to prison health care is access to suitable psychiatric care, including adequate supervision to prevent suicidal behaviour<sup>21</sup>. The latter has also been recognised as a common law duty arising under the tort of negligence: see Reeves v The Commissioner of Police of the Metropolis [2000] 1 AC 360.

The use of unnecessary physical force in prison (or unnecessary fetters) may also raise questions of inhuman or degrading treatment: in essence, force

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<sup>19</sup> General Assembly resolution 43/173 of 9 December 1988

<sup>20</sup> Issued in 1957 and amended in 1977: UNESCO resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>21</sup> See Keenan v UK [2001] Prison Law Reports 180, (2001) 33 EHRR 913: failure to provide adequate treatment to psychiatrically unwell prisoner, who committed suicide after a severe disciplinary punishment put back his release date; this was found to be inhuman and degrading, in breach of Art 3 ECHR.

must be strictly necessary as a response to the conduct of a detainee<sup>22</sup>. (Proof of such treatment may be difficult: but the existence of injuries inflicted whilst a person is in custody may give rise to a duty to investigate and explain, or otherwise allegations of mistreatment may be found credible.) There have also been cases finding high secure conditions, and associated features such as routine strip-searching and closed (non-contact) visiting, to breach the prohibition on inhuman or degrading treatment: see Lorsé and others v Netherlands [2003] Prison Law Reports 407 and Baybasin v Netherlands [2008] Prison Law Reports 1.

The rights of prisoners with disabilities should also be noted. The impact of imprisonment may be particularly severe on such a prisoner, and failures to take that into account (in both the decision to impose the sentence of imprisonment and also in the regime put in place by the prison authorities) may lead to a breach of the prohibition on inhuman or degrading treatment<sup>23</sup>. The Convention on the Rights of Persons with Disabilities 2006 emphasises the particular needs of persons with disabilities in all contexts, making the point that reasonable accommodation of the additional needs of such persons is necessary to avoid discrimination in effect.

#### (ii) The Protection of the Family and Privacy Matters

The protection offered in Article 17 ICCPR – which expressly mentions privacy, correspondence and the family – has been widely interpreted as offering protection to the autonomy of the individual. This is necessarily compromised by reason of the need for punishment: but prison entails the loss of the right to liberty and so the choice of where to live, not necessarily the other aspects of these privacy rights.

Correspondence has often been subjected to censorship: this is often justified on the basis of the need to prevent illicit items coming into prison. (Censorship of outgoing correspondence was often said to be justified as a manner of uncovering criminality or escape plans.) Whatever the strength of these claims, they have to be balanced against the importance generally attached to the privacy of correspondence (both written and in the form of telephone contact), which attains a higher level if it becomes a more important way of maintaining contacts as a result of separation from family and friends. Moreover, there are certain types of correspondence where security concerns are minimal and the importance of confidentiality is particularly high: so censorship of legal correspondence or to officials involved in investigating complaints will be particularly difficult to justify; similarly

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<sup>22</sup> Higginson v Jamaica (HRC no 792/98) confirms that corporal punishment is in breach of Art 7 ICCPR; it is outlawed in the Standard Minimum Rules (rule 31)

<sup>23</sup> An example of this is Price v UK [2001] Prison Law Reports 359, which related to the detention of a 4-limb deficient prisoner in facilities that were not fit for her use – so for example she could not use the toilet or access help buttons – meant that detention was disproportionately severe.

medical correspondence deserves enhanced protection<sup>24</sup>. (It is worth noting that the English common law has accepted that prisoners should have a right to correspond with investigative journalists with a view to seeking evidence that might be used in an appeal<sup>25</sup>: as a common law right, it is one that can be overturned by a Parliament that does not have an over-arching human rights framework.)

This guarantee of privacy and related matters has also given rise to numerous other arguments, particularly in the more developed jurisprudence of the ECtHR: as examples, there have been findings of a breach of Article 8 ECHR (the equivalent to ICCPR Art 17) in relation to a refusal to allow a prisoner to attend a funeral when any security concerns could have been overcome<sup>26</sup>, and also in relation to an overly restrictive approach to allowing the wife of a prisoner to make use of artificial insemination to have a child when, in light of her age and his expected release date, that was the only potential route for her to conceive<sup>27</sup>.

### (iii) Disciplinary Measures

As noted above, Article 14 ICCPR contains guarantees of a fair trial in relation to civil matters and criminal charges. If it is a criminal charge, then the trial must be accompanied by various additional guarantees, namely the presumption of innocence and various procedural guarantees<sup>28</sup>. The key issue is whether a matter is criminal. It has been established recently in case law in the ECtHR (considering similar provisions) that the domestic classification of the process as disciplinary cannot prevent it being criminal for the purposes of international human rights law: this is an example of the term having an autonomous meaning for the purposes of international law, ie not one that depends on the domestic view. What is more important is the nature of the

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<sup>24</sup> There are also issues relating to the maintenance of confidentiality when prisoners are escorted to medical appointments outside hospital (and also the use of security features that may impact on treatment).

<sup>25</sup> R (Simms) v Home Secretary [2000] 2 AC 115.

<sup>26</sup> Ploski v Poland [2003] Prison Law Reports 120.

<sup>27</sup> Dickson v UK [2008] Prison Law Reports 334.

<sup>28</sup> Article 14(3) refers to the rights "(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) not to be compelled to testify against himself or to confess guilt." There are various other rights, such as a review or appeal (Article 14(5), and the prohibition on retroactive criminalisation or increases in sentence (Article 15).

charge and the penalty that is at stake: see Ezeh and Connors v UK [2004] Prison Law Reports 95, (2004) 39 EHRR 1, in which it was held that the determination of prison disciplinary allegations by a prison governor, resulting in an award of additional days, was within the scope of Art 6 ECHR. The complaint in the case turned on whether or not legal representation should have been allowed, which it should in light of the nature of the process, but it also meant that the process could not be carried out by a prison governor, who was not an independent and impartial tribunal such as is essential for a fair trial.

#### (iv) Other Matters

A number of other areas have been discussed in cases: some examples are (i) the obligation to provide protection to life includes duties as to the training of prison staff in dealing with disorder; see Burrell v Jamaica (HRC, 546/93), in which the use of lethal force in dealing with disorder in prison breached the right to life of a prisoner who died. (ii) In Hirst v UK (No 2) [2005] 1 Prison Law Reports 275, the UK's position of denying all serving prisoners the vote, irrespective of the length of sentence or the nature of the offence, was held to be outside the margin of appreciation allowed to a country in relation to the right to vote.