

*Direct, Herman
- Ley internacional*

FOUNDATION FOR LEGAL AID IN CHILE
(STICHTING RECHTSHULP CHILI)

"THE PROTECTION OF HUMAN RIGHTS AND THE IMPACT OF
EMERGENCY SITUATIONS UNDER INTERNATIONAL LAW:
THE CHILEAN CASE"

SECOND SPECIFIC REPORT:

"THE RIGHT TO PHYSICAL INTEGRITY"

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INTRODUCTION

The right to physical integrity includes:

- I - the right to life
- II - the right to humane treatment.

These rights will be dealt with separately below.

I. THE RIGHT TO LIFE

IA. *GENERAL REMARKS.*

The right to life is recognized by all civilized nations, which is reflected in numerous provisions of national and international law.¹ It is the most fundamental of human rights and inherent to human existence.

Violation of this right was already rejected in 1764, by Beccaria (1758-1794), the father of civilized nations' criminal law; he regarded capital punishment as neither useful, just, nor necessary.² Since then, cruelty has diminished and punishment has been humanized, proclamation and administration of punishment has become less arbitrary, and more restricted by legal norms.

IB. *INTERNATIONAL PROTECTION OF THE RIGHT TO LIFE*

The international codifications of the right to life and of the prohibition of cruel, inhuman and humiliating treatment or punishment were milestones in the development of the protection of human rights. These codifications protect both rights in absolute terms, that is to say, also in emergency situations.

IB1. On a world level:

This protection is effected on a world-wide level within the framework of the UN:

1. The International Covenant on Civil and Political Rights (ICCPR), art. 6 & 7 (for the full text of the articles mentioned, see appendix). This treaty came into force on 23-3-1976. Chile has ratified it and is therefore bound by the treaty from the date mentioned (see art. 49,2).

2. The Universal Declaration of Human Rights (UD), art. 3 & 5. Adopted by resolution by the General Assembly, with 48 votes in favour (including Chile), and none opposed. The UD has great moral authority. Furthermore, through its UN delegate, Chile declared to regard this declaration as an authoritative interpretation of the UN Charter, that is, as implying a legally binding obligation.

3. Within the framework of the Geneva Conventions (GE) of 12-8-1949: art. 3. These conventions came into force on 12-4-1951 and are binding for 117 states, including Chile, which signed them in 1949, and ratified them in 1950.

IB2. On a regional level:

A. *Within the framework of OAS:*

1. American Convention on Human Rights (AC), art. 4 & 5. Chile signed the convention on 22-11-1969, and is thus on the basis of art. 19 of the Vienna Convention on Treaties held to refrain from actions which are contrary to the purpose and subject of the treaty, as long as no statement of non-ratification is made.

2. American Declaration on the Rights and Duties of Man (AD), art. 1. Came into existence as a resolution at the 9th Inter-American Conference. Its provisions have the character of general principles of law, recognized by civilized nations. Furthermore, as a result of the coming into force of the new OAS Charter in 1970, the AD has now a constitutional basis as transitional law.

B. *Within the framework of the Council of Europe:*

European Convention for the protection of Human Rights and Fundamental Freedoms (EC, art. 2 & 3). Concluded on 4-11-1950. Binding for all member states of the Council of Europe (except, at this moment, for Portugal).

IC. "NOTSTANDEEST"

In the following treaties derogation of the provisions concerning the right to life is explicitly forbidden:

ICCPR: see art. 4,2.

AC: see art. 27,2.

GE: see art. 3.

EC: see art. 15,2.

In these clauses, the right to life has been declared "notstandfest". This concept will be discussed in the section on the right to humane treatment (see IIC).

ID. CAPITAL PUNISHMENT

As far as the relation between the right to life and capital punishment is concerned: in art. 6,6 of ICCPR the member states declare, according to the most authoritative interpretation, any broadening of the applicability of capital punishment as contrary to the convention.³ In the same vein, the member states of the AC have committed themselves to a prohibition of re-enactment of capital punishment in states where it has been abolished (see art. 4,3).

In his interpretation of "inhuman punishment" (ICCPR art. 7, UD art. 5, GE art. 3, AC art. 5, EC art. 3) Fawcett speaks of inhuman punishment, if the punishment is disproportional to the crime committed. He refers to the moral and legal evolution which has, in most national legislations and jurisprudence, led to abolition or at least strict limitation of the possibility of capital punishment.⁴

Both ICCPR and AC, furthermore, list a number of cases in which national legislation may never contain provisions for imposing or carrying out capital punishment:

- it shall not be imposed on persons under 18 years of age (ICCPR art. 6,5);
- capital punishment shall not be imposed on people who, at the time of the crime, were younger than 18 or older than 70 years of age (AC art. 4,5);
- capital punishment shall not be applied to pregnant women (AC art. 4,5);
- given the right of anyone sentenced to death to request amnesty or commutation of sentence, the punishment shall not be carried out pending the request (ICCPR art. 6,4, AC art. 4,6);
- capital punishment shall in no case be inflicted for political offences or related common crimes (AC art. 4,4);
- capital punishment shall be inflicted only for the most serious crimes (ICCPR art. 6,2, AC art. 4,2).

IE. *PROTECTION OF THE RIGHT TO LIFE*

The legal form which the protection of the right to life takes, contains two general elements:

- protection by the law, and
- protection against arbitrary deprivation of life (ICCPR art. 6,1, AC art. 4,1, EC art. 2,1).

Legal doctrine gives the following, authoritative interpretation of "protection against arbitrary deprivation of life": "This implies a need for judicial process, involving an impartial finding of facts and application of the law ... by an established tribunal; it excludes amongst other things (deprivation by) administrative order".⁵

II. THE RIGHT TO HUMANE TREATMENT

IIA. *GENERAL REMARKS*

Developments with regard to the right to life cannot be separated from the development towards a more humane treatment of those under arrest and those in detention, particularly since capital punishment is inflicted only every now and again, and is replaced more and more by detention. General minimum norms have been elaborated, which serve as a touchstone for the treatment of people under arrest or detention. The most general outline of the concept under discussion: "humane treatment", can be found in the following statements:

- a. The protection of all persons from being subjected to torture and cruel, inhuman or degrading treatment or punishment (ICCPR art. 7);
- b. All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person (ICCPR art. 10);
- c. Every person has the right to have his physical, mental and moral integrity respected (AC art. 5).

IIB. *INTERNATIONAL PROTECTION OF THE RIGHT TO HUMANE TREATMENT*

The right to humane treatment can be found in the following documents:

IIB1. Within UN-framework:

1. ICCPR art. 7, 8, 10.
2. UD art. 5.
3. GA Resolution 3452 (XXX), Dec. 9 1975, Declaration on the protection of all Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Declaration gives a list of general principles of law and can be used in interpreting the UC and the ICCPR.⁶ The GA Resolution was adopted unanimously.
4. Standard Minimum Rules for the Treatment of Prisoners, adopted during the first UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva from August 22nd to September 3rd 1955, with participation of Chile. These minimum rules were approved by the Economic and Social Council of the UN by resolution 663 CI (XXIV).
5. UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, Resolution no. 7 (XXVII) of August 20 1974.
6. Study of the right of arrested persons to communicate with those whom it is necessary for them to consult in order to ensure their defence or protect their essential interest (Report of the Committee on Communication, 1969).

Within the framework of the Geneva Conventions of August 12 1949:

1. GE art. 3.
2. Draft Protocol II, art. 6, 7, 8 and 12. This protocol deals with the protection of victims of a non-international armed conflict. It confirms and elaborates art. 3 GE, and as such, reflects the development with regard to the protection of this right.

IIB2. On a regional level:

A. Within the framework of OAS:

1. AC art. 5 & 6,2.
2. AD art. 25,3.

B. Within the framework of the Council of Europe:

1. EC art. 3 & 4.
2. Standard Minimum Rules for the Treatment of Prisoners, adapted for the European situation. Adopted by the Council of Ministers, on Jan. 19 1973, at the 217th meeting of the Ministers' Deputies, by way of resolution (no. 73,5).

IIC. *NOTSTANDEFEST*

IIC1. Emergency situation.

The following general remarks apply to both the right to life and the right to humane treatment.

Certain fundamental rights, including the right to life and the right to humane treatment, have explicitly been recognized as minimum conditions, and declared "notstandfest". In order to prevent the use of an emergency situation for curtailing human rights just for the convenience of the administration, it must always be taken as a temporary measure, it may only be proclaimed "in time of public emergency which threatens the life of the nation", and the measures taken on the basis of the emergency situation must not be disproportional to the requirements of that situation (see art. 4 ICCPR, art. 27 AC, art. 15 EC).

The following international conventions have explicitly declared the right to life and the right to humane treatment to be "notstandfest":

ICCPR, see art. 4,2

AC, see art. 27,2

GE, see art. 3

GE Draft Protocol II, see art. 6,2

IIC2. Broadening of the "notstandfest category" and strengthening of mechanisms of protection in the light of the development of international law.

A. *Broadening of the "notstandfest" category.*

UD and AD did not yet distinguish between rights which were "notstandfest", and those which were not. ICCPR (1966) does contain a clause to that effect, in art. 4, which governs, among others, the article which is relevant to our subject, notably art. 7. A similar provision can be found in AC art,27, concerning the same right (here art. 5 & 6). While ICCPR had declared art. 7 "notstandfest", it had not - yet - done so for art. 10, which describes the same right in positive terms ("the right to be treated with humanity and with respect for the inherent dignity of the human person"). In 1969, the Committee on Communication, set up by the UN Commission on Human Rights, published in its report a draft declaration which contains the general principles of law recognized by all civilized nations. In articles 18 & 19, the right to communication with counsel and the right to notification are declared

"notstandfest". This means a reevaluation of two elements of the right to humane treatment. The UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, in its Resolution of August 20, 1974 (no. XXVII) lists the following minimum basic rights which must be granted to all persons in detention: The right not to be subjected to torture and cruel, inhuman or degrading treatment or punishment, the right to communicate with legal counsel and the right to be treated with humanity and with the inherent dignity of the human person. This declares the whole of art. 10 ICCPR "notstandfest".

The European version of the Standard Minimum Rules (1973) must be interpreted in the same way. This European version adds to the older UN version the following basic principle: "Deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity" (Rule 5,3).

B. Strengthening the mechanisms of protection.

A trend towards more effective protection of the basic rights of prisoners can be detected, apart from the above, from the following facts: The Subcommission, in the above-mentioned resolution no. 7 of August 20, 1974, plans to conduct an annual surveillance of developments in the field of human rights of all prisoners. The Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders (December 1975), which drafted a declaration on this subject, stated: "It represents only an initial step in the direction of more effective protection. There is a need for more effective procedures to implement this declaration". Also, the desirability of adequate complaint procedures and of instituting a mechanism to protect the rights of prisoners was emphasized.

Subsequently, the UN General Assembly unanimously adopted Resolution no. 3452 (XXX), on Dec. 9, 1975: Declaration on the Protection of all persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as a guideline for all states and other entities exercising effective power. Article 4 of this declaration obliges every state to take effective measures to prevent torture and other cruel, inhuman or humiliating treatment or punishment; the measures mentioned are:

- systematic supervision of methods and techniques of interrogation, treatment and surveillance (art. 6);

- penalization, in national legislation, of all forms of torture, exhortation to, participation and complicity in torture (art. 7);

- setting up of an independent investigation into the occurrence of torture, based on concrete complaints or reasonable suspicion (art. 8).

In Resolution 3453 (XXX) of Dec. 9, 1975, the UN General Assembly expresses as its conviction that further international effort will be necessary to ensure adequate protection against torture and other cruel, inhuman or humiliating treatment or punishment. Furthermore, it asks the Commission on Human Rights to take all necessary steps for:

- a. ensuring effective observance of the declaration
- b. formulating a "body of principles" for the protection of all people who are in any way under arrest, on the basis of the above-mentioned study by the Committee on Communication and the Draft Principles which this study contains.

The Assembly plans to give an evaluation at its next meeting about the developments regarding the aims contained in this resolution.

IID. DESCRIPTION OF "HUMANE TREATMENT"

The concept of humane treatment consists of the following rights:

1. *The right not to be subjected to physical and mental torture.* By mental torture is meant for instance: taking hostages, placement in a cell under conditions of extreme light, darkness, noise or silence (GA Resolution 3452, GE art. 3, GE Draft Protocol II art. 6, Draft Principles art. 24, 26 & 27, AC art. 5, Travaux Préparatoires EG art. 3).
2. *The right not to be deported or extradicted.* Deportation and extradition can be called "inhuman treatment" in relation to separation from spouse and children and also in view of the treatment to be expected after deportation and extradition (art. 3 EC).
3. *The right of notification.* The prisoner's relatives must be informed of his arrest and possible transfer, and information about illness and death must be able to pass both ways (Std. Min. Rules 44, Draft Principles art. 18 & 19,2).
4. *The right to communication.* The prisoner has the right to communicate with his counsel, relatives, friends, and a minister of religion (ICCPR art. 14,3b, AC art. 8,2d, Std. Min. Rules 37 & 41, GE Draft Protocol II art. 8,3c, Draft Principles art. 19,1&3 and 21).

5. *The right to medical care.* The prisoner has the right to medical care, particularly when the application of disciplinary punishment can cause harm to his physical and mental health.

Those who are physically or mentally ill, those who need dental treatment and pregnant women have the right to special care. The available medical officer must also have some knowledge of psychiatry, and must have sufficient quantities and varieties of medicine at his disposal (Std. Min. Rule 22 to 26 and 32, Draft Protocol II art. 8 and 12).

6. *The right to adequate food.* The food must be of adequate nutritional value, and regular hours must be kept for the meals. There must be a sufficient supply of drinking water (Std. Min. Rule 20, GE Draft Protocol II art. 8,2c).

7. *The right to adequate accomodation.* The prisoner must have his own cell, equipped with a bed, sufficient light, ventilation and heating (Std. Min. Rule 20, 9, 10 and 19, GE Draft Protocol II art. 8,2b).

8. *The right to adequate hygiene.* Sufficient facilities must exist for toilet and bathing, which must be kept clean regularly, as well as clothes and bed (Std. Min. Rules 13 to 16, GE Draft Protocol II art. 8,2b).

9. *The right to suitable clothing.* Clothing should be in good condition and suited to the climate; it shall not be humiliating for the prisoner (Std. Min. Rules 17 and 18, GE Draft Protocol II art. 8,2c).

10. *Freedom from forced labour.* A person who has not yet been convicted according to fair trial principles shall not be forced to work. Any work to be done must be suitable for the physical and mental condition of the prisoner. Normal working hours must be kept, and at least one day a week must be reserved for rest (ICCPR art. 8,3, AC art. 6,2, Std. Min. Rules 71, 75 and 89).

SUMMARY

Given these minimum conditions for humane treatment, violation of points 1, 4, 5, 6, 7 and 9 is unacceptable in any case, since it would constitute torture, etc. in the sense of Resolution 3452, and as such be incompatible with the concept of humane treatment. It is also forbidden by all sources of international law.⁷

The minimum character of the two principal rights which we have discussed here can, a fortiori, be stressed by pointing out that political criminals (in the case of Chile an important category) have always had a privileged position, a fact which can be concluded from the agreements in the field of rules concerning asylum and extradition, and the principle of "custodia honesta" which applies to this category.^{8/9}

NOTES

1. Art. 38,1 of the Constitution of the International Court of Justice gives the following sources of international law:
 - a. International treaties
 - b. International custom
 - c. General principles of law recognized by civilized nations
 - d. (...) judicial decisions and the views of most qualified authors.
2. C. Beccaria, *Over Misdaad en straffen*, Zwolle/Antwerpen 1971. In an UN publication about capital punishment, New York 1962, p. 54 no. 234, this book is used as an authoritative source.
3. A.H. Robertson, *Human Rights in the World*, Manchester University Press 1972. Professor Robertson was "Head of the Directorate of Human Rights, Council of Europe, Strasbourg.
4. J.E.S. Fawcett, *The application of the European Convention on Human Rights*, Oxford University Press 1969.
5. Fawcett: cf. note 4.
6. The Introduction of the Declaration reads as follows:

"The General Assembly,
Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Considering that these rights derive from the inherent dignity of the human person,
Considering also the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,
Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,
Adopts the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the text of which is annexed to the present resolution, as a guideline for all States and other entities exercising effective power. 2433rd plenary meeting, 9 December 1975".
7. Art. 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, gives the following definition of torture:
 1. For the purpose of this Declaration, torture means any act by which severe pain is suffering, whether physical or mental, is intentionally inflicted by

or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.
8. Robert Charvin, *Justice et Politique*, Paris: Pichon et Durand, Auzias 1968.
Christian Baltzer, *Die Geschicklichen Grundlagen der Privilegierten Behandlung Politischer Straftäter im Reichsches Gesetzbuch von 1871*, Bonn: Ludwig Röhrscheid Verlag. 1966.
9. Furthermore, cf. what we said about capital punishment: Capital punishment shall not be imposed for political crimes.