Positive obligations to ensure the human rights of prisoners

Safety, healthcare, conjugal visits and the possibility of founding a family under the ICCPR, the ECHR, the ACHR and the AfChHPR

Piet Hein van Kempen[1]

Introduction

Deprivation of liberty to a large extent complicates, restricts or even removes the possibility that individuals can assert their human rights. This certainly does not mean that a person in detention legally forfeits all his rights merely because of his status as a prisoner. That it will not be possible for every detainee to enjoy all human rights also seems obvious, though. In this respect human rights law is even more complicated in respect of prisoners than it already is in relation to free individuals. Perhaps the real difficulty concerns not so much which human rights prisoners have, but which obligations rest on the authorities to ensure those rights. Where the assurance of a human right to a free individual often only demands that the State does not breach the right (a negative duty), in case of a prisoner this will usually also require that the authorities actively shape the preconditions under which the prisoner can actually enjoy the right (a positive duty). Thus, besides negative obligations – such as the obligation not to torture detainees – prison authorities have numerous positive obligations. The substance and foundation of some of these obligations corresponds closely with the state's positive obligations towards free individuals. This, for example, applies to the duty to organise and run an electoral system that enables individuals to vote in elections. Many positive obligations on prison authorities only exist, however, because the state did not first comply with the negative duty not to interfere with human rights, i.e., the right to liberty.

For example, fully guaranteeing the right to manifest one's religion or belief normally requires that the authorities do not interfere with people's lives. Yet with regard to detainees, guaranteeing this right – which in prison applies to

[1] Professor of Human Rights Law, Radboud University Nijmegen, The Netherlands, (email p.h.vankempen@jur.ru.nl), and part time Justice in the Court of Appeal, 's-Hertogenbosch, The Netherlands.

the fullest extent compatible with the specific nature of the constraint[2] – would call on the authorities to provide places for worship, special religious food, visits by religious leaders etcetera[3]. Another example offers the right to correspondence: where in normal life this right demands that the state will not interfere with the mail and telecommunication systems, in prison it might involve a positive duty of the state to deliver mail to the detainees and possibly to supply them with means to enable them to communicate with persons outside prison. Most importantly, the need for State activity instead of mere constraint clearly also applies with regard to rights concerning life, humane treatment, private and family life and the founding of a family[4].

The main theme of this contribution concerns the state's positive obligations to ensure the human rights of prisoners. Duties correlating to the rights to life, humane treatment, private and family life and the founding of a family are analysed and discussed. In particular I shall go into the duty to protect prisoners against killing and violence by other detainees, the duty to offer prisoners healthcare, and the duty to afford prisoners the possibility to enjoy conjugal visits and to beget children. To that end I examine the international and regional jurisprudence (including case law and official commends and interpretations) related to the world's four most important general human rights treaties on civil and political rights, *i.e.*: the International Covenant on Civil and Political Rights (ICCPR, 1966), the European Convention on Human Rights (ECHR, 1950), the American Convention on Human Rights (ACHR, 1969), and the African Charter on Human and People's Rights (AfChHPR, 1981). However, a brief account is given of some important principles of international law that have to be taken into consideration when as-

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2 HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (art. 18)', 30 July 1993, para 8.

3 Cf. on the provision of such facilities, *e.g.*, Peter J.P. Tak, 'Muslims and non-Christian religious minorities in Dutch prisons', in Peter J.P. Tak & Manon Jendly (ed.), *Minorities and Cultural Diversity in Prison* (Colloquium of the IPPF), Nijmegen, Wolf Legal Publishers, 2006, p. 73-97 (on The Netherlands and France).

4 On the law and practices with regard to those rights and other prisoners' (human) rights in different individual countries, see *e.g.*, Dirk van Zyl Smit & Frieder Dünkel (eds), *Imprisonment Today and Tomorrow. International Perspectives on Prisoners' Rights and Prison Conditions*, The Hague / London / Boston, Kluwer Law International 2001 (reports on 26 countries around the world); A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen & F. Dünkel (eds), *Foreigners in European Prisons*, Nijmegen, Wolf Legal Publishers, 2007 (reports on 25 European Union countries); Roy Walmsley, *Further Deverlopments in the Prison Systems of Central and Eastern Europe*, Helsinki, Heuni 2003 (reports on 24 Central and Eastern European countries); Mahgoub El-Tigani Mahmoud, *The Human Rights of African Prisoners*, Lewiston / Queenston / Lampeter, The Edwin Mellen Press 2006 (reports on 4 African countries); Sufian Hemed Bukurura, 'Emerging trends in the protection of prisoners' rights in Southern Africa', 2 *African Human Rights Law Journal* (2002), p. 92-109.

sessing whether a restriction or denial of a certain human right is allowed in prison. These will be merged to a 'minimum basic principle' and used as a point of reference to elaborate on the jurisprudence on specific positive human rights obligations on States to ensure the rights of prisoners. A central question of this elaboration is: to what extent and how are these principles reflected in the jurisprudence on the ICCPR, the ECHR, the ACHR, and the AfChHPR in general and, more particularly, in view of the rights and obligations discussed?

Preservation of human rights in prison: a minimum basic principle

An intrinsic and therefore inevitable consequence of imprisonment is the loss of the right to liberty. Although deprivation of liberty often to a certain degree forms an obstacle to the enjoyment of other rights too, this does not as such mean that authorities are permitted also to deny those rights to prisoners. Several international soft law instruments confirm this. Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners[5] (1990) states: 'Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and [...] United Nations covenants'. Moreover, the United Nations Standard Minimum Rules for the Treatment of Prisoners[6] (1957) affirms in Rule 57 that 'the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation'[7].

The principle that prisoners retain all rights apart from the right to liberty can also be found in several regional soft law instruments. For example, Rule 2 of the European Prison Rules 2006 states: 'Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody'. More specific is Principle VIII of the recently approved Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)[8]: 'Persons deprived of liberty shall enjoy the same rights recognized to every other person by domestic law and international human rights law, except for those rights which exercise is

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5 UN General Assembly Res. 45/111, adopted 14 December 1990.

6 Council of Europe Committee of Ministers, Rec(2006)2, adopted 11 January 2006.

7 See also Principles 1 and 3 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, adopted 9 December 1988.

8 I-ACionHR, approved 3-14 March 2008.

temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of liberty'[9]. And in the Kampala Declaration on Prison Conditions in Africa[10] (1996) the second Recommendation on Prison Conditions declares 'that prisoners should retain all rights which are not expressly taken away by the fact of their detention'. Furthermore, those regional instruments demand, in various formulations, that the suffering inherent in imprisonment shall not be aggravated by the regime in prison[11]. Rule 5 of the European Prison Rules 2006 even specifies: 'Life in prison shall approximate as closely as possible the positive aspects of life in the community'.

These soft law principles have largely been affirmed in the international and regional case law on the main human rights conventions. This is of major importance, for those conventions are legally binding upon the States which are a party to them. Moreover, the international and regional opinions and decisions on these conventions must at least be considered as authoritative interpretations which cannot be set aside by any of the state parties without good reason. And as far as the European, African and Inter-American Courts of human rights are concerned, their decisions are unconditional legally binding on the parties to the case in which they are rendered[12].
With this in mind it is important to note that the Human Rights Committee (HRC) holds that 'Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment'[13]. No less significantly, the Committee goes on to state that 'no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner'. The Grand Chamber (GC) of the European Court of Human Rights (ECtHR) repeatedly emphasised 'that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to

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9 See also Principle I of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

10 Adopted at the International Seminar on Prison Conditions in Africa, 19 to 21 September 1996.

11 See Rule 102.2 of the European Prison Rules 2006, and Recommendation 4 on Prison Conditions in the Kampala Declaration on Prison Conditions in Africa. Cf. Principle I of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

12 See art. 46 § 1 ECHR, art. 68 § 1 ACHR, and art. 30 Protocol to the AfChHPR on the establishment of an African Court on Human and People's Rights.

13 HRC, General Comment No. 21 'Humane treatment of persons deprived of liberty (art. 10)', 10 April 1992, para 3.

liberty'[14]. The Court has even confirmed that a difference in treatment between prisoners and free individuals is discriminatory if it has no objective and reasonable justification[15]. Restrictions of human rights with regard to prisoners may be justified for reasons of security, in particular the prevention of crime and disorder. The Inter-American Court of Human Rights (I-ACtHR) stresses that 'impairment of rights arising from the deprivation of liberty or as its collateral effect, must be strictly minimized' and that deprivation of liberty may not result in suffering exceeding the unavoidable level of suffering inherent in detention[16]. Finally, in its 'Resolution on Prisons in Africa' the African Commission on Human and Peoples' Rights (AfCionHPR) considers 'that the rights established and guaranteed under the African Charter on Human and People's Rights extend to all categories of persons including prisoners, detainees and other persons deprived of their liberty'[17].

Considering the above it can be established at the very least as a binding basic principle of international human rights law that prisoners enjoy all the same human rights as free individuals except for the right to liberty, and that the authorities thus have an obligation to actually secure those human rights in prison. Apparently this obligation differs distinctly from the duty to secure human rights within the community. Not only are the authorities required to secure the prisoners' human rights with the specific intention of reformation and social rehabilitation: in addition the obligation to secure human rights seems to be broader within prison than outside. It appears that the state has a positive obligation actively to prevent prisoners suffering that goes beyond the unavoidable level of suffering inherent in detention. This may mean, as is demonstrated in the next section, that the authorities have a duty to compensate or repair human rights that are jeopardised by the mere deprivation of liberty.
At the same time, however, the basic principle is subject to several limitations. All acknowledged limitations to the basic principle lower the standard it initially sets and they have therefore to be taken in consideration when seeking to establish what human rights standard is minimally required in prison: that constitutes the minimum basic principle. So what are these acknowledged limitations? First of all, restrictions that are unavoidable in a closed environment are permitted. Although at first sight this emerges as a

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14 Notably ECtHR (GC), Judgment of 6 October 2005, appl. 74025/01, para 69 (see also para 70) (*Hirst v. the United Kingdom (no. 2)*).

15 ECtHR, Decision of 4 January 2008, Appl. 23800/06, para 2 (*Shelley v. the United Kingdom*).

16 I-ACtHR, Judgment of 5 July 2006, para 86 (*Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*).

17 AfCionHPR, Res. 19(XVII)95 'Resolution on Prisons in Africa', 13-22 March 1995.

logical inevitability, on second thought it is not quite clear how one should determine whether a restriction is unavoidable or inherent to imprisonment. Are there any inescapable restrictions apart from the restriction on the right to liberty itself? Possibly almost anything can be arranged within the walls of prison, at least in theory. The question therefore remains whether this exception to the basic principle is of an objective and purely factual nature or partly subjective and normative in substance. A second limitation to the basic principle is that the authorities are permitted to limit human rights in view of security and maintaining order. This exception certainly is subjective and consequently its scope is fairly vague, too. Moreover, it does not expressly include conditions of proportionality and necessity. Although this does not indicate that the State is totally unbound in this way, it appears to connote a wide margin of latitude for the authorities applying this exception.
The general acceptance in both soft and hard law of the minimum basic principle formulated above is, of course, of great significance. General acceptance alone does not suffice, though. At least as important is the extent to which the principle is acknowledged in regard to specific human rights and in individual cases. Accordingly now a closer look will be taken at a variety of specific human rights and correlating positive obligation concerning prisoners.

Obligations to secure the safety of prisoners

Of evident importance for the wellbeing of prisoners is the obligation on States to protect them against lethal violence and ill-treatment by other detainees. Although this positive obligation is not expressly provided for in any of the general human rights instruments, all of them are being interpreted and applied in such a way that they do require the State to afford such protection.

The UN Covenant on Civil and Political Rights contains several provisions that have been used by the Human Rights Committee to formulate State obligations to protect prisoners against each other as well as against themselves. Especially relevant are article 6 § 1, which demands that the right to life 'shall be protected by law', and article 10 § 1, which stipulates that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. In the case of *Barbato versus Uruguay* the Human Rights Committee recognizes that the right to life implies that the state has a duty to take adequate measures to protect the life of a prisoner against suicide, forced suicide and killing by others while in custody[18]. And in the case of *Daley versus Jamaica* the State's neglecting to take

[18] HRC, View of 21 October 1982, Comm. 84/1981, para 9.2 and 10(a) (*Barbato v. Uruguay*).

measures to protect the complainant, who was assaulted regularly by other inmates, was one of the main factors that lead the Committee to conclude that article 10 § 1 ICCPR had been breached[19]. The justification of this duty to protect prisoners is apparently that they are particularly vulnerable because of their status as persons deprived of liberty[20] and that the State party, by arresting and detaining individuals, takes on the responsibility to care for their life[21], wellbeing[22], and, presumably, the dignity of the person. To avoid such violations against them it is at least incumbent on the State to resolve problems of prison overcrowding and to segregate different categories of detainees.

Similar positive state obligations can be found in the decisions on the regional human rights conventions of Europe, the Americas and Africa. It is particularly interesting to take a closer look at this jurisprudence, because those obligations are usually more precisely formulated and explained in these decisions than in the opinions of the Human Rights Committee.
For example, in the case of *Paul & Audrey Edwards versus the United Kingdom*, the European Court held that in appropriate circumstances the State authorities have a positive obligation 'to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'[23]. The protection of prisoners is part of this obligation. In the same way States have a duty to protect detainees against suicide and self-harm[24]. Both duties are based on the provision: 'Everyone's right to life shall be protected by law' (art. 2 § 1 ECHR). However, on the basis of, *inter alia*, the prohibition that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment' (art. 3 ECHR), States are also required to

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19 HRC, View of 31 July 1998, Comm. 750/1997, para 7.6 (*Daley v. Jamaica*). See also HRC, View of 30 October 2003, Comm. No. 868/1999, para 7.3 (*Wilson v. The Philippines*).

20 HRC, General Comment No. 21 'Humane treatment of persons deprived of liberty (art. 10)', 10 April 1992, para 3.

21 HRC, View of 26 March 2002, Comm. 763/1997, para 9.2. (*Lantsova v. Russia*).

22 HRC, View of 6 November 2003, Comm. 970/2001, para 9.3 (*Fabrikant v. Canada*).

23 ECtHR, Judgment of 14 March 2002, Appl. 46477/99, para 54-56 (*Paul & Audrey Edwards v. the United Kingdom*). For the same obligation but with regard to citizens in general, see ECtHR (GC), Judgment of 28 October 1998, Appl. 23452/94, para 115-116 (*Osman v. the United Kingdom*). For a survey of European instruments and case law regarding the safety of prisoners see Egbert Myjer, 'Prison security and human rights. The Strasbourg case-law', in Peter J.P. Tak & Manon Jendly (ed.), *The implementation of prison sentences and aspects of security* (Colloquium of the IPPF), Nijmegen, Wolf Legal Publishers, 2006, p. 97-122; see in the same publication also Francis Casorla, 'La sécurité des prisons et les droits de l'homme', p. 123-130.

24 ECtHR, Judgment of 5 July 2005, Appl. 49790/99, para 67-70 (*Trubnikov v. Russia*); ECtHR, Judgment of 3 April 2001, Appl. 27229/95, para 90-93 (*Keenan v. the United Kingdom*).

protect all individuals – and thus prisoners – against non-lethal violence by private parties[25]. This clearly should include the obligation to prevent prison rape, since rape constitutes inhuman treatment according to article 3 ECHR[26]. The obligations apply when the authorities 'knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party'[27]. Although the obligation to protect individuals against violence by others applies with regard to all individuals alike, these conditions are more likely encountered in the context of prisoners. After all, within prison the authorities have substantially more control over both the victim and the perpetrator of violence than in free society, and therefore they are sooner able to learn about tensions between individuals. Furthermore, the rational of the duty of the authorities to protect prisoners differs slightly from that of the duty to protect individuals within society. Not only are detainees in general in a more vulnerable position than free citizens, the authorities are also directly responsible for this. So if a risk of violence occurs, the State has 'to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'. Concrete measures that have been pointed out in the case law of the European Court are the screening of prisoners, segregation of dangerous detainees, and supervising detainees[28]. In case of a risk of suicide or self-harm, relevant measures can be: monitoring of the prisoner, regular doctor's visits, assessment and treatment by a psychiatrist, administration of medication, availability to the prisoner of an alarm mechanism, withholding alcohol and drugs, and restraint in disciplinary punishments[29].

Effective protection of the life and personal safety (including the physical, mental and moral integrity) of all inmates is also required under the right to life that 'shall be protected by law' (art. 4 ACHR), and the right to humane treatment, *i.e.*, 'the right to have his physical, mental, and moral integrity re-

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25 See ECtHR, Judgment of 3 May 2007, Appl. 71156/01, para 96, 103, 111 en 124-125 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*); ECtHR, Judgment of 12 October 2006, Appl. 13178/03, para 53 (*Mubilanzila Mayeka & Kaniki Mitunga v. Belgium*).

26 ECtHR, Judgment of 25 September 1997, Appl. 23178/94, para 80-87 (*Aydin v. Turkey*); ECtHR, Judgment of 4 december 2003, Appl. 39272/98, para 148-153 (*M.C. v. Bulgaria*).

27 See, *e.g.*, ECtHR, Judgment of 14 March 2002, Appl. 46477/99, para 55 (*Paul & Audrey Edwards v. the United Kingdom*).

28 Notably ECtHR, Judgment of 14 March 2002, Appl. 46477/99, para 58-64 (*Paul & Audrey Edwards v. the United Kingdom*); ECtHR, Judgment of 11 May 2006, Appl. 52392/99, para 83-88 (*Ucar v. Turkey*).

29 See, *e.g.*, ECtHR, Judgment of 3 April 2001, Appl. 27229/95, para 97-99 and 114-116 (*Keenan v. the United Kingdom*); ECtHR, 5 Judgment of July 2005, Appl. 49790/99, para 71-77 (*Trubnikov v. Russia*).

spected' (art. 5 § 1 ACHR)[30]. The State has an obligation to guarantee security and maintain public order, especially within the prisons[31]. According to the Inter-American Court, the basis of this duty is that the State is presumably responsible for what happens to those who are in its custody[32]. Indeed, the prison authorities exercise severe control or command over the persons in their custody[33]. In order to execute the duty to protect detainees and fulfill its role as 'guarantor' of rights 'the State should utilize all possible means to reduce the level of violence' and 'adopt all appropriate measures to guarantee' the rights to life and humane treatment. Those measures and their implementation must be effective. More specifically, measures the State can be obligated to undertake are confiscation of weapons possessed by inmates, prevention of riots (which can be triggered by unsatisfactory security, infrastructure, conditions of incarceration, and health and hygiene), acceptable space for each inmate, changes in surveillance patterns, physical segregation of different categories of inmates, and the devising and application of a prison policy that prevents crises[34]. Preventive measures have priority over repressive ones[35].

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30 See, *e.g.*, I-ACtHR, Order of 7 July 2004 (Provisional Measures), 'Considering' para 11 (*Matter of Urso Branco Prison v. Brazil*); I-ACtHR, Order of 3 July 2007 (Provisional Measures), 'Considering' para 9-12 (*Matter of the Monagas Judicial Confinement Center ('La Pica') v. Venezuela*); I-ACtHR, Order of 30 March 2007 (Provisional Measures), 'Considering' para 6-7 (*Matter of Mandoza Prisons v. Argentina*); I-ACtHR, Order of 2 February 2007 (Provisional Measures), 'Considering' para 7-10 (*Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison) v. Venezuela*). Under the ACHR too States are duty-bound to protect all persons: see the last-mentioned decision, para 5, with further references to jurisprudence, and I-ACtHR, Order of the President 7 April 2000, 'Considering' para 9 (*Constitutional Court Case v. Peru)*.

31 I-ACtHR, Judgment of 25 November 2006, para 240 (*Case of the Miguel Castro-Castro Prison v. Peru*).

32 See, *e.g.*, I-ACtHR, Order of 7 July 2004 (Provisional Measures), 'Considering' para 6 (*Matter of Urso Branco Prison v. Brazil*).

33 I-ACtHR, Judgment of 2 September 2004, para 152 (*Case of the 'Juvenile Reeducation Institute' v. Paraguay*).

34 For example I-ACtHR, Order of 7 July 2004 (Provisional Measures), 'Considering' para 7, 9, 12, 13 and 15, (*Matter of Urso Branco Prison v. Brazil*); I-ACtHR, Order of 2 February 2007 (Provisional Measures), 'Considering' para 10-11 (*Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison) v. Venezuela*); I-ACtHR, Judgment of 5 July 2006, para 90-94 (*Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*); I-ACtHR, Order of 30 March 2007 (Provisional Measures), 'Considering' para 12 (*Matter of Mandoza Prisons v. Argentina*).

35 I-ACtHR, Judgment of 5 July 2006, para 71 (*Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*).

Finally, in cases of massive killings the African Commission has recognised a State duty under the African Charter to protect the life and safety of all citizens against violence and damaging acts by non-state actors[36]. Since the duty applies to all citizens, it should include the obligation to protect detainees against violence by other prisoners[37]. Furthermore, this would be in keeping with the principle that the State's responsibility for someone's integrity and wellbeing 'is heightened in cases where an individual is in its custody'. This principle is explained by the completely dependence of prisoners on the actions of the authorities[38]. The right to 'life and the integrity of his person' in article 4, the prohibition of 'torture, cruel, inhuman or degrading punishment and treatment' in article 5, and 'the right to liberty and to the security of his person' in article 6 of the AfChHPR (can) in particular serve as a basis for the obligation.

Undeniably, in none of the human rights provisions discussed here are the several positive obligations to operational protect detainees, literally set down. This, however, does not mean that such obligations are not logically contained within them. It can very well be argued that the State is putting pressure on the right to life and the right to humane treatment, and to that extent is suppressing the negative duty not to violate human rights, for the state takes away someone's freedom and places that person in a state-controlled, physically limited environment with other (often more than averagely violent) individuals. In such a setting someone is more likely to encounter violence and the infringement of his rights than in free society, while he is generally less able to escape the actions of others or defend himself against them. Therefore, on the basis of these convention rights the authorities are responsible for taking away the state-caused threat to the human rights of the prisoner by protecting every prisoner against other detainees and against self-harm or suicide. In other words: the State has actively to take measures to compensate the unintentional consequences of the infringement of the right to liberty. The rationales for the existence of this duty offered by the human rights bodies discussed above, support this line of reasoning.

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36 AfCionHPR, Report of October 1995, Comm. 74/92, para 18-26 (*Commission Nationale des Droits de l'Homme et des Libertes v. Chad*); AfCionHPR, Report of October 2001, Comm. 155/96, para 57 (*Social and Economic Rights Action Center & Center for Economic and Social Rights v. Nigeria*).

37 Cf. AfCionHPR, Report of 1999, Comm. 48/90, 50/91, 52/91, 89/93, para 47-50 (*Amnesty International & Others v. Sudan*), in which such duty is based on the right to life (and integrity of the person) in art. 4 AfChHPR.

38 AfCionHPR, Report of 31 October 1998, Comm. 137/94, 139/94, 154/96, 161/97, para 112 (*International Pen & Others v. Nigeria*).

Each with a slightly different argumentation, the bodies make it clear why the duty to protect individuals is in general more urgent in the case of prisoners than in that of free persons.

The State's obligation to protect detainees against lethal violence and inhuman treatment by other prisoners as well as against suicide and self-harm has thus been broadly acknowledged in the jurisprudence on the main international and regional human rights conventions. Nor is this surprising from another point of view. All the rights involved (the right to life, the prohibition of torture and inhuman treatment, and the right to humane treatment of prisoners) are absolute and in addition, save for article 10 ICCPR, they are non-derogable[39]. This means that there is no margin to depart from the basic principle that prisoners enjoy all the same human rights as free individuals, except for the right to liberty, and that the authorities thus have an obligation actually to secure those human rights in prison. Hence, the limitation to the principle that those rights are subject to the restrictions that are unavoidable in a closed environment or necessary in view of security and the maintenance of order cannot apply, given the absolute character of the rights involved. What is more: States cannot invoke lack of material resources to justify a defective performance of this duty[40].

Although the collected jurisprudence of the aforementioned human rights bodies on the duty to protect prisoners is not identical in every case, it is clear that they are very closely attuned. Where differences occur they are primarily about the way in which the duty is elaborated. Thus, the conditions under which the duty applies are fairly precisely expounded in the jurisprudence of the European Court, while the Inter-American Court is more specific about the measures that states have to take in order to comply with the duty. But in essence the different jurisprudence collections do not reveal a different approach to the substance of the conditions under which the duty applies, the measures required to fulfill it, and the scope of the duty. As a consequence, the acknowledgement of the duty to protect prisoners on the basis of the ICCPR, the ECHR, the ACHR, and the AfChHPR confirm and strengthen each other. This makes it possible to adopt a unified view of the

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[39] See art. 4 § 2 ICCPR, art. 15 § 2 ECHR, and art. 27 § 2 ACHR. See for a different approach within the African system, AfCionHPR, Report of 15 November 1999, Comm. 140/94, 141/94, 145/95, para 41-43 (*Constitutional Rights Project, Civil Liberties Organisation & Media Rights Agenda v. Nigeria*) in relation to art. 27 § 2 AfCHPR.

[40] Cf. HRC, General Comment No. 21 'Humane treatment of persons deprived of liberty (art. 10)', 10 April 1992, para 4; ECtHR, Judgment of 9 June 2005, Appl. 44082/98, para 77 (*Case of I.I v Bulgaria*); I-ACtHR, Judgment of 5 July 2006, para 85 (*Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*); AfCionHPR, Report of October 1995, Comm. 25/89, 47/90, 100/93 (1195), para 47 (*Free legal Assistance Group v. Zaire*).

jurisprudence of the distinct human rights bodies on this duty. Together, the jurisprudence collections offer a more or less full picture of what the duty entails. As a result, the jurisprudence on this duty of all these bodies is ultimately relevant to each and every state.

Obligations to provide prisoners with healthcare

The duty to protect detainees against suicide and self-harm illustrates that safety and healthcare can be closely related[41]. As we have seen, regular visits, assessment and treatment by doctors and psychiatrists can be obligated in case of mentally-ill prisoners who might kill themselves. Furthermore, the Human Rights Committee has held that a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under the right to life and the right to humane treatment of prisoners[42]. Finally, healthcare can help to prevent violence against prisoners, by systematically keeping track of injuries and by (within certain limits) communicating information to the prison authorities.
However, even in situations where such a relation between safety and healthcare does not clearly exist, the authorities can be required to offer medical and psychiatric assistance and remedies. Insofar as withholding such care might cause the prisoner death or inhuman suffering, a duty to offer healthcare is in conformity with the duty to ensure the safety of prisoners. In both cases the positive obligation rests primarily on the fact that the State has brought someone into a situation in which he cannot provide for his own health or safety as well as he generally would be able to in free society. It is therefore perfectly in line with the minimum basic principle that authorities are obligated actively to provide measures of healthcare as a compensation for the unintended consequences of imprisonment. So, for example, the Human Rights Committee found a violation of the right to life (art. 6 § 1 ICCPR) in the case of *Lantsova versus Russia*, in which the son of the applicant died in prison because the authorities had not taken appropriate medical measures when his health deteriorated dangerously[43]. And the European Court has made clear that denying psychiatric care may contravene the prohibition of

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41 See on the human right to health care in general: Brigit C.A. Toebes, *The Rights to Health as a Human Right in International Law*, Antwerpen / Groningen / Oxford, Intersentia – Hart 1999.

42 HRC, View of 7 August 2003, Comm. 763/1997, para 7.7 (*Cabal & Pasini v. Australia*).

43 HRC, View of 26 March 2002, Comm. 763/1997, para 9.2 (*Lantsova v. Russia*). See for the duty to provide medical treatment based on the articles 7 and 10 § 1 ICCPR, *e.g.*, HRC, View of 28 October 1981, Comm. 63/1979 (R. 14/63), para 16.2 and 20 (*Sendic v. Uruguay*); HRC, View of 22 October 1992, Comm. 255/1987, para 8.5 (*Linton v. Jamaica*).

torture and inhuman treatment (art. 3 ECHR), if this causes the detainee suffering that could be classified as inhuman or degrading[44]. In conformity with the basic principle, moreover, is that the duty to provide healthcare to prisoners is not limited to situations in which the detainees' condition that needs treatment is caused in, or is due to his stay in prison. The obligation, for example, also applies to prisoners who were already ill before their liberty was taken away.

What are the conditions that have to be met if the duty to provide medical and psychiatric care comes into play? Does the obligation only arise when the prisoner might lose his life without it or when a failure to provide the healthcare causes (continuation of) inhuman suffering, as in the cases just mentioned? Or is there also a duty to provide healthcare when the non-derogable rights to life and against torture and inhuman treatment are not at stake?
The ICCPR does not expressly provide for a right to health care. Still, proceeding from the article 6 ICCPR right to life, the article 7 ICCPR prohibition that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', and the article 10 § 1 ICCPR right to humane treatment of prisoners, the Human Rights Committee takes the stance that 'adequate' or 'appropriate and timely medical care must be available to all detainees'[45]. The Committee held that 'free access to doctors' should be guaranteed in practice, immediately after arrest and during all stages of detention[46]. That, however, does not necessarily mean that prisoners are free to choose a particular medical treatment. Ultimately, the authorities only seem to be compelled to provide for the most appropriate treatment 'in accordance with professional medical standards'[47]. At the same time, appropriate and timely medical care must be offered even if it is not requested by the prisoner. What is more, at least under the right to life, the states are required 'to know about the state of health of the detainees as far as may be reasonably expected'[48]. Lack of financial means does not reduce this responsibility. Those duties

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44 ECtHR, Judgment of 30 July 1998, Appl. 25357/94, para 64-66 (*Aerts v. Belgium*) (in which case those conditions where not met). Cf. ECtHR, Judgment of 3 April 2001, Appl. 27229/95, para 116 (*Keenan v. the United Kingdom*).

45 HRC, Concluding. Observations, *Democratic People's Republic of Korea*, ICCPR, A/56/40 vol. I (2001) 98 at para. 86(16); HRC, Concluding Observations, *Portugal*, ICCPR, A/58/40 vol. I (2003) 56 at para 83(11); HRC, Concluding Observations, *Kenya*, ICCPR, A/60/40 vol. I (2005) 44 at para 86(19).

46 HRC, Concluding Oberservations, *Ukraine*, ICCPR, A/57/40 vol. I (2002) 32 at para. 74(15). Cf. HRC, Concluding Observations, *Benin*, ICCPR, A/60/40 vol. I (2004) 30 at para. 83(17).

47 HRC, View of 6 November 2003, Comm. 970/2001, para 9.3 (*Fabrikant v. Canada*).

48 HRC, View of 26 March 2002, Comm. 763/1997, para 9.2. (*Lantsova v. Russia*).

reach beyond the situation in which the life of the prisoner is in danger or in which he will suffer inhumanely without health care[49]. The article 10 § 1 ICCPR right to be treated with humanity and with respect for the inherent dignity of the human person, has a broader meaning than the right to life and the right not to be tortured or ill-treated, while it still includes the right to adequate medical care during detention[50]. So, for example, denying healthcare to a prisoner who suffers from skin disease and from recurrent stomach pains constitutes a violation of article 10 § 1 ICCPR[51].

By contrast, the ECHR (which contains no explicit right to healthcare either, nor an equivalent to article 10 § 1 ICCPR) does not generally demand healthcare for detainees when there is no life threatening situation or suffering which is at least inhuman[52]. Only within the boundaries of the right to life in article 2 ECHR, and the prohibition of inhuman treatment in article 3 ECHR, are States duty-bound, given the practical demands of imprisonment, to secure the health of prisoners in an adequate and timely fashion by, among other things, providing them with requisite medical assistance[53]. The Court does not seem to be willing to stretch the right to life and the prohibition of inhuman treatment in order to broaden the right to healthcare. So, in the case of *Rehbock versus Slovenia* the applicant, a German body-building champion, suffered from headaches. Prison staff refused to provide him with painkilling medication on several occasions, but since this did not amount to treatment contrary to article 3 ECHR, there was no obligation under the European Convention to supply painkillers[54]. In the more serious case of *Melnik versus Ukraine*, article 3 was breached, however, because the complainant did not receive the necessary medical treatment and assistance for tuberculosis in timely and adequate fashion while serving his sentence[55]. Besides that, the authorities might have a positive obligation under article 2 ECHR or article 3 ECHR to eradicate or prevent the spread of a particular disease or infection[56].

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49 HRC, View of 27 July 1993, Comm. 326/1988, para 6.5 (*Kalenga v. Zambia*).

50 Explicitly so HRC, View of 20 July 1990, Comm. 232/1987, para 12.7 (*Pinto v. Trinidad and Tobago*).

51 HRC, View of 18 July 1996, Comm. 527/1993, para 3.5-3.6 and 10.4 (*Lewis v. Jamaica*).

52 See ECtHR, Judgment of 3 April 2001, Appl. 27229/95, para 97-102 and 111-116 (*Keenan v. the United Kingdom*); ECtHR, Judgment of 18 May 2000, Appl. 41488/98, para 75-76 (*Velikova v. Bulgaria*); ECtHR, Judgment of 27 June 2000, Appl. 22277/93, para 87 (*Ilhan v. Turkey*); and the Judgments referred to below.

53 ECtHR (GC), Judgment of 26 October 2000, Appl. 30210/96, para 94 (*Kudla v. Poland*); ECtHR, Judgment of 29 April 2003, Appl. 50390/99, para 45 and 52-58 (*McGlinchey v. the United Kingdom*).

54 ECtHR, Judgment of 28 November 2000, Appl. 29462/95, para 80 (*Rehbock v. Slovenia*).

55 ECtHR, Judgment of 28 March 2006, Appl. 72286/01, para 104-106 (*Melnik v. Ukraine*).

56 ECtHR, Decision of 4 January 2008, Appl. 23800/06, para 1 (*Shelley v. the United Kingdom*).

However, in principle they have a substantial margin of appreciation in this regard. And insofar as a health threat falls outside the scope of these provisions, the right to respect for private life in article 8 ECHR does not demand that general preventive healthcare measures be taken, either. Consequently, in the recently decided case of *Shelley versus the United Kingdom* the authorities were not required to replace the supply to inmates of agents to disinfect needles for the use of drugs with more effective needle exchange schemes[57]. Furthermore, the European Convention does not lay down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment[58]. Nor do prisoners otherwise seem to have a real right to choose a particular medical treatment under the ECHR, which the ICCPR does not afford them either, although the prisoner's choice of physician should as a rule be respected[59]. Support for the conclusion that prisoners lack a right to choose a particular medical treatment can be found in the fact that States are allowed to transfer a prisoner to another facility in order to provide for the necessary medical treatment. In the case of *Matencio versus France*, the applicant did not want to be transferred because the facility to which he was going to be transferred for an indeterminate period of time was a long way from where his family lived. The European Court held that the State did not contravene the rights of the applicant by not offering him the necessary healthcare in the prison in which he was staying at that time[60]. The approach by the European Court is quite understandable. Since the right to healthcare is not explicitly part of the ECHR, the question for the Court to answer is not whether this right is complied with but whether denial of healthcare constitutes a violation of the right to life or the prohibition of inhumane treatment.

The Inter-American Court seems to distinguish a broader right to healthcare for prisoners than either the European Court and, to a lesser extent, the Human Rights Committee. According to the Inter-American Court, the article 5 ACHR right to humane treatment involves an implied duty upon States 'to provide detainees with regular medical checks and care and adequate treatment whenever necessary'. Not only must the authorities allow medical assistance to detainees by a professional physician of their choice, they must also facilitate it. This, however, does not mean that all the wishes and preferences of detainees regarding medical assistance have to be satisfied: the duties apply to the real needs consistent with the actual circumstances and con-

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57 Idem.

58 ECtHR (GC), Judgment of 26 October 2000, Appl. 30210/96, para 93 (*Kudla v. Poland*).

59 ECtHR, Judgment of 29 September 2005, Appl. 24919/03, para 186 and 187 (*Mathew v. the Netherlands*).

60 ECtHR, Judgment of 15 January 2004, Appl. 58749/00, para 82-90 (*Matencio v. France*).

dition of the detainee. 'Lack of adequate medical assistance could be considered per se a violation of articles 5(1) and 5(2) of the Convention depending on the specific circumstances of the person, the type of disease or ailment, the time spent without medical attention and its cumulative effects'[61]. The duty to provide healthcare at least applies to those suffering from contagious diseases or those who are suffering from a serious medical condition[62].
Contrary to the ICCPR, the ECHR and the ACHR, the African Charter explicitly puts forward a right to 'medical attention'. This right is included in article 16 § 2 AfChHPR. Leaning on this provision, as well as on the article 4 AfChHPR right to life and the article 5 AfChHPR prohibition of torture and inhuman treatment, the African Commission on various occasions has stipulated that States have an obligation to grant detainees 'access to adequate medical care'[63] and to medicine[64, 65]. Although the African Charter expressly provides for a right to medical attention, and a corresponding duty is recognized in the case law of the ACionHPR, that case law offers hardly any elaboration on the contents and scope of the duty.

The somewhat more extensive acceptance of an implied prisoner's right to healthcare under the ICCPR and ACHR than under the ECHR is understandable, insofar as, in particular, provisions under article 10 § 1 ICCPR (right to humane treatment of prisoners) and article 5 § 1 ACHR (right to respect for the physical, mental and moral integrity) are formulated more openly and broadly than article 2 ECHR (right to life) and article 3 ECHR (prohibition of torture and inhuman treatment). This, however, cannot explain the difference in approach as to whether prisoners should in principle be free to choose a particular medical treatment once the duty applies. Is the

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61 I-ACtHR, Judgment of 5 July 2006, para 102-103 (*Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*). See also I-ACtHR, Judgment of 7 September 2004, para 156-157 (*Case of Tibi v. Ecuador*).

62 I-ACtHR, Order of 30 September 2006 (Provisional Measures), para 23 (*Matter of the 'Dr. Sebastião Martins Silveira' Penitentiary v. Brazil*).

63 AfCionHPR, Report of 31 October 1998, Comm. 137/94, 139/94, 154/96, 161/97, para 80-81, 104, 112 (*International Pen & Others v. Nigeria*). See also AfCionHPR, Report of 31 October 1998, Comm. 105/93, 128/94, 130/94, 152/96, para 89-91 (*Media Rights Agenda & others v. Nigeria*); AfCionHPR, Report of 1995, Comm. 64/92, 68/92, 78/92, para 7 (*Achutan & Amnesty v. Malawi*); AfCionHPR, Report of 15 November 1999, Comm. 143/95 and 150/96, para 5 and 28 (*Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*); AfCionHPR, Report of November 2003, Comm. 250/2002, para 55 (*Liesbeth Zegveld & Messie Ephrem v. Eritrea*).

64 AfCionHPR, Report of 15 November 1999, Comm. 151/96, para 27 (*Civil Liberties Organisation v. Nigeria*).

65 See on healthcare for individuals in general AfCionHPR, Report of October 1995, Comm. 25/89, 47/90, 100/93 (1195), para 47 (*Free legal Assistance Group v. Zaire*).

denial of this choice by the Human Rights Committee, and ultimately by the European Court as well, in line with the basic principle that persons continue to enjoy all human rights following conviction except the right to liberty? This, of course, depends on whether such choice must be regarded as part of the human rights obligation to provide healthcare in prison. To the Inter-American Court it apparently is. Nevertheless, it is not quite clear how a right to choose can be based on rights concerning life and humane treatment, for denial of a choice of a specific medical treatment will hardly be able to threaten life or lead to ill-treatment. This observation makes it clear that (and why) the Committee and the European Court, at least when deciding on the healthcare of prisoners, are only willing to realise the basic principle insofar as the human rights provided for in the ICCPR respectively the ECHR offer a basis. So the obstacle for those human rights bodies is that the human rights treaties they monitor do not contain an independent human right to health (care). The approach of the Inter-American court is quite different in this regard, as this body appears to succeed in practicing the basic principle beyond the scope of the American Convention, which treaty does not expressly include such a right either. Interestingly, it is also this Court that seems to acknowledge a broader principle than the basic one: the subject of the Inter-American Court's principle are not 'human rights' but 'rights' in general.

Obligations to make provision for conjugal visits and begetting children

Deprivation of liberty greatly influences the opportunity for prisoners as well as their relatives to enjoy their rights to private life, family life, and the possibility to found a family. All of these rights are covered by the ICCPR, the ECHR and the ACHR[66]. The African Charter, by contrast, at most only indirectly provides for some aspects of them[67]. The several UN, European and American provisions in which the rights are contained are mostly derogable[68] while none of them are absolute. Their character differs in that respect quite fundamentally from most human rights provisions discussed above. This nonetheless does not mean that the rights to private life, family life and founding a family can simply be ignored by the prison authorities. Generally, restrictions to these rights must be provided by law, serve a legitimate aim

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66 See art. 17 (*inter alia*, right to private and family life) and 23 § 2 (*inter alia*, right to found a family) ICCPR, art. 8 (*inter alia*, right to private and family life) and 12 (*inter alia*, right to found a family) ECHR, and art. 11 (*inter alia*, right to private and family life) and art. 17 (*inter alia*, right to raise a family) ACHR.

67 See art. 18 AfChHPR, and art. 6 (i), art. 14 § 1(g) Protocol AfChHPR on the Rights of Women in Africa.

68 The exception is art. 17 ACHR; see art. 27 § 2 ACHR.

and meet a high standard of necessity. This applies equally within and outside prison. Furthermore, the minimum basic principle that persons continue to enjoy all human rights following conviction save the right to liberty only allows for limitations that are unavoidable in a closed environment or necessary in view of security and the maintenance of order. To consider the meaning and scope of this principle it is worth exploring whether prisoners under the aforementioned rights should be offered a possibility to engage in intimate (conjugal) contacts with non-detained partners and to beget children.

None of the human rights treaties discussed here contain any formulations concerning consummation of marriage or conjugal visits. Nevertheless, sexual relations between consenting adult partners fall indisputably within the boundaries of the right to private life[69]. State-caused limitations on the possibility for adult prisoners to have a consenting sexual relationship with other adults therefore imply a restriction of the right to a private life. Furthermore, in case the limitation concerns a relationship within the concept of the family, it may also restrict the right to family life, and possibly also the right to found a family. However, none of this actually means that States have a general obligation under international human rights law to provide prisoners with the opportunity to have intimate contacts with other adults. The jurisprudence is developing, however.
In State Reports to the Human Rights Committee, the allowance of and provision for conjugal visits has been presented as a fulfilment of the obligation to secure humane living conditions and treatment of prisoners[70]. More importantly, considering article 7 and article 10 ICCPR, the Committee holds that States parties must ensure that the rights of persons deprived of their liberty are protected on equal terms for men and women. Differences between male and female prisoners regarding access to conjugal and family visits do not seem to be acceptable in this regard[71]. The right to conjugal visits does not seem to have been addressed as such by the Committee.
By contrast, the European Court was forced to take a general stance on conjugal visits. In the case of *Aliev versus Ukraine* the applicant submitted that his right to respect for his private and family life had been violated for he had

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[69] Cf., *e.g.*, HRC, View of 31 March 1994, Comm. 488/1992, para 8.2 (*Toonen v. Australia*); ECtHR, Judgment of 22 October 1981, Appl. 7525/76, para 41 en 52 (*Dudgeon v. the United Kingdom*).

[70] See, *e.g.*, HRC, State Party Report Israel, 9 April 1998, CCPR/C/81/Add.13, para 193, 330; HRC, State Party Report Costa Rica, 2 October 1998, CCPR/C/103/Add.6, para 298, 319, 364; HRC, State Party Report Peru, 17 March 1999, CCPR/C/PER/98/4, para 104.

[71] See HRC, General Comment No. 28 'Equality of rights between men and women (art. 3)', 29 March 2000, para 15.

been deprived of any intimate contact with his wife. The Court considered 'that while detention is by its very nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members'[72]. Denying prisoners intimate visits may anyhow 'for the present time be regarded as justified for the prevention of disorder and crime' within the meaning of article 8 § 2 ECHR. This judgment implies that a right to intimate visits is part of the right to private and family life under article 8 § 1 ECHR, but that a blanket ban on such visits is unconditionally accepted by the Court under § 2 of this provision. At the time of writing, therefore, the Court appears unwilling to demand from states that the denial of the right is in accordance with the law, serves a legitimate aim and is necessary in every separate case. Hence, the right does not in fact exist under the European Convention. Consequently, States have no obligation whatsoever to make provision for such visits. Yet at the same time the Court makes it clear that a right to intimate visits and a positive obligation to provide facilities for them might in the future be recognized under the right to private and family life. Meanwhile, the Court lauds the reform movements in several European countries to improve prison conditions by facilitating conjugal visits[73].

An approving attitude to offering prisoners facilities for intimate visits can also be detected in the case law on the Inter-American Convention on Human Rights[74]. Indeed, at present a right to such visits is not acknowledged under this human rights instrument either[75]. Nevertheless, the Inter-American Commission has consistently held that the state is obligated to facilitate contact between the prisoner and his or her family. When a State voluntarily fulfils this obligation by allowing intimate visits it may not restrict this possibility, impose conditions or conduct procedures that constitute an infringement of any of the other rights protected by the American Convention. First of all this means that the authorities may not discriminate between inmates in different facilities or between male and female inmates in their policy on

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72 ECtHR, Judgment of 29 April 2003, Appl. 41220/98, para 187 (*Aliev v. Ukraine*), with reference to the somewhat more elaborate ECionHR, Decision of 22 October 1997, Appl. 32094 /96 (*E.L.H. & P.B.H. v. the United Kingdom*). Confirmed by ECtHR (GC), Judgment of 4 December 2007, Appl. 44362/04, para 81 (*Dickson v. the United Kingdom*).

73 Idem, para 188.

74 I-ACionHR, *Annual Report 1987-1988*, 16 September 1988, OEA/Ser.L/V/II.74, doc. 10 rev. 1, Chapter IV (under: Cuba). Cf. I-ACtHR, Judgment of 15 September 2005, para 125, 135 (*Raxcacó-Reyes v. Guatemala*), and the I-ACionHR's case law referred to infra.

75 Notably I-ACionHR, Report of 15 October 1996, No. 38/96, Case 10.506, para 99 (*X & Y v. Argentina*).

intimate visits[76]. It might also imply that authorities are forbidden to deny homosexuals conjugal visits where they are allowed for unmarried heterosexual couples[77]. Furthermore, if conjugal visits are allowed the authorities are obligated to take the measures necessary to allow such visits to take place in conditions which are reasonable[78]. Non-fulfilment of these obligations can amount to an undue interference with the ACHR. So requiring a vaginal search or inspection of a visitor each time the prisoner wished to have a personal contact visit with that person can constitute a violation of the right 'to protection by society and the state' of the family in article 17 ACHR[79]. A violation of the ACHR may also occur when a prisoner is on an unlawful basis denied family and conjugal visits as a form of punishment[80]. Apart from the American Convention on Human Rights, the I-CionHR also takes cases on the basis of the American Declaration of the Rights and Duties of Man (ADHR). Article VI ADHR states that '[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore'. Interestingly, on the basis of this provision the Inter-American Commission seems to acknowledge that prisoners have a right to conjugal visits as such, which right can only be limited if there are sufficient reasons to do so. In the case of *Oscar Elías Biscet et al. versus Cuba* the authorities had restricted family and conjugal visits for no apparent reason. This fact contributed significantly to the finding by the I-ACionHR of a violation of article VI of the American Declaration[81].

The consequence of the denial of a right to intimate visits seems to be that prisoners cannot enjoy the human right to found a family either. Certainly this was undeniable so for a long time, but modern techniques like artificial insemination imply, of course, that this no longer holds true. In the case of

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[76] I-ACionHR, *Follow-Up Report on the State of Guatemala's Compliance with the Recommendations Made by the IACHR in its Fifth Report on the Situation of Human Rights in Guatemala (2001)*, 7 March 2003, OEA/Ser.L/V/II.117, Doc. 1 Rev. 1, para 168, 182-183.

[77] Cf. I-ACionHR, Report of 4 May 1999 (admissibility), No. 71/99, Case 11.656, para 21-22 (*Marta Lucía Álvarez Giraldo v. Colombia*). The I-ACionHR never decided on the merits of the case as the Columbian Supreme Court overturned the prohibition on homosexual conjugal visits in October 2001 on the ground that it constituted unlawful discrimination.

[78] I-ACionHR, *Follow-Up Report on the State of Guatemala's Compliance with the Recommendations Made by the IACHR in its Fifth Report on the Situation of Human Rights in Guatemala (2001)*, 7 March 2003, OEA/Ser.L/V/II.117, Doc. 1 Rev. 1, para 168.

[79] I-ACionHR, Report of 15 October 1996, No. 38/96, Case 10.506, para 99-100 (*X & Y v. Argentina*).

[80] I-ACionHR, *Report on the Situation of Human Rights in Mexico*, 24 September 1998, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, para 245-246.

[81] I-ACionHR, Report of 21 October 2006, No. 67/06, CASE 12.476, para 235-240 (*Oscar Elías Biscet* et al. *v. Cuba*).

Dickson versus the United Kingdom a prisoner and his wife complained to the European Court of Human Rights about the refusal to afford access to artificial insemination facilities which they argued breached their right to private and family life under article 8 ECHR and/or their right to found a family under article 12 ECHR[82]. The refusal must indeed be considered a restriction of those rights. Obviously, respect for the decisions to become (or not to become) a parent belongs to the core of the article 12 right, and according to the European Court it also falls within the ambit of article 8[83]. The remaining question therefore was whether such restriction is justified. The authorities asserted that it is. They offered three principles as an explanation. First, losing the opportunity to beget children is part and parcel of the deprivation of liberty and an ordinary consequence of imprisonment. With this the government implicitly refers to the restriction clause on inherent limitations. Secondly, public confidence in the prison system will be undermined if the punitive and deterrent elements of a sentence were to be circumvented by allowing prisoners to conceive children. Thirdly, the inevitable absence of one parent, including that parent's financial and other support, for a long period has adverse consequences for the child and for society as a whole. The European Court, on the other hand, found that the restriction was not justified and that the authorities therefore had violated the right to private and family life[84]. The main argument for the violation was that the policy on which the refusal was based effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case[85]. This means that States have a positive obligation to provide prisoners with access to artificial insemination facilities, unless fairly balancing the concrete circumstances in the case at hand indicates that a restriction is called for. It also implies that a restriction of the possibility to beget children may not be regarded as a limitation inherent to imprisonment. To be sure, this judgment is only about granting access; it does not imply that authorities should at their own expense have to make provision for artificial insemination facilities as such.

In the *Dickson* case on artificial insemination facilities the European Court takes a very different approach from that in the aforementioned *Aliev* case on conjugal visits. Where conjugal visits may be completely denied within the

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82 ECtHR (GC), Judgment of 4 December 2007, Appl. 44362/04, para 65-66 (*Dickson v. the United Kingdom*).

83 Para 66. Cf. ECtHR, Judgment of 4 December 2007, Appl. 44362/04, para 71-72 (*Evans v. the United Kingdom*).

84 Para 65-85. Considering its Judgment on art. 8 ECHR, the Court did not find it necessary also to examine the complaint under art. 12 ECHR (see para 86).

85 Para 82-85.

prison system without even having to offer an adequate general explanation, the refusal to grant a prisoner access to artificial insemination facilities at least demands a fair balance test and motivation tailored to the concrete case. As a remarkable result of this, prisoners have no human right to try to effectuate their right to found a family in a natural way, whereas they do have the right to try to accomplish this through modern artificial methods. Notably, it is only with artificial insemination that the European Court is clearly in line with the minimum basic principle. By contrast, conformity with the basic principle as regards conjugal visits could be detected in the case law of the Inter-American Commission on the American Declaration of the Rights and Duties of Man (not to be confused with the ACHR).

Nevertheless, a clear recognition of a right to intimate visits is not yet offered under the ICCPR, the ACHR and the AfChHPR, nor is it under the ECHR. This seems to be in violation of both the minimum basic principle and the general human rights limitation system that restrictions to these rights must be lawful, serve a legitimate aim and be necessary. Conjugal visits do in principle concern private life, the family, and the possibility of begetting children. More importantly, denying such visits infringes the human rights to private life, family life, and the possibility of founding a family. Therefore, the legal starting point is an obligation on the authorities to present every prisoner with the opportunity to enjoy conjugal visits. Restriction of the correlated right to conjugal visits is then only allowed insofar this is demonstrably necessary. To some degree it may be justified to generally restrict the right of certain categories of prisoners (*e.g.*, short stay detainees, classes of sex offenders, juveniles) or when certain circumstances apply (detention in police facilities, disorder, etcetera).

All the same, there cannot be any room for a blanket ban on conjugal visits. What is more, the right to intimate visits has to be applied equally to male and female inmates – as is confirmed by the Human Rights Committee and Inter-American Commission. In addition, at least the right to respect for private life, and possibly also the right to family life, appears to require that unmarried couples and same sex couples should also be able to enjoy intimate visits. So a broad acknowledgement of positive obligations to shape the conditions that allow for intimate visits is called for. Ultimately, there seems to be yet another reason for that: allowing intimate visits might even aid the fulfilment of the duty to protect the safety of prisoners, for such visits can help to prevent prison rape[86].

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[86] See Rachel Wyatt, 'Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?', 37 *Case W. Res. J. Int'l L.* (2006), p. 579-614.

Conclusions

Prisoners enjoy all the same human rights as individuals in the community save the right to liberty, and the authorities have an obligation to actually secure those human rights in prison. This is a basic principle that has been widely recognized in many international and regional soft law instruments and in the jurisprudence of the UN Human Rights Committee and the regional Commissions and Courts within the European, Inter-American, and African human rights systems. Not only is the principle generally accepted in that jurisprudence, it is also reflected in the interpretation and application by these human rights bodies of various specific human rights provisions. Of course, the basic principle may be restricted. The basic principle and the accepted limitations together produce a 'minimum basic principle': the human rights standard that is minimally required in prison. Restrictions are allowed insofar as they are unavoidable in a closed environment or in view of security and the maintenance of order. But the margin within which those restrictions can be applied is vague and subjective. The introduction of at least express conditions of proportionality and necessity into the limitation clause of the minimum basic principle, and their systematic enforcement, would be a welcome contribution to the protection of prisoners. Moreover, this would be in keeping with the general human rights restriction system. Until then, it is all the more imperative to realize that the minimum basic principle is only what it says it is: a minimum. Many soft law instruments contain more stringent obligations on prison authorities and less room for limitations. And even those instruments provide only basic standards.

Nevertheless, the aforementioned human rights bodies have formulated a large variety of positive obligations with which the State has to comply in order to ensure human rights in prison. As a result, prison authorities have a duty actively to take measures to ensure the safety and health of detainees as a means of compensating the state-caused inability of the individual to take care of himself. Moreover, in order to repair the infringement on the right to family life and the right to found a family as unintentional consequences of the deprivation of liberty, the authorities have to cooperate with prisoners who want access to artificial insemination facilities. Hardly any of those obligations are expressly provided for in the ICCPR, the ECHR, the ACHR, and the AfChHPR[87].

[87] On the absent of express prisoners human rights in the ECHR, see Stephen Livingstone, 'Prisoners' Rights in the Context of the European Convention on Human Rights', 2 *Punishment & Society* (2002), No. 3, p. 309-313.

Besides, provisions that are absolute and/or non-derogable, as well as provisions that are neither, have served as a basis for the acknowledgment of such implied duties. Indeed, with this, such obligations are strong, specific confirmations of at least the minimum basic principle.

Yet this does not imply that the principle is constantly in the lead. Justly, it is ultimately the scope of the treaties rather than the principle as such that decides whether a human rights body acknowledges a positive obligation to restrict the life of detainees as little as possible, apart from their liberty. Only the Inter-American Court has managed to implement the principle beyond the scope of the rights discussed in this contribution. Secondly, with respect to conjugal visits it has become clear that the minimum principle is not even complied with as such in matters that clearly fall within the scope of specific human rights provisions. Hence, the minimum basic principle is not of absolute in nature. Nor can it be considered to be a prisoner's human right on its own. The principle can nonetheless be regarded as an important, commonly accepted, generally binding legal rule.