

**Reply to Questions Raised by Member States during the Interactive
Dialogue at the 66th Session of the UN General Assembly**

18 October 2011

Question raised by the European Union: What is the difference between solitary confinement and being held incommunicado? Is there a conceptual difference? Do you approach incommunicado detention similarly or differently than you would solitary confinement?

As Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment I define solitary confinement as “the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day” (A/66/268, para. 25). I urge States to abolish solitary confinement that is either indefinite or prolonged, as defined as exceeding 15 days. Solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. I emphasize that “when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed” (A/66/268, para. 89). The exceptional circumstances where solitary confinement may be used are: 1) where necessary to avoid collusion among persons charged with a crime; or 2) where necessary to seek to prevent someone from frustrating investigation of an offense.

“Solitary confinement can be also used as a coercive interrogation technique, and is often an integral part of [...] incommunicado detention” (A/66/268, para. 44). Incommunicado detention refers to the practice in which a detainee’s communication with other human beings is either highly restricted or nonexistent (A/63/175). The definition of incommunicado detention is informed by looking to the jurisprudence of the European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR), and the Human Rights Committee (A/37/173, para. 13; *see also* A/66/268, para. 44; A/63/175, para. 22). In *Aksoy v. Turkey*, the ECtHR characterized incommunicado detention as detention without access to a judge or other judicial officer. The Court

considered denying access to a lawyer, doctor, relative or friend and “the absence of any realistic possibility of being brought before a court to test the legality of the detention [...]” to be critical factors informing the court’s determination of whether a particular detention regime constituted incommunicado detention (*Aksoy versus Turkey*, (No. 26), 1996-VI, Eur. Ct. H.R. para. 84). A 2010 joint study by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found that a person is said to be kept in “secret detention” when,

State authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State, deprive persons of their liberty; where the person is not permitted any contact with the outside world (“incommunicado detention”); and when the detaining or otherwise competent authority denies, refuses to confirm or deny, or actively conceals the fact that the person is deprived of his/her liberty hidden from the outside world, including, for example family, independent lawyers or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee. (A/HRC/13/42)

The term incommunicado detention has also been used with reference to the practice of enforced disappearance where the individual’s whereabouts are not disclosed and his or her detention is left unacknowledged by the State (*See A/63/175*, para. 22). The Convention defines enforced disappearance as “[t]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” (A/RES/61/177)

On the issue of incommunicado detention, the UN Human Rights Committee provided that,

among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives (A/54/426, para. 42).

Due to the high risk of severe harm to the detainee posed by incommunicado detention, the Special Rapporteur recommends that incommunicado detention be abolished (A/54/426, para. 42). Some forms of restrictions on communication are permitted but only in exceptional circumstances, e.g. if necessary to avoid frustration of investigation of an offense, and for a short period. A detainee must, however, always have access to legal counsel (A/66/268, para. 99). If a State chooses to employ the more limited restrictions on communication, it must do so only where: 1) the State can make a showing of exceptional circumstances; 2) a magistrate is responsible for overseeing and monitoring the process; and 3) the detainee has access to appeal measures.

The need for the procedural safeguards identified in my report on solitary confinement is heightened in detention regimes of incommunicado detention because of the increased risk of harm to the detainee. States should therefore implement both the internal and external safeguards necessary to protect detainee well-being:

“Internal safeguards

From the moment that solitary confinement is imposed, through all stages of its review and decisions of extension or termination, the justification and duration of the solitary confinement should be recorded and made known to the detained person. Additionally, the detained person should be

informed of what he or she must do to be removed from solitary confinement. In accordance with rule 35 of the Standard Minimum Rules for the Treatment of Prisoners, the detained person must receive this information in plain language that he or she understands. This information must additionally be provided to any legal representative of the detained person.

A documented system of regular review of the justification for the imposition of solitary confinement should be in place. The review should be conducted in good faith and carried out by an independent body. Any change in the factors that justified the imposition of solitary confinement should immediately trigger a review of the detained person's solitary confinement. All review processes must be documented.

Persons held in solitary confinement must be provided with a genuine opportunity to challenge both the nature of their confinement and its underlying justification through a process of administrative review. At the outset of the imposition of solitary confinement, detained persons must be informed of their alleged criminal or disciplinary infraction for which solitary confinement is being imposed and must immediately have an opportunity to challenge the reasons for their detention. Following the imposition of solitary confinement, detained persons must have the opportunity to file a complaint to prison management through an internal or administrative complaints system.

There shall be no limitations imposed on the request or complaint, such as requiring evidence of both mental or emotional suffering and physical suffering. Prison officials have an obligation to address all requests or complaints promptly, informing the detained person of the outcome. All internal administrative findings must be subject to external appeal through judicial processes.

External safeguards

Detained persons held in solitary confinement must be afforded genuine opportunities to challenge both the nature of their confinement and its underlying justification through the courts of law. This requires a right to appeal all final decisions by prison authorities and administrative bodies to an independent judicial body empowered to review both the legality of the nature of the confinement and its underlying justification. Thereafter, detained persons must have the opportunity to appeal these judgements to the highest authority in the State and, after exhaustion of domestic remedies, seek review by regional or universal human rights bodies.

Individuals must have free access to competent legal counsel throughout the period in which they are held in solitary confinement. Where necessary to facilitate complete and open communication between a detainee and his or her legal counsel, access to an interpreter must be provided.

There should be a documented system of regular monitoring and review of the inmate's physical and mental condition by qualified medical personnel, both at the initiation of solitary confinement and on a daily basis throughout the period in which the detained person remains in solitary confinement, as required by rule 32, paragraph 3, of the Standard Minimum Rules for the Treatment of Prisoners. Medical personnel monitoring detained persons should have specialized training in psychological assessment and/or the support of specialists in psychology. Additionally, medical personnel must be independent and accountable to an authority outside of the prison administration. Preferably, they should belong to the general national health structure. Any deterioration of the inmate's mental or physical condition should trigger a presumption that the conditions of confinement are excessive and activate an immediate review.

Medical personnel should additionally inspect the physical conditions of the inmate's confinement in accordance with article 26 of the Standard

Minimum Rules for the Treatment of Prisoners. Relevant considerations include the level of hygiene and cleanliness of the facility and the inmate, heating, lighting and ventilation of the cell, suitability of clothing and bedding, adequate supply of food and water and observance of the rules concerning physical exercise". (A/66/268, paras. 94-101)

Question raised by Switzerland: What was the basis for forming the 15-day limit on solitary confinement?

Solitary confinement in excess of 15 days should be subject to an absolute prohibition. As noted in my report, I am "aware of the arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful" (A/66/268, para. 28). However, in weighing both objective and subjective factors, and in particular the studies that suggest that solitary confinement may cause serious psychological harm to detainees, I concluded that after 15 days the harmful effects of isolation rise to the level of torture or cruel, inhuman, or degrading treatment or punishment. As I stated,

The adverse acute and latent psychological and physiological effects of prolonged solitary confinement constitute severe mental pain or suffering. Thus the Special Rapporteur concurs with the position taken by the Committee against Torture in its General Comment No. 20 that prolonged solitary confinement amounts to acts prohibited by article 7 of the Covenant, and consequently to an act as defined in article 1 or article 16 of the Convention. For these reasons, the Special Rapporteur reiterates that, in his view, any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances (A/66/268, para. 76).

Therefore, I called on the international community to agree to such a standard and to impose an absolute prohibition on solitary confinement exceeding 15 consecutive days (A/66/268, para. 76).

Extensive medical research has documented the wide array of harmful effects that result from the physical and social isolation of solitary confinement regimes. Studies indicate that harmful effects may arise after as little as a few days, and become more severe the longer an individual is held in solitary confinement.¹ “While the acute effects of solitary confinement generally recede after the period of solitary confinement ends, some of the negative health effects are long term. The minimal stimulation experienced during solitary confinement can lead to a decline in brain activity in individuals after seven days” (A/66/268, para. 64). Therefore, I have chosen 15 days as the point at which solitary confinement becomes prolonged, as a practical matter and as a conservative assessment of when, based on my survey of medical research, the harm suffered by individuals held in solitary confinement constitutes torture or cruel, inhuman, or degrading treatment or punishment.

Importantly, short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment as well (A/66/268, para. 88). However, unlike prolonged solitary confinement, short-term solitary confinement can be a legitimate practice in other circumstances provided that adequate safeguards are in place, including control and monitoring mechanisms (*see* A/66/268, paras. 94-101 noting the internal and external safeguards that should be in place under all circumstances). Solitary confinement is legitimately used by a State only where necessary to avoid collusion among persons charged with a crime or where necessary to seek to prevent someone from frustrating investigation of an offence. States should note that the 15 day limit is intended to serve

¹ For further discussion of the harmful psychological effects of solitary confinement on inmates, including an overview of numerous medical studies on the subject, *see* Stuart Grassian, "Psychopathological Effects of Solitary Confinement," *American Journal of Psychiatry*, 140, 1450-1454 (1983); Grassian, S., & Friedman, N. "Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement," *International Journal of Law and Psychiatry*, 8, 49-65 (1986); Craig Haney and Mona Lynch, "Regulating Prisons of the Future: A Psychological Analysis of Supermax Prisons and Solitary Confinement" 23 *N.Y.U. Rev. L. & Soc. Change* 477 (1997); Bruce Arrigo and Jennifer Bullock, "The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change," *Int J Offender Ther Comp Criminol*, vol. 52 no. 6 622-640 (December 2008); Maria Luise, "Solitary Confinement: Legal and Psychological Considerations," 15 *New Eng. J. on Crim. & Civ. Confinement* 301 (1989).

as a clear point of departure from which solitary confinement no longer constitutes a legitimate tool for State use regardless of the circumstances.

Question raised by Norway: Can you provide examples of control measures that could serve as effective alternatives to solitary confinement during pretrial detention?

States often justify using solitary confinement in pretrial detention by claiming that it meets two important objectives: 1) preventing detainees from intermingling, thereby avoiding demoralization and collusion; and 2) allowing States to apply pressure on detainees which may lead to cooperation and even confession of crimes from some detainees (A/66/268, para. 45). However, as asserted by both the Special Rapporteur and the UN Committee against Torture, prolonged solitary confinement, particularly when used during pretrial detention, whether as a preventive or disciplinary measure may result in serious physical and mental harm (A/66/268, para. 31).

As I asserted, “[w]hile physical and social segregation may be necessary in some circumstances during criminal investigations, the practice of solitary confinement during pretrial detention creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation (A/66/268, para.78).”

The use of solitary confinement as an extortion technique during pretrial detention should be abolished altogether. “When solitary confinement is used intentionally during pretrial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture as defined in article 1 or to cruel, inhuman or degrading treatment or punishment under article 16 of the Convention against Torture, and to a breach of article 7 of the International Covenant on Civil and Political Rights (A/66/268, para. 73).”

Therefore, as I asserted, “[S]tates should adopt effective measures at the pretrial stage to improve the efficiency of investigation and introduce alternative control measures in order to segregate individuals, protect ongoing investigations, and avoid detainee collusion (A/66/268, para. 85).” In identifying alternative control measures, I emphasize

that detainees should have access to legal counsel at all times, even if other forms of access to the outside world are restricted, irrespective of the duration of the detention. Access to legal counsel is a basic due process right of all detainees, and bears particular importance during the pretrial detention period. I recognize that States may have concerns regarding detainees' contact with legal counsel but reiterates that despite these concerns, cutting off contact to counsel cannot serve any legitimate purpose. Moreover, lawyers are bound by law and by rules of ethics not to contribute to crime or to impunity. Although all lawyer-client conversations are privileged, this does not mean they can carry messages to accomplices. Furthermore, bar associations play a key role in enforcing lawyer's ethical duties and disciplining lawyers when they fail to meet their obligations.

I additionally assert that pretrial detention should only be imposed in exceptional circumstances and not as a general practice. If a State seeks to use solitary confinement in pretrial detention, it must not exceed 15 days in length. In all instances of pretrial detention, a State should employ the least restrictive measures required. If the State is able to demonstrate that pretrial solitary confinement is necessary due to exceptional circumstances, e.g. for the safety of persons or property, the detention must, *inter alia*, be exercised under close judicial and medical supervision and provide clear methods for appeal (*see* A/63/175, para. 80).



Juan E. Méndez

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment