

Equality and Detention: Experts' Perspectives

Detention is increasingly used by states not only in the context of their criminal justice system, but also to serve other governmental objectives, including immigration control and national security purposes. The act of detention is always a restriction on the liberty of the individual – a human right – and it must comply with established principles of international law for it to be lawful. Two of the fundamental and well established principles in this regard are the principle that detention should not be arbitrary, and that detention should not amount to torture, cruel, inhuman or degrading treatment or punishment. A third, equally fundamental principle is that detention should not be discriminatory. Though recognised under international law, the particular issue of discrimination against members of vulnerable groups – both within the processes leading to detention, and within places of detention themselves – has yet to attract the level of attention it deserves. Inequality and discrimination remain prevalent and largely unaddressed across a wide range of detention regimes.

ERT spoke with Wilder Tayler, Secretary-General of the International Commission of Jurists and an expert on the UN Sub-Committee on the Prevention of Torture, and with Professor Mads Andenas, Professor of Law at the University of Oslo and a member of the UN Working Group on Arbitrary Detention about their perspectives on patterns of discrimination in the detention context, based on their own first-hand experiences of monitoring places of detention, and their thoughts on how the right to equality of detainees can best be protected.

ERT: Mr Andenas, you are widely recognised as an expert on detention related issues. Can you tell us a little more about what led you to getting involved in this area?

Mads Andenas: That is a very generous way to put the question, many thanks. Anyone involved with rights, law, history, or, for that matter, the human condition, has to be concerned with arbitrary detention and with how prisoners are treated. Thinking back to my schooldays, political prisoners was the

one cause you could get fellow-pupils and teachers to unite on, although those on the right and those on the left would rarely agree on who were worthy of one's interest. But to me it was the issue on which you could agree with both sides at the same time and support all their motions and sign all their petitions. If you could suspect some of using human rights as a weapon to beat their enemies, and tolerating abuses by the friends as justified or something one should not take too seriously, you could limit yourself to agree with them whenever they were concerned



Mads Andenas

with the abuses. Prisons and camps were full of opposition figures in Spain, Greece, the Soviet Union, and all of the Latin-American dictatorships. There was the persecution of opponents of apartheid, and then the very German handling of the Baader – Meinhof phenomenon.¹ All very different, but all human rights abuses. Also in Norway, where I grew up, we had political refugees from these countries. They were heroes and saints to us, even though I do not believe they were all that much better treated than their counterparts today who still face so much vilification as a group. In the popular press, the term “asylum-seeker” is not a reference to heroes or saints. Both at school and university, sending Amnesty’s Urgent Action postcards and letters demonstrated the hopelessness of it all, but at the same time that involvement from the outside world just might save a person from torture or death. My law school professor, Torkel Opsahl, who involved me in the human rights institute he was setting up at the University of Oslo, had chaired the

European Commission on Human Rights inquiry into the internment and torture of alleged members of paramilitary groups in Northern Ireland in the 1970s.² That provided another perspective, and when I later in life met some who regarded themselves as his UK opponents, I appreciated more fully how controversial (and absolutely right) his critical approach had been. Opsahl was also a member of the UN Human Rights Committee and I learnt much about the international supervision of human rights from him.

In my years in the UK, it was Guantanamo Bay, and also the UK involvement in this and other forms of detention that made clear to me the role of arbitrary detention, with torture and prison conditions as accompanying features. The justification of detention and torture as anti-terrorism measures, with 11 September 2001 as the event “that changed everything” and provided a catch-all derogation from international law and domestic rights guarantees, provided a fundamental challenge to any thinking international lawyer or rights-oriented person. In the first years of the decade, I undertook an annual review of human rights and good governance of Rwanda for the governments of the UK, the Netherlands and Sweden, as part of a system these countries had set up for providing aid to Rwanda on a bilateral basis outside the UN system with the World Bank, etc. Rwanda had some 80,000 long-term prisoners awaiting trial for genocide and genocide-related offences. Its friends were anxious to explain and defend, but walking around the overcrowded prisons made clear what a problem arbitrary detention and prison conditions are. And also that there was the need for reliable international human rights supervision to ensure that major powers are not tempted to shield their clients, or that they do not get away with it. Here, four very different countries were involved, all of them

failing to protect rights which were clearly violated on a large scale.

The UN Working Group on Arbitrary Detention (WGAD) was the first UN body to take the US to task over Guantanamo Bay. I knew it as a body that managed to deal with politically charged issues in an impartial and judicial manner, and also much admired its initiator, the French judge Louis Joinet, and his successor Manuela Carmena Castrillo, a judge from Spain who relentlessly and not without personal sacrifice pursued the detention and torture of detainees in the “War on Terror”.

So when I was asked to stand for the appointments process for new members of the WGAD, I could only answer yes. The post takes time, our cases are rarely happy ones, and we are not paid anything. We cannot know if our involvement in a case will have much effect. But we have the assistance of a very dedicated professional staff in the Office of the UN High Commissioner of Human Rights, and the great pleasure when we see results of our work. We are five members, very different in backgrounds and outlook, but we share a feeling of a strong common purpose, and I have not had more rewarding collegiate cooperation.

I have always been involved with issues relating to political prisoners, arbitrary detention and torture. But my scholarship has had a wider European and international law orientation. You could say that I have come to human rights law as an international lawyer. Some traditionalist lawyers and politicians refer to human rights lawyers they see as too activist, or as *droits de l'hommeistes*. For an international and European lawyer, the development of the supervision of human rights in international law is an exciting and important project. It is difficult not to be ex-

cited. I have become a self-professed *droits de l'hommeiste*.

ERT: Mr Tayler, what about you? How did you become involved in these issues?

Wilder Tayler: I started defending political prisoners in Uruguay in the early 1980s. At that time there was a military dictatorship there, and most detentions were politically motivated and arbitrary. Political opponents were subjected to military justice. So that is what led me directly into this area of work. From there, once democracy was recovered, I moved to sponsor different sectors in the social movement in Uruguay. I represented Unions, student associations and civil society organisations. Because of the nature of the activities they deployed, members of those groups happened to be arrested or harassed so part of my job was to get them out of the police stations. This is how I got further involved in detention-related issues. After that I became a legal adviser for Asia and Latin



Wilder Tayler

America in Amnesty International, and issues of detention featured prominently in my brief because it was Amnesty's mandate at the time to focus on detainees.

ERT: How important an aspect of your role is the assessment of detention conditions? Is this a neglected issue with too much focus being placed on the legality of detention?

Wilder Tayler: I think that the assessment of detention conditions is a neglected issue. People do tend to focus a lot on the legality of detention, and tend to forget about the plight of those deprived of liberty. As you know, I sit on the UN Subcommittee on the Prevention of Torture (SPT) and it is very clear to me that while both issues – the legality of detention and detention conditions – may have a very significant impact on the human rights of the individual involved, most of the focus is on the legality aspects. Prison conditions unfortunately do not appear to be a major priority for governments. It's something that features low in their list of priorities and that is something that I have verified not only through my work on the SPT, but also before that when I was working for NGOs and civil society organisations.

Mads Andenas: The assessment of detention conditions is clearly an important aspect. The WGAD considers detention to be arbitrary if it is in breach of international human rights standards of detention conditions. We report on our work and working methods to the UN Human Rights Council and the UN General Assembly. The link between arbitrary detention and conditions of detention has been accepted for our work, but we do not have any express mandate to deal with detention conditions. Periodically, there will be attempts by some countries to limit our role here, and when the WGAD points to the

importance of this aspect of its mandate and the need to list detention conditions in the text of our mandate, this is sometimes not taken up. There is no other human rights mandate with an express covering of detention conditions. It is not as if this is a field without pressing problems of human rights violations. It is less glamorous than many of the other fields, and it also concerns most countries. If you remember the infamous response by George Bush in 2003 about the treatment of the prisoners at Guantanamo Bay in violation of international humanitarian law, it was that "the only thing I know for certain is that these are bad people."³ When you have prisoners convicted of serious offences in a normal criminal trial, this kind of argument may seem even stronger. But the political process is certainly not able to safeguard the rights of the "bad people", who in ever greater numbers go to prison and remain there under criminal legislation which is incrementally extending the sentences and inventing new forms of detention.

Today much of the burden rests on national courts. In May 2011, the US Supreme Court in *Brown v Plata* held that "a prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society"⁴ The majority opinion by Justice Kennedy criticised a prison system that produced "needless suffering and death". Justice Scalia said in his dissent that "one would think that (...) this Court would bend every effort to read the law in such a way as to avoid that outrageous result". Justice Alito in his more moderate dissent said "the majority is gambling with the safety of the people of California". The majority attached photos to the judgment that you must look up if you have not seen them. You will agree with me that Justice Kennedy did not use strong words. Can you feel anything

but shame when someone practically says he wants to bend the law to maintain such conditions - as a human being, or perhaps even more as a lawyer? The case concerned conditions in Californian prisons, and they were not better than those international bodies have condemned in the poorest of countries. Even people who do not like country and western music may agree with Johnny Cash when he sings in deep baritone: "Well, you wonder why I always dress in black" and gives as one "reason for the things that I have on": "I wear it for the prisoner who has long paid for his crime, but is there because he's a victim of the times". There is every reason, until things are brighter, to wear black.

In Europe, some of the leading judicial figures have undertaken reviews on prisons conditions. One of my judicial heroes is Guy Canivet who, while he was French Chief Justice, proposed reforms to strengthen external oversight and review of prison conditions. Also, in his judicial work, he managed to provide a corrective to the political process. In 2007, the French *Conseil d'état* established a more intense judicial review of prisons conditions as proposed by Mattias Guyomar as rapporteur public. In the UK, we all know Lord Woolf's blueprint for prison reform in 1991 following the riots at Strangeways prison in Manchester.⁵ He has recently spoken out against the severe prison overcrowding. Dame Anne Owers as Chief Inspector of Prisons in the UK was also absolutely fearless and highly effective in providing independent scrutiny of prison conditions.

But the national systems are left with too much of an autonomous regime. Prisoners' rights are universal rights, and there should not be any margin of appreciation for domestic traditions of mistreatment and abuse. This is an area where international law, standards and review should have an important role.

There have been some important judgments by the European Court of Human Rights in this regard. It has censured France over prison conditions in a series of judgments in the last year, finding violations of the prohibition of torture and degrading and inhuman treatment in Article 3 of the European Convention on Human Rights. Germany, Russia, Ukraine, Moldova, Poland and Romania are among the other countries recently censured.

Among the UN treaty bodies, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child all look into prison conditions. Among the Charter-based bodies, we in the WGAD and several of the rapporteurs will do so as well. But we need to have prison conditions expressly there in our mandates, and there is a need for a special rapporteur with general responsibility for conditions in prison and other forms of detention. All countries feel vulnerable here, so this will only come about if there is strong civil society pressure.

ERT: What are the main challenges that must be addressed in ensuring that authorities do not discriminate in exercising their powers of detention, both in making decisions to detain and in the way they treat detainees? What safeguards should a good detention regime have in place to protect against such practices?

Mads Andenas: The law seems to accept much structural discrimination, and perhaps most openly against foreigners. They are detained in all countries without much need of justification. There is in practice none of the proportionality review that applies to a country's own nationals or residents. Without passing judgment on any other aspect of Dominique Strauss-Kahn's case, the custodial

remand, in practice justified on grounds of nationality, illustrates this point. The less privileged are obviously not treated much better.

Law enforcement and places of detention can be used to promote agendas of insidious and invidious discrimination. The Egyptian persecution of homosexuals at the end of the previous regime served the same functions as pogroms at other times in other countries. Law enforcement and places of detention are also contexts where discrimination which takes place elsewhere can become a matter of an existential nature, and where policies and practices can become violations of the right to life or the prohibition of torture. Anti-discrimination policies and their enforcement here have an importance that exceeds their importance in any other context.

In the review on discrimination issues in its 2003 Report, the WGAD sets out that discrimination is of course a common phenomenon in the administration of criminal justice. The report states:

“[S]ince 11 September 2001, differences in treatment and discrimination, particularly with regard to foreign nationals, have greatly increased. As part of efforts to combat terrorism and transnational organized crime, countries with large migratory flows have tightened up their legislation to control illegal immigration and imposed restrictions on the right to asylum which are not always in conformity with refugee law and international humanitarian law. Some countries routinely detain anyone found on or entering their territory illegally, while others just as routinely denigrate or lock up victims of slavery or trafficking in migrants; at the same time, entire populations are rightly or wrongly assessed as potentially dangerous and, solely for that reason, risk being

subjected to lengthy administrative detention. (...) The Working Group has also been informed that, in some countries, drug addicts, prostitutes, homosexuals and people suffering from AIDS are locked up on the grounds that they represent a risk to society, and people are given prison sentences solely because of their sexual orientation.”⁶

In its 2002 Report,⁷ the WGAD dealt extensively with the cases of some 55 persons prosecuted and detained on account of their homosexuality, and held that their detention was arbitrary because it violated Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), and the guarantee of equality before the law and the right to equal legal protection against all forms of discrimination, including “sex”. The WGAD established that category II of arbitrary detention in its methods of work includes deprivation of liberty in violation of guarantees against discrimination in the ICCPR. In the 2004 Report, the WGAD addressed detention of immigrants in irregular situations.⁸

So what are the main challenges? Well, the provisions of the law discriminate, as do the authorities. International law and constitutional law does not allow this. To make authorities comply with the law and international obligations prohibiting discrimination is a particular challenge. The first step is to establish that no one can hide behind any form of authority, wherever they find it, to violate the law and international obligations prohibiting discrimination. Law enforcement and places of detention must just accept that they will be under particular scrutiny, which should be more intense than the scrutiny of any other sectors. Legislation, training, independent administrative scrutiny and judicial review are core elements of this. The annual reports of all these services should address

anti-discrimination in dealing with suspects and convicts as one of their first headings. It should be in their mottos.

International scrutiny has an important role to play. In particular, the reporting of the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child plays a role in domestic discussion of prison conditions in most countries, and in Europe, the judgments of the European Court of Human Rights play such a role. But this is just not enough. There is such a system's failure, or today a real break-down, in the national policies, that international scrutiny has a particularly important role to play.

Wilder Tayler: The main challenges, in my opinion, relate to implementation. Both questions are intertwined, so it is good that they are put together. Quite frequently, the legal framework is not as bad as we think. On the contrary, you may have an acceptable legal framework, although we do face major issues with the problem of preventive detention. Let's say that if safeguards, such as *habeas corpus* or *amparo*, are used as they should be, and put in practice as they should be, they should provide a fairly good shield against discrimination for detained individuals.

We also face some important issues during the first stages of detention – when interrogation takes place, and when most cases of torture occur. Controls such as the recording and filming of interviews and registering the conditions under which interrogation takes place are of the essence. We still do not have a widespread acceptance that a lawyer should be present from the very first moment at which the detainee enters into contact with an interrogating authority. We do not have acceptance of the value of re-

ording interrogation sessions. So these are the kind of things that we still have to work on. We have guidelines, but the law that regulates interrogation in general is not as "hard" as the law which regulates the legality of detention. For example, *habeas corpus* exists almost everywhere, whereas the right to be interrogated from the first moment with a lawyer of your choice sitting next to you is not so clear. Regimes of preventive detention suffer major loopholes.

Vulnerable groups are more at risk. They tend to be more likely to suffer from discriminatory practices. There are some groups that are particularly targeted. Street children and juveniles in trouble with the law are vulnerable, particularly when the safeguard of separation from others is not respected. They are often subjected to inter-prisoner violence. There are also very specific kinds of abuses of women in detention. LGBT minorities also need to be looked at, as they do tend to be targeted, not only in terms of being detained, but also throughout the whole detention process – when they are already imprisoned. Migrants, in my opinion, are also a group with a high degree of vulnerability. Those that can be more isolated, to a certain extent, or to whom society tends to show less interest, are those who are more targeted for discrimination practices. Above all, there tends to be one common character shared by the most vulnerable groups, and that is poverty. The poor tend to be discriminated against in general.

ERT: Have you come across examples of good practice in preventing discrimination in detention settings? What were the key factors that gave rise to such good practice? How important was international and/or domestic law in promoting a positive approach?

Wilder Tayler: Very often, good practices come together with having specialised facilities and personnel – whether they are, for example, for children, women or sexual minorities. This is why you find police stations for women, where they get arrested and are kept separated according to gender and age, both during preventive detention and during imprisonment. This is very important.

These good practices also come hand in hand with implementation of the law. International law is not necessarily perfect, rounded up and complete. After all, the standard minimum rules are minimum rules. The principles tend to be basic principles – minimum and basic principles. But when these are put in practice, they do offer a reasonable degree of protection against discrimination and other abuses. I return to my previous answer as a lot is about implementing the law. International and domestic law is important. Sometimes, one concept appears to take root, even in quite abusive contexts. For example, I remember one country I visited where people were being abused – usually beaten up or ill-treated through words – and most of all they were being arrested on bogus charges. However, everybody, including the police force, abided by the principle that detainees could not be held for more than 24 hours because this was in the law. This has taken root, and people were being released after 24 hours. The 24 hours was seen as the natural period – so people were held for 24 hours. There was no practice of keeping people beyond this period. This was a particular guarantee, established in law, which had taken root in the consciousness of the police force.

Mads Andenas: I do not want to be too negative but good practices are hard to find. In the treatment of children, some of the special ombudsmen or similar independent institutions have played an important role. In many coun-

tries, issues of ethnicity are discussed but as opposed to good practice, in relation to ethnicity we find only bad, and then really bad, practices. NGO involvement has had an important impact in many places. Minority groups may have active and good NGOs representing them, but this usually ends when they go to prison. Detention and discrimination should be a fertile field for solidarity among advocates of different anti-discrimination causes, but this has not materialised. I would have liked to refer to a deserving national body, but cannot in good conscience do so.

But I do believe in the force of the law. Independent review can bring out facts and influence political opinion in addition to remedying the very worst abuses. Justice Kennedy's opinion and photos in *Brown v Plata*⁹ are the most powerful I have seen on prison conditions, perhaps with the exception of Premier président Canivet's 2000 report¹⁰ in its totally different style. And the US Supreme Court could order releases that no politician could achieve.

I also believe that international human rights protection should play a more important role in promoting a positive approach.

ERT: What challenges does the increasing presence of privately run detention institutions present for those interested in protecting detainees against discrimination and human rights abuses?

Mads Andenas: Clearly, privately run detention institutions can provide another bar or obstacle. But, in relation to detention, no one can hide behind any form of authority, wherever they may find it, in order to violate law and international obligations prohibiting discrimination. The delegation of authority, or the passing of tasks on to the private sector, does not alter this. Private contractors and

their employees are as much subject to anti-discrimination law and human rights as anybody else. But we see that it may take time to establish effective systems and review mechanisms. International scrutiny and NGO activity is of paramount importance.

Wilder Tayler: I do not have a vast experience of monitoring privately run detention institutions. I think that keeping people in detention is a state function, to ensure that they come under the protection and responsibility of the state in conditions of vulnerability. I think that the degree of accountability must be clear-cut. There can be no place for confusion. There are other functions that can be privatised in detention institutions. For example, I see no reason why the running of a prison kitchen cannot be privatised. For me, it is not so much a question of whether they are privatised, but rather whether there is a sufficient degree of control and regulation exercised by the state authority. The responsibility for holding someone who is deprived of liberty – this should not be privatised or given to anyone else for profit. I personally do not, however, have a major experience in visiting privately run institutions to the point where I could say whether you could find more discrimination there than in other detention settings.

There are many concerns about corruption taking hold in privately run institutions. I have to say, however, that I have seen quite a lot of corruption, and this has mostly been in state-run institutions. This often comes hand in hand with human rights abuses. The SPT does have the mandate to visit all detention settings. I have encountered no apparent problems in terms of access in entering privately run institutions. Our mandate is determined by the condition of the potential victim and our preventative function. Provided

that someone is deprived of liberty against his or her will, we can go there.

ERT: In respect to the decision to detain, is a lack of safeguards at the early stages of the criminal justice system, for example regulating police use of stop and search, contributing to the over-representation of certain groups in detainee populations?

Wilder Tayler: Yes. We all know that in different societies, there are some groups that get particularly targeted, for example, through stop and search practices. Even if there is not a particular policy of profiling, such profiling arises out of the prejudice of the individuals who set the policies, or that present in the neighbourhoods in which they work. This contributes to the over-representation of certain groups. But it is not only that. It is also the lack of other safeguards that contributes to over-representation. If you cannot mount a strong or robust legal representation from the first moment, you are more likely to enter the system than come out, irrespective of what you have done. The lack of a vigorous legal representation system is therefore a factor which contributes to the over-representation of certain groups in detainee populations. This is again an example of where the issue of poverty comes into play, especially where there are weak public defence systems. Where the public defender cannot attend on the person who has been arrested, or simply does not show up, and when people are illiterate and do not understand the language of a legal document – these are contributing factors.

It is definitely young and poor males who tend to be detained more than anyone else. That is very clear. And also juveniles between

16 and 18 years of age form a particular segment of society which tends to be particularly targeted.

Mads Andenas: The over-representation of ethnic minorities and foreigners must be addressed in better ways, in the UK as in practically every other country, although the problems vary. This is again a universal problem that calls for international action, where the distance from domestic political pressures may facilitate qualitatively better solutions.

It can be added that the retention of DNA is closely related. It is one of the areas where the European Court of Human Rights has had a civilising influence on the UK system, through the ruling by the UK Supreme Court in *R v The Commissioner of the Police of the Metropolis* in May 2011 following the European Court's decision in *Marper v UK*, censuring the guidelines of the Association of Chief Police Officers of 2006 which state that the discretion of chief police officers to destroy DNA and fingerprints "should only be exercised in exceptional cases".¹¹ The police unions have successfully prevented the retention of their officers' DNA, regularly taken to exclude officers working at the crime scene to make it easier to identify the DNA of suspects. The unions' arguments were that it would disproportionately affect their members and give an unfair impression of them as a group if detection rates would increase more than for the population at large. When you combine this with the stop and search practices indicated in the question, you wonder why it had to take censure by the European Court of Human Rights before the UK law on retention of DNA was amended.

ERT: What are the factors that lead to over-representation of certain groups in detainee populations? Do you agree that prison

populations are a reflection of patterns of discrimination in society at large? What should society's response be to this?

Mads Andenas: I agree that prison populations are a "reflection of patterns of discrimination in society at large", although this phrase allows the urgency and pressing nature of these problems to be lost. The burning glass is a better way of imagining them. Discrimination, which is reprehensible elsewhere, gets an intensity in detention settings which gives a power to ignite or destroy and which it would not have outside law enforcement and places of detention.

Wilder Tayler: I do not have any scientific evidence to confirm that prison populations are an exact reflection, but I have no doubt whatsoever that patterns of discrimination in society at large influence the prison population. Whether they are an exact mirror – that is more difficult to say. That would require a study which I have not carried out. It happens a lot with migrants. You see it clearly – the correlation between presence of migrants in prisons and the discrimination they face inside the prison as foreigners.

What factors lead to this over-representation? The key factor is discrimination itself. Obviously, in the case of poor migrants, I would say that the main issue is the lack of legal defence and the lack of networks of social support. There is no community backing up these individuals – or at least no organised community backing them up. There are also few NGOs, and these are issues that make people more vulnerable to the harshness of the law. These are the individuals who see the blunter side of the law. For the law to function properly, you need a series of interactions and balances to be established. On the one hand, there is the part of the law

investigating you – essentially trying to identify whether there has been any wrongdoing. On the other hand, there is the part of the law which is taking care of your own interest. If the latter is lacking, you are in a very unbalanced situation and you are more likely to go to prison. It is a simple process, and it looks similar everywhere.

We attribute enormous importance to legal defence in the prevention of torture – legal defence from the very first moment. Someone who is next to the person deprived of liberty with the exclusive function of protecting their interests is absolutely key.

ERT: What patterns of discrimination (if any) have you observed in the detention regimes you have inspected? Can you give examples from your experience of groups upon which detention has a particularly negative impact which warrants an alternative approach?

Wilder Tayler: I can refer to some of the latest experiences I have. In one particular country, LGBT groups were under serious pressure in some of the prisons that I visited. Those people were trying to lock themselves up during the night because otherwise they were forced into prostitution within the prison setting at the hands of other prisoners. There was also a corrupt organisation of guards who were profiting from such activity. LGBT people were clearly a discriminated group under a lot of pressure.

In another country, which had experienced a period of riots and street protests, people (and particularly young people) who were political opponents to the government at the time would necessarily be beaten up and suffer physical assault and aggression in police stations.

These are two very different examples of discrimination. The LGBT discrimination happened in an imprisonment setting, whilst the second example, involving political opponents, took place in police stations. In both cases, however, discrimination was clearly marking the type of treatment which these vulnerable groups were suffering.

I have also witnessed other cases. I remember an example from Latin America where members of indigenous groups were particularly targeted. They were given the worst food and the heavier tasks, such as cleaning bathrooms. They were forced to do the most menial and unpleasant tasks.

Mads Andenas: There is no detention regime that does not discriminate. Take it as a given (which in real life you cannot) that prison officials and inmates are less prone to discriminate, and you still have a problem with law enforcement and places of detention which is greater than in society at large.

What I have said about the limited solidarity among advocates of different anti-discrimination causes has its counterpart among prison inmates. We cannot expect that belonging to a discriminated minority should equip them with a solidarity in prison which people outside do not have. And we know how ethnic and social divisions create incendiary conditions in prison. So again, extraordinary measures are called for.

Children are, first and foremost, the group on which detention has a particularly negative impact. Long before I myself was a child, the policy has been stated that children should not be in prison. I have now grown to be middle-aged, and children have not got out of the prison system, and now all the rich countries of the world are putting more and more chil-

dren behind bars and for ever longer periods. In Germany, they are adopting reforms undoing the liberalisation of the 1920s which even the Nazi regime did not undo. As a guest for some twenty years in the UK, most kindly and generously treated, it is perhaps not nice to harp on the civilising influence of European Court of Human Rights on the UK system. But this is another such area.

The mentally ill and the disabled are also disadvantaged. Have another look at the photos in Justice Kennedy's majority opinion in *Brown v Plata*¹² of the telephone-booth sized cages without toilets in which they kept the mentally ill detainees for prolonged periods.

ERT: Under international law, states have an obligation to provide reasonable accommodation for persons with disabilities. From your experience, what are the particular needs of disabled people in places of detention? Can you give examples of where states have succeeded and failed to accommodate the needs of disabled people in places of detention?

Mads Andenas: You are right to point out the obligations under international law, but they have to be complied with and enforced. Many countries have lost cases before international human rights courts and bodies, and there is, for the time being, much resistance to individual complaints bodies. The new Optional Protocol to the Convention on the Rights of Persons with Disabilities, which has been ratified by the UK and most other member states of the EU, is so restricted, and tilted in favour of states, that its complaints mechanism will not be as effective as it could have been. Further, my own country, Norway, and the US are among the countries that have opted not to ratify the complaints mecha-

nism. Ultimately, NGOs will pressure them to do so, and I hope that the UN Committee on the Rights of Persons with Disabilities will give prison conditions a high priority.

The particular needs of disabled people in places of detention are as they are elsewhere, only stronger; and it does not help that their rights are less complied with. Examples of failure to accommodate the needs of disabled people are something you will find in most prisons. There are, however, a few examples of NGO activity that may show the way for other NGOs in this regard.

Wilder Tayler: I have to say that in general, I have not found that third world prison facilities provide the kind of support that disabled people need. On the contrary, quite frequently, we see disabled people mingling with the rest of the prison population. There are some cases, for example for the mentally disabled, in which they are brought to separate pavilions, or they spend quite some time in the infirmary, but quite often you ask yourself whether they should even be there in the first place. Should they not be in a hospital, with the necessary security?

I am unable to give one example at the moment in which I could say I have identified a good practice for these people. During one particular visit, a prisoner told me that he had been accommodated on the ground floor because of the difficulties he had in climbing the stairs. Disabled people are often, however, discriminated against inside prison as these tend to be harsh environments. Disabled people are restricted even more inside prisons than they are outside. They may experience individual gestures of solidarity, from other prisoners or individual lenient guards, and the benefits of establishing small networks inside compounds. People cling to

such connections in order to survive. But I have seen very few organised systems.

ERT: Do the specific experiences of women in detention, or the impact detention has upon them, require women to be treated differently in detention?

Wilder Tayler: There is one very specific issue relating to women, and that relates to mothers in detention. They are required to be treated differently. We have seen many cases where the only different treatment is that they are kept with their infants, which poses a number of legal, practical and ethical issues. In particular, it poses the question of how long a child should be kept with his/her mother. This is a hotly debated issue. It is one of the most important features of a discussion about women in detention.

I have to say that in some places, as well, I have noticed that police stations intended specifically for women – especially when they are staffed by women – tend to be more reasonable as far as the general physical conditions are concerned than other places. That includes the condition of the cells. In some police stations where the cells are in quite deplorable condition, due to being overcrowded or extremely dirty places, women are kept outside of such cells. They are kept outside or in a particular room, and are not put behind the bars of the cell.

In one place I visited, the cells were in good condition, but where they were not, there was a practice of not keeping women in those places. Women could only be kept there for short times, before being sent to a specialised place for women. Having visited those places for women, I reported later that they were in good condition. It is notable that the places in good condition had not been given

massive resources. They were just clean, and the registering books were proper. The bath-rooms were more or less in order and there was a small section for children. I have recorded more than one case when I have seen this in Latin American countries.

Basic resources can still allow state authorities and police authorities to keep people within conditions of dignity. Indignity does not need to occur. Things can be improved with better practices. It has happened more than once when I have visited police stations that I see 25 prisoners in one very small cell and then there are two empty cells next to it. Returning to my earlier responses, it is just a simple lack of interest and discrimination against the poor or those suspected of wrongdoing. There is a natural inclination to disregard the fact that these people are under the custody of the state and therefore the state authorities are responsible for their well-being. It is this last part which is missed by the higher authorities. There is a disassociation between the fact of holding someone in custody and the corresponding responsibility to take care of that person's well-being. Intellectually, you see that many police forces do not appreciate this point.

So I am able to give examples of good practice regarding women being kept in separate facilities. When they are not in separate facilities, sometimes they are still treated differently. But women do tend to suffer abuses at the hands of men, and particularly sexual abuse. It is often in times of turmoil and upheaval that such forms of abuse take place.

Mads Andenas: I expect it is difficult to disagree with the charge that women have been, and are being, marginalised within a criminal justice system designed by men for men. The female prison population is on the rise, and new issues have to be addressed.

ERT: From your experience, to what extent does the occurrence of deaths in custody reflect patterns of discrimination? How should inquest procedures be adapted in order to ensure that states comply with their positive obligations (as defined in the European Court judgment in *Nachova v Bulgaria*) to take account of discriminatory practices?

Mads Andenas: The House of Lords decision in *Amin* in 2003¹³ was only one of the stark reminders of how deaths in custody reflect patterns of discrimination. The House of Lords followed the European Court of Human Rights in *Edwards v UK*¹⁴ and Lordingham said: “A systemic failure to protect the lives of persons detained in custody may well call for even more anxious consideration and raise even more intractable problems”. You mention *Nachova v Bulgaria*¹⁵ where the European Court deals with ethnically motivated killings which will require “particular vigilance and an effective response from the authorities.” This duty will not be less if the killing takes place in a prison (in *Nachova* it was in a Romani settlement).

Wilder Tayler: I cannot tell you from my experience that discrimination plays such a significant incidence in deaths in custody. However, there is the fact that inside a prison establishment, you find the same divisions that you find in society in general. There are rich, middle-class and poor people. As is the case outside a prison, violent death is more likely to occur among poor people. That is a fact of life, especially as they are much more exposed to corruption. Detainees who are rich, and who live in the VIP cells or pavilions, have TV and air-conditioning. They also pay for security. Whereas those who do not have a place to sleep – they live in the corridors or outside – are more exposed to violence. Inter-prisoner violence is quite

common and those who suffer the most are the poorest.

In some contexts, there is one particular type of detainee who suffers the most, and that is the sex-offender against children. Those individuals are targeted by fellow prisoners more frequently than others. Because of that, they require a particular degree of security which is not always provided. Therefore, discrimination on the grounds of the crime which an individual has committed takes place amongst prisoners.

I think it should absolutely be a priority to identify discriminatory practices in deaths in custody, because discriminatory practices are a fact of life and it must be assumed that there is a serious chance that they have taken place, for example, towards women, children and foreigners.

ERT: Immigration detention is a growing industry throughout the world. In your perspective, is this a reflection of growing intolerance and discriminatory attitudes towards migrants? What would be a just and fair social response to irregular migration?

Wilder Tayler: I can answer the first part easily. Yes – there is a reflection of growing intolerance and discriminatory attitudes towards migrants in the growth of immigration detention. As for what the just and fair social response would be – one needs to write a PhD in order to answer that! Detention is not a just and fair social response, but the problem is that you cannot analyse this issue without going back to the origins of these individuals; without assessing where they have come from. The question of a just and fair social response raises issues of social justice which are perhaps too broad to address here.

Mads Andenas: The answer to your question regarding just and fair social response is not prison. Migrants are not criminals and should not be treated as such. The WGAD has a clear jurisprudence on putting migrants in prison. Most countries do not treat migrants as criminals: they treat them worse than criminals. You also ask if immigration detention is a reflection of growing intolerance and discriminatory attitudes towards migrants. Well yes, it is difficult to look at it in any other way. The result is that solutions other than detention must be found. The different ways of circumventing international law on *non-refoulement*, which prohibits states from pushing refugees back to places where their lives or freedoms are threatened, give rise to other questions. International law does not any longer facilitate the different ways of limiting the jurisdictional reach of human rights, and national courts are also less inclined to accept such arguments. I have my own views on the just and fair social response to irregular migration, but today I keep to the legal issue: it cannot be prison.

ERT: Do you think it is fair to assert that immigration detention regimes are shielded from the full scrutiny of human rights law, due to immigration being widely perceived as a matter of national sovereignty and broad discretion being given to decision-makers as a result? If so, what do you think needs to be done to address inequalities and the lack of protection from discrimination that emerges as a result? In your experience, can states strike a better balance between protecting national sovereignty and protecting vulnerable persons and groups from discriminatory treatment?

Mads Andenas: The answers here are yes. I have two further points. Immigration detention regimes are gradually being subjected to

domestic and international judicial review. National courts are reticent, and the questions are highly politically charged. But as you say, immigration is widely perceived as a matter of national sovereignty and broad discretion is given to decision-makers as a result. This should not include, however, the discretion to breach human rights and put people in prison or even worse forms of detention.

At the end of last year, in the case of *Diallo (Guinea v the Congo)*,¹⁶ the International Court of Justice developed international customary law on arbitrary expulsion and detention, in parallel with the different international human rights bodies.

Wilder Tayler: I think that most immigration regimes, not just the detention aspects, are overly charged by the phenomenon of national sovereignty. National sovereignty plays such an important role, and it excuses a tremendous degree of discretion and flexibility in the treatment of migrants. These are regimes which allow for a large degree of state expedience. This is why the migrant, and the irregular migrant in particular, is usually a member of a vulnerable section of society. It is also true for some countries that immigration detention facilities are the worst. What makes it even worse is that they are supposed to be temporary, yet they are such a punishing environment which is experienced by individuals who have not been charged, or who are being held only in relation to an administrative issue. Yet the conditions in which they are kept are absolutely horrendous.

We examine immigration detention facilities during SPT visits, precisely because of the discrimination and the vulnerability faced by the detainees. It is still very early to assess the impact of the SPT, and it remains difficult

because it is still a relatively new experience. We have only conducted ten or eleven visits so far, so it is too early to draw conclusions regarding impact. I can tell you, however, that the ability to evaluate our impact is very much in our minds. We are a visiting body. If we do not manage to change or prevent difficult situations on the ground, then we have not discharged our mandate. This is something we take very much into account. I would say that the response from governments has tended to be mostly positive, including in some cases where compliance with SPT's recommendations required the allocation of financial resources to certain areas.

Immigration regimes present one of the toughest issues in the menu of trying to prevent ill-treatment, precisely because these are the regimes which are so defined by this underlying concept of national sovereignty. You realise that sovereign states can do so much, despite the fact that a border is nothing more than a line in the sand.

ERT: Stateless persons are amongst the most vulnerable of all migrants and they are the most likely to suffer prolonged and even indefinite detention due to the inherent difficulties of removing them from a country. What should states do to change this? Have you come across any policies that can be highlighted as good practices in this regard? Do you believe that the failure to make special provisions would amount to discrimination, rendering such detention unlawful?

Wilder Tayler: I have not found any good practices in this regard and this is not an area I know well. This requires more than national efforts. You need a multi-national effort to address the issue of statelessness. Again, ultimately, that will require a major standard-

setting effort to resolve this. It is amazing that the international community has not come together to create sets of possibilities for people to move out of their stateless situation. This is one of the most blatant gaps in the international regime of protection.

Mads Andenas: Again, prisons or camps are not the answer, neither for stateless persons nor for the wider group of migrants. It may be surprising how refugees in some of the world's poorer countries, where most refugees live, are integrated into the domestic economy. There is no other reasonable alternative with the large number of refugees in some of these poor countries. However, to keep large numbers of people in some permanent incarceration so as not to encourage other migrants (as has been done in the richer countries), is difficult to justify on any grounds. Many current regimes are not complying with international law obligations, and their position under domestic law will be equally questionable. But the international system of human rights supervision is fragile, and this is not a field where countries are going to queue up to establish enforcement mechanisms.

Stateless persons are as you say among the most vulnerable, and there is some assistance in the case law on groups in need of particular protection under international law. The European Court of Human Rights judgment in *M. S. S. v Belgium and Greece*¹⁷ set out the criteria for categorising groups as a member of a particularly underprivileged and vulnerable population group in need of special protection, making the state's margin of appreciation substantially narrower and requiring very weighty reasons for restrictions, amounting to a rebuttable presumption. Refugees were classified as a vulnerable group. Both states were held in violation of Article 3 (Prohibition of Torture) of the

ECHR. Judge Rozakis, in his concurring opinion in *M. S. S.*, relied on Greece's international obligations to guarantee asylum-seekers certain material conditions. The Court concluded that the Greek authorities "must be held responsible, because of their inaction, for the situation in which [the asylum-seeker] has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs". One of the judges, Judge Sajó, was of the view that although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group where all members of the group, due to their adverse social categorisation, deserve special protection. He pointed out that in the context of the Dublin Convention, particularly "vulnerable persons or people" refer only to two categories within refugees – victims of torture and unaccompanied children – and did not amount to a rebuttable presumption.

So the European Court of Human Rights classified refugees as a vulnerable group. When they are in detention, there are also other factors making them more vulnerable. In my view, the reasons for extending special protection will typically obtain even more clearly and with more force in the case of stateless persons.

ERT: How important is the principle of proportionality in the assessment of whether a person can be legally detained? In this context, how important is it for states to introduce viable alternatives to detention in order to prevent discrimination? Do/should states have a legal obligation to do so?

Mads Andenas: The principle of proportionality is at the core of the international legal system. It applies when the reach of the pro-

hibition against arbitrary detention is to be determined, and in determining whether the derogations and restrictions are justified. It is not enough for the authorities to claim some public interest: a domestic court will require reasons, and want to see whether a proportionality test is satisfied, including how the relevant interests are balanced against one another. This is the same in international courts and human rights bodies.

In many of the situations we have discussed, it is simply not open to states to choose detention. There can be a duty to introduce viable alternatives to detention to prevent discrimination, and this can be a legal obligation both under domestic and international law. But again, detention can be arbitrary both on substantive and procedural grounds. The ordinary alternative to detention is of course release. As a matter of law, the consequence of a breach of the prohibition against arbitrary detention will most often just be a duty to release.

Wilder Tayler: Detention should in principle be a matter of last resort, and of course you have to examine the individual case. I agree that the principle of proportionality does count. This is a principle of international law, although the way it is formulated may suggest to some that this is more of a guideline, rather than a prescription. Article 9(3) of the International Covenant on Civil and Political Rights provides that individuals awaiting trial should not, as a rule, be detained in custody. This is, however, formulated in the passive voice. This is one of those legal wordings with a twist, where the duty-holder is not clear. I would say that the wording, particularly in the context in which it is, should be understood to be there to be applied to its full strength. The ICCPR is a binding instrument and its provisions are presumed to be binding. The states parties have assumed ob-

ligations under the ICCPR freely – so I would say that under no circumstances would I accept that this is just a guideline, even though it sounds suspiciously like one. I would have preferred a formulation which states that: “a person awaiting trial should not be detained in custody unless specific and well-grounded reasons have been determined by the judge”. That would have offered a better degree of protection.

Detention should not be the general rule but often it is, and it is becoming more and more so, especially in relation to particular crimes, such as drug trafficking, for which individuals are sent to prison automatically, irrespective of the seriousness of the particular offence.

ERT: Do you think that detainees or prisoners can or should be considered as a vulnerable group in the context of discrimination law? Is imprisonment or restriction of liberty a valid ground of discrimination or should it be?

Wilder Tayler: This is an interesting question. I think that, in principle, I feel disinclined to say that detainees or prisoners are a vulnerable group in the context of discrimination law. I see no inherent attribute in the individual here, but rather the fact that an individual’s liberty has been restricted. The imposition of imprisonment, or restriction of liberty by law, should be in principle, by law, accompanied by protections which prevent discrimination. There is no point of contention about that. So the mere fact of imprisonment should not be a ground of discrimination, in the same way that nationality, gender, political opinion, religious creed could be.

I can give an example in support of my position. As somebody who advocates a liberal interpretation of how imprisonment should be used, I think it should only be used for the

most serious crimes, including war crimes and crimes against humanity. I would hate to reach the conclusion that those individuals are being discriminated against just because they are imprisoned.

Mads Andenas: I just mentioned the European Court of Human Rights judgment in *M. S. S. v Belgium and Greece*¹⁸ which categorises asylum-seekers as “vulnerable” group in need of special protection. In *Oršuš* in 2010,¹⁹ the European Court had held that the Roma minority, as a result of their history, had become a specific type of disadvantaged and vulnerable minority in need of special protection. In *Alajos Kiss*,²⁰ also from 2010, persons with mental disabilities were included as a particularly vulnerable group in society, which has suffered considerable discrimination in the past. It will be interesting to see where the Court develops this concept of the “vulnerable minority”. Whether you regard “imprisonment” or “restriction of liberty” as a valid ground of discrimination or not may not be so important. Those subject to such restrictions have a right to have them subjected to an intense proportionality review. That includes a vigorous review of possible discrimination.

ERT: Following the question above, what criteria should be used to decide whether certain rights and liberties should be stripped away from prisoners and/or detainees? How does one assess, for example, whether prisoners should have the right to vote, and is the restriction of such a right an act of discrimination?

Mads Andenas: Here again we have a solid body of case law emerging. *Iwańczuk v Poland* from 2001²¹ concerned a person detained on remand exercising his voting rights. *Hirst v The United Kingdom (No. 2)*²² concerned a blanket ban on convicted prisoners’ right

to vote which the European Court of Human Rights held to be in violation of the right to vote under Article 3 of Protocol No. 1 of the European Convention on Human Rights. *Frodl v Austria*²³ concerned a prisoner serving a life sentence for murder in Austria. The Austrian provisions on disenfranchisement were more narrowly defined than in the case of *Hirst*, but the provisions were still not in conformity with the Convention as there was no link between the offence committed and the issues relating to elections and democratic institution.

European and international human rights courts and bodies will continue to develop these criteria. They are of essence to any political system and not suited for determination on a country by country basis. Countries that want to take part in a European legal order just have to accept this.

In *Hirst*, the UK Government submitted that the ban was in fact restricted in its application as it affected only around 48,000 prisoners, and made the point that this number included those convicted of crimes serious enough to warrant a custodial sentence and not including those detained on remand, for contempt of court or default in payment of fines.

The European Court's terse reply was that 48,000 prisoners was a significant figure and that it could not be claimed that the bar was negligible in its effects. It also included a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Also, in sentencing, the criminal courts in England and Wales made no reference to disenfranchisement and it was not apparent that there was any direct link between the facts of any individual case and the removal of the right to vote.

The UK Government also submitted that much weight had to be attached to the position adopted by the legislature and judiciary in the United Kingdom. The European Court of Human Rights could just point out that Parliament had never sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. There had been no parliamentary discussion on the justification, or even the continued justification in the light of modern day penal policy and of current human rights standards, for maintaining such a general restriction on the right of prisoners to vote. The nature of the restrictions was in general seen as a matter for Parliament and not for the national courts. The UK courts had therefore not undertaken any assessment of the proportionality of the measure itself.

This was not a good case for British democracy or rule of law. It was, however, a good case for international human rights supervision. The compliance with the judgment in *Hirst* is now turning into a major issue where the European Court of Human Rights and the European human rights system will not back down. It is a bad case for the UK government over which to pick a fight with "Europe" because it involves a matter of law and of human rights. But we all appreciate the populist appeal of succeeding with the trick of aligning "Europe", "human rights" and "prisoners" with one another.

Wilder Taylor: I have no doubt whatsoever that the disenfranchisement of prisoners is an act of discrimination. You send someone to prison because there is a judicial decision to restrict their liberty. In order for someone to be deprived of the right to vote, one would expect to have to confront at least an electoral offence. But any restriction of rights has to be interpreted in a restrictive

way. I know that, for example, in the US where the issue of disenfranchisement is common, it is not the actual act of discrimination that is the only cause of concern, because there is also a discriminatory effect. There are states in the US where 25% of the black male population is disenfranchised because they are in jail, or because they have been in jail and are no longer able to vote.

I appreciate that when you restrict liberty, associated rights – such as the right of peaceful assembly or public demonstration, or the right to have a family – will be impacted as a natural consequence. However, if the sentence imposed is a sentence of restriction of liberty, the idea of disenfranchising the detainee as an associated penalty is a discriminatory measure.

Interviewer on behalf of ERT:
Libby Clarke

¹ Andreas Baader and Ulrike Meinhof were members of the Red Army Faction, a German urban guerrilla group of the late 1960s and 1970s. They were imprisoned in the high security facility Stammheim in Germany. Reports that several of the Red Army Faction leaders, including Baader and Meinhof, had committed suicide in prison started a controversy which has lasted until today.

² *Ireland against the United Kingdom*, Appl. no. 5310/71, Report of the European Commission of Human Rights, 25 January 1976.

³ Statement made during the Press Conference of President Bush and Tony Blair, July 17th 2003, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030717-10.html>.

⁴ *Brown v Plata*, 563 U.S. 09-1233 (2011).

⁵ Woolf, H., *Prison Disturbances: April 1990: Report of an Enquiry. Rt. Hon. Lord Justice Woolf (Parts I and II) and His Honour Judge Steven Tumin (Part II)*, Cm 1456, HMSO, 1991.

⁶ UN Working Group on Arbitrary Detention, *Civil and Political Rights, including the questions of torture and detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, Para 73-74.

⁷ UN Working Group on Arbitrary Detention, *Civil and Political Rights, including the questions of torture and detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2003/8, 16 December 2002, Paras 68-70.

⁸ Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004.

⁹ See above, note 5.

¹⁰ Canivet, G. (Chair of Commission), *Report on the improvement of external control of prison facilities*, La Documentation Française, 6 March 2000.

¹¹ *R v The Commissioner of the Police of the Metropolis*, UKSC 2010/0173, May 18 2011, Para 4.

¹² See above, note 5.

¹³ *R v Secretary of State for the Home Department (Respondent) ex parte Amin* (FC) (Appellant) [2003] UKHL 51.

¹⁴ *Paul and Audrey Edwards v UK*, Appl. no. 46477/99, ECHR, 14 March 2002.

¹⁵ *Nachova and Others v Bulgaria*, Appl. nos. 43577/98 and 43579/98, ECHR, 6 July 2005.

¹⁶ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, General list no. 103, November 2010.

¹⁷ *M. S. S. v Belgium and Greece*, Appl. no. 30696/09, ECHR, 21 January 2011.

¹⁸ *Ibid.*

¹⁹ *Oršuš and Others v Croatia*, Appl. no. 15766/03, ECHR, 16 March 2010.

²⁰ *Alajos Kiss v Hungary*, Appl. no. 38832/06, ECHR, 20 May 2010.

²¹ *Iwańczuk v Poland*, Appl. no. 25196/94, ECHR, 15 November 2001.

²² *Hirst v The United Kingdom (No. 2)*, Appl. no. 74025/01, ECHR, 6 October 2005.

²³ *Frodl v Austria*, Appl. no. 20201/04, ECHR, 8 April 2010.