

Memorandum on the compatibility of the practice of bringing fabricated charges with international human rights standards, national jurisprudence and international standards on policing

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1. Introduction

This Memorandum has been prepared by REDRESS to provide legal arguments to support the Asian Human Rights Commission in its litigation of cases concerning 'fabricated charges,' two of which are described in more detail below. It has been drafted in response to several cases in Sri Lanka in which such charges have been used, often in combination with torture and ill-treatment either to detain and prosecute a person and/or to deter (the pursuit of) complaints of torture. This practice is of utmost concern because it constitutes an abuse of power that undermines the rule of law in Sri Lanka, facilitates the use of torture in the course of criminal proceedings and contributes to impunity.

The Memorandum provides an analysis of the compatibility of such practices with international human rights standards and international standards applying to the conduct of law enforcement officers. It focuses on violations inherent in the use of fabricated charges. The Memorandum does not include an analysis of incidental violations that may and often do occur in cases of fabricated charges, such as denial of custodial safeguards, in particular the right to access a lawyer and the right to habeas corpus, torture and ill-treatment, and a violation of the right to be tried within a reasonable time.¹ The legal standards pertaining to these violations, some of which were alleged in the two cases described below, and the arguments to be made would need to be analysed, in addition to the issue of 'fabricated charges,' taking into account the circumstances of the case at hand.

The term 'fabricated charges' denotes a practice where the police knowingly bring unfounded charges against an arrested or detained person, which may serve one or several of the following purposes:

- (i) justifying the initial arrest and/or continued detention of a person, including preventing that a person is released on bail; and
- (ii) securing a conviction against a person.

The case of Dodampe Gamage Asantha Aravinda illustrates this practice. According to the Asian Human Rights Commission:

"Dodampe Gamage Asantha Aravinda, a young man was traveling on a motor scooter with a friend when he was struck behind by a truck. In the accident Aravindra's friend suffered injuries while Aravindra was thrown to the side of the road. The truck driver, who was a businessman in the area, ran from the scene and came back with a group of policemen from the Pitabaddara Police Station, Matara. The group included the Officer-in-Charge of the station. The policemen arrested Aravindra and assaulted him severely. When he cried for help and asked for water, instead of water the truck driver offered him a cup containing acid. When Aravindra refused to drink it, the acid was thrown in his face. The police later took Aravindra and his friend to the police station and held them for several days without medical treatment. Finally due to the pressure exercised by the families, they were brought to a hospital where the doctors declared that Aravindra had permanently lost the use of one eye. In the meantime, the Officer-in-Charge of the station filed charges against Aravindra for being in possession of a live bomb and stated in the report to the Magistrate that some unknown person had thrown acid in Aravindra's face. Due to the fact that it was dark at the time the acid thrower could not be identified. As one of the fabricated charges filed, the possession of a live bomb, is a non-bailable offense, the victim who suffered the acid attack and lost the sight in one eye is now in remand prison while the acid thrower remains at large. Despite of complaints made to the Assistant Superintendent of Police, Akuressa, other senior police authorities in the area, the Inspector General of Police, the Human Rights Commission of Sri Lanka and the National Police Commission, about the acid attack and the fabrication of charges, no inquiries have been held and nothing has been done to release Aravindra from the fabricated charges."

The police may also, in addition or separately, fabricate charges against a person (or threaten a person with bringing such charges) who has complained about torture and/or other forms of ill-treatment in order to deter him or her from pursuing such complaint further.

This is what happened in the case of Sarath Kumara Naidos according to the Asian Human Rights Commission:

"Sarath Kumara Naidos is a young construction worker. He was arrested on the 5th July 2008, at noon at a place close to his sister's house where he was residing. From the moment of arrest, members of Mr. Naidos' family visited him several times each day at the Moratuwa Police Station where he was being held. The family members and others, including two lawyers, heard his complaint that he was being beaten severely several times a day and that the police officers were demanding that he should hand over the gold he was supposed to have stolen. Pleas by him and his family that they were unable to return what they had not stolen were of no avail. From the 5th to the 13th July he was held at this police station. The family members made complaints, including written complaints to the Inspector General of Police, the Human Rights Commission of Sri Lanka and the National Police Commission with regard to illegal detention and torture and pleading that Mr. Naidos be brought before a magistrate. Angered by these complaints, the police filed an added charge when he was finally produced before a magistrate on the 13th July. According to this charge Mr. Naidos was arrested in possession of 2,300 milligrams of heroin at 11:30 p.m. on the night of the 12th. As Mr. Naidos was in police custody from the 5th to the 13th July it was physically impossible for him to have been found in this manner on the evening of the 12th. The charge of possession of such a quantity of heroin is a non-bailable offense and if proved also carries the death sentence. The complaints made to the Superintendent of Police, Moratuwa, other local police authorities, and the offices mentioned above have not lead to any inquiries. Despite of lengthy representations with oral and written evidence in proof of the illegal detention and torture of Mr. Naidos, nothing has yet been done to release him and take action against the officers who have fabricated the charges."

An obvious challenge to using the concept of 'fabricated charges' is the difficulty of determining whether charges are genuine, i.e. based on sufficient prima facie evidence, or the result of the deliberate framing of the person concerned. This is essentially an evidentiary matter, the outcome of which depends on the circumstances of the case concerned and the applicable rules of evidence. The following considerations are based on the assumption that it can be shown that the charges were unfounded and the police knew them to be unfounded.

2. Violations of due process and fair trial rights

2.1. Violation of the right to liberty and security of the person

Article 9 (1) ICCPR requires that any arrest and/or detention must be carried out in accordance with the law and must not be arbitrary: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary

arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

(i) Lawfulness: The existence of reasonable suspicion

There is often no information or facts to warrant an arrest and/or detention. Subsequently, the police may plant evidence or obtain it by unlawful means, prior or subsequent to the arrest, to show that facts and/or information existed that would have justified the arrest. An arrest that is not based on the existence of facts and/or information according to which the person concerned may have committed a criminal offence is unlawful.

The European Court of Human Rights elaborated on the meaning of ‘reasonable suspicion’ in the case of *Gusinskiy v Russia*:

“The Court reiterates that in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c) it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 29-30, § 53). Neither is it necessary that the person detained should ultimately have been charged or taken before a court. The object of detention for questioning is to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention (see *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55). **However, the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words “reasonable suspicion” mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, pp. 16-17, § 32). [Emphasis added].”²**

“...[What] may be regarded as ‘reasonable’ will ... depend on all circumstances of case”

as held by the Court in the case of *Fox, Campbell and Hartley v. the United Kingdom*.³

Most domestic laws that govern the arrest of a person suspected of having committed a criminal offence require an arrest to be based on a reasonable

suspicion. The arrest of a person irrespective of any available evidence against him or her with a view to obtaining a confession/information by unlawful means and/or fabricating charges (either from the outset or subsequently) in order to justify prosecution will be contrary to most if not all national laws.

National courts have repeatedly found arrests unlawful where the police had failed to show that there were sufficient factual grounds for a 'reasonable suspicion.'

The Tonga Court of Appeal, in the case of *Fifita & Anor v Fakafanua*, held that:

"the respondent was not arrested on reasonable grounds of suspicion of having committed an offence but simply because the police wanted to interrogate him" and that "assumed facts do not provide any grounds for suspicion."⁴

The Constitutional Court of the Seychelles found in *Charles v. The Attorney General* that:

"In the case of 'reasonable suspicion' for the burden to be discharged the state's evidence must disclose the grounds for so holding (*Talma v Sauzier* 1974 SLR 163 applied). However, in this case, there is only a bare averment regarding the issue in the affidavits of the two arresting police officers which does not disclose any act done or even the presence of C at the scene of the fire. In these circumstances, the burden has not been discharged...."⁵

The Sri Lankan Supreme Court has found a violation of the fundamental right to liberty under Article 13 (1) of the Constitution in several cases where a reasonable suspicion was lacking, such as in *Hewagam Koralalage Maximus Danny v IP Sirinimal Silva & Ors*:

"Therefore for the petitioner to be lawfully charged under the Ordinance there must have been evidence that he had committed an offence under it. However, there was neither a complaint nor any reasonable suspicion that he had done so as he was merely a passive occupant staying overnight with a companion. In these circumstances his arrest was clearly unlawful violating his fundamental rights under Art 13(1)."⁶

(ii) Arbitrariness

Intentionally bringing charges that are unfounded, i.e. not based on facts and/or information obtained lawfully, as a means of justifying arrest and/or continued detention grossly violates the fundamental tents of due process of law. An arrest and/or the detention of a person based on such charges would be arbitrary.

Even where an arrest may be lawful under applicable domestic law, the arrest and detention of a person may violate the right to liberty and security of the person if it were arbitrary. According to the decision of the Human Rights Committee in *Mukong v. Cameroon*:

“Arbitrariness is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law... remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances...”⁷

The Inter-American Court of Human Rights applied the notion of arbitrariness in the case of *Gangaram Panday v. Suriname*:

“No one may be subjected to arrest or imprisonment for reasons and using methods that – although classified as legal – can be considered incompatible with regard for the fundamental rights of the individual, because they are, among other matters, unreasonable, unpredictable, or disproportionate.”⁸

Following the initial arrest and investigation, any continued detention must be based on specific charges. Moreover, according to the Human Rights Committee in the case of *Mukong v Cameroon*:

“remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances,”⁹ and, “in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.”¹⁰

Deliberately accusing someone of a crime that he or she has not committed and laying charges to this end violates fundamental principles of criminal justice, in particular the presumption of innocence. Arresting someone on those grounds and/or seeking to remand or remanding him or her in custody on the basis of charges known to be false for which no appropriate justification can be provided (even where there had been a reasonable

suspicion at the time of arrest) constitutes an apparent injustice that is clearly not reasonable in the circumstances.

There is ample national jurisprudence by courts that have applied notions of 'arbitrariness' in finding a breach of fundamental rights of liberty and security and/or the commission of the tort of 'false imprisonment,' often in combination with the tort of 'malicious prosecution.'

The Sri Lankan Supreme Court has in several instances found a violation of the fundamental right to liberty in cases of fabricated charges on the grounds that conclusions resulting in arrest and detention were "wilfully false, perverse and unreasonable."¹¹ In addition, the Court held that arbitrariness may be inferred where the police fails to file a plaint in connection with a charge within a reasonable time, in particular where other evidence corroborates the arbitrary nature of arrest or detention.¹²

Arrest and detention will also be arbitrary if the public authority acted mala fides, i.e. abused its power where it cannot be established that it genuinely pursued the purposes it avowed to pursue. The Court of Appeal in Malaysia held in *Mohamad Ezam Bin Mohd. Noor & Ors v Inspector General of Police* that this was the case where petitioners were detained for questioning about their political beliefs rather than the purported national security grounds.¹³

Arrests and detentions that are malicious are by their very nature arbitrary. As held by the Judicial Committee of the Privy Council in *Harracksingh v Attorney General of Trinidad & Tobago & Anor*:

"If illegal acts are really done for some motive other than an honest desire to execute a legal duty and without an honest belief that they are done legally, e.g. from a desire to injure a person, then the Act is no defence (dicta of Scrutton LJ in *Scammel and Nephew Ltd v Hurley* [1929] 1 KB 419 at page 427 applied). ... The charging of a person with an offence, which the arresting officer knows he has not committed, necessarily involves a lack of honest belief on the part of the officer, and his motive can only have been improper, and liability for malicious prosecution in such a case is 'irresistible'.¹⁴

2.2. Violation of the right to presumption of innocence

Arresting and detaining a person, and even seeking to prosecute him or her on the basis of charges known to be unfounded, which may be accompanied by efforts to corroborate such charges by means of coercion, reliance on false witness statements, planting of evidence or other methods designed to

falsely implicate a person is fundamentally opposed to the presumption of innocence.

The presumption of innocence is a fundamental principle of criminal proceedings enshrined in article 14 (2) of the ICCPR and recognised in all regional human rights treaties.¹⁵ According to the General Comment 32 of the Human Rights Committee on article 14:

"The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle."¹⁶

The presumption of innocence is so fundamental to criminal justice that there is a high threshold for the establishment of guilt. The Inter-American Court of Human Rights, for example, has emphasised the importance of the presumption of innocence in the case of *Calderon v Ecuador*, where it made clear that:

"This Court has stated that the principle of presumption of innocence constitutes a foundation for judicial guarantees. ... It would constitute a violation to the Convention to keep a person whose criminal responsibility has not been established detained for a disproportionate period of time. This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law."¹⁷

Accordingly, prosecutors and investigators must do their utmost to establish the facts, identify the perpetrators and bring charges where the evidence warrants it provided it has been obtained in the course of investigations complying with international standards.¹⁸ Seeking to portray a person as guilty knowing that there is no evidence to support such claim, constitutes a violation his or her right to be presumed innocent and perverts the course of justice.

3. Right to an effective remedy and reparation in case of arbitrary arrests and detention

International human rights treaties, in particular article 2 (3) of the ICCPR, provides victims of violations with the right to an effective remedy. The act of

wrongfully arresting and/or detaining a person on the basis of charges known to be unfounded gives rise to the right to a remedy and entails a duty of the state authorities to investigate those responsible for the violation, and to prosecute and punish them accordingly.

Cessation (release) and the duty to investigate violations

Anyone who has been arrested must have the possibility to challenge promptly the lawfulness of detention and, in regular periodic intervals, the lawfulness of continued detention.¹⁹ The cessation of an ongoing violation, which would, in the case of fabricated charges, consist of release from custody in order to stop the continued unlawful detention (or to prosecute the person without undue delay),²⁰ constitutes an integral part of the right to an effective remedy.

State parties also have a positive obligation to investigate allegations of violations and to take appropriate measures, including sanctions against the perpetrators, in order to prevent repetition. These principles have been recognised by the UN Human Rights Committee in its General Comment 31:

“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.”²¹

In case of complaints that detention is arbitrary because it is based on fabricated charges, or where a judicial body orders the release of a detainee on such grounds, the competent authorities should commence a prompt, impartial and effective investigation with a view to establishing the facts and to identifying the persons responsible. Where the latter have acted unlawfully or have even committed a criminal offence, the person(s) concerned should be subject to disciplinary or criminal proceedings, as appropriate, and should be given adequate punishments.²²

Compensation

Victims of arbitrary arrests and detention are entitled to compensation and other forms of reparation.

Article 9 (5) of the ICCPR explicitly stipulates a right to compensation for the victims of unlawful arrest or detention: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

The Human Rights Committee has found in a series of decisions that states parties are under an obligation to provide adequate compensation in cases of arbitrary arrest and detention, without, however, specifying the amount of compensation.²³

In case of arbitrary arrest and/or detention based on false charges, any award should reflect the material damages and the mental harm due to the powerlessness stemming from the knowledge that the law enforcement authorities deliberately fabricated such charges. According to the Human Rights Committee, states parties must make reparation, which comprises compensation and other appropriate forms:

"Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."²⁴

According to the jurisprudence of regional human rights courts, victims of violations of their right to liberty are entitled to material damages, which need to be proved, and to moral damages proportionate to the violation. Human rights courts have awarded moral damages for arbitrary arrest and detention for the distress, anxiety and frustration suffered by the victim, for example the European Court of Human Rights in the case of *Rakevich v Russia*:

"The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary loss. She referred to the emotional stress and anxiety caused by her detention in the psychiatric institution. She underlined that she had also felt helpless because of the manner in which her detention had been effected and the inability to challenge it.

The Court observes that some forms of non-pecuniary damage, including emotional distress, by their very nature cannot always be the object of concrete proof (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 96). This does not prevent the Court from making an award if it considers that it is reasonable to assume that an applicant has suffered prejudice requiring financial compensation. In the present case, it is reasonable to assume that the applicant suffered distress, anxiety and frustration because her detention, for many days, was not based on a judicial decision.

Deciding on an equitable basis, the Court awards the applicant EUR 3,000 under this head."²⁵

There is ample national jurisprudence according to which anyone who knowingly arrests and/or detains someone without lawful grounds or arbitrarily incurs liability for the tort of false imprisonment. In addition, bringing a prosecution on the basis of fabricated charges gives rise to liability for the tort of malicious prosecution. For example, in the case of *Thompson v Commissioner of Police of the Metropolis; HSU v Commissioner of Police of the Metropolis*, the police were found by the jury to have deliberately fabricated a case of assault on police officers against both of the plaintiffs to cover up their previous wrongdoing, i.e. in once case physical assaults and racial abuse before arrest.²⁶ The Court awarded aggravated and exemplary damages to both plaintiffs for several violations, including wrongful arrest, false imprisonment and malicious prosecution.

The Supreme Court of the Bahamas held in *Tynes v. Barry*, that, whilst "special damages must be strictly proven", "damages for the tort of assault, battery and malicious prosecution were at large." As such, there is no limit to the amount of damages, which:

"should include an amount for the humiliation, i.e. the injury the plaintiff had endured to his dignity and pride; mental suffering (as the plaintiff suffered from claustrophobia); and loss of reputation."²⁷

The Nigerian Supreme Court held in *Odugu v. Attorney-General of the Federation & Ors* that:

"Compensation in cases such as this should reflect not only the actual pecuniary loss of the victim but also the abhorrence of society and the law for such gross violations of human rights. This is especially so for cases involving a breach of personal liberty, which is a commodity of an inherently high value. An unwitting trivialisation of a serious matter by an inordinately low award should be avoided."²⁸

Awards in tort cases frequently include exemplary damages for 'oppressive, arbitrary or unconstitutional action.'²⁹

Courts have frequently awarded compensation for a breach of the right to liberty in fundamental rights cases. In South Asia, the Indian Supreme Court has awarded damages for a number of pertinent fundamental rights violations since its judgment in the case of *Rudul Shah v. State of Bihar* in 1984, which concerned unlawful detention. Justice Anand specified, in the case of *Nilabati Behera v State of Orissa*, that in fundamental rights cases:

"the compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty [of not protecting the fundamental rights of its citizens] and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."³⁰

"The quantum of compensation will depend upon the peculiar facts of each case... [and is] awarded by the court (and paid by the state) to redress the wrong done..." as held by the Indian Supreme Court in the *D.K. Basu* case.

The High Court of Sind, Karachi, Pakistan, held in *Mazharuddin v State*, a case of unlawful arrest where there was no "material whatsoever before the court to show that M's arrest was legal or that there were reasonable grounds for believing that M was involved in an alleged offence (Government of Sindh & Ors v Raeesa Farooq & Ors 1994 SCMR 1283 (Pak SC) followed)" that:

"No credit whatsoever could be attached to his statement, which had been falsely made to cover up the illegality of his action."... "The right to recover compensation, provided for under the CPC, is now internationally recognised

in Art 9(5) of the International Covenant on Civil and Political Rights. Such compensation is payable by way of a public law duty of the state and its officers and is independent of the private rights that a citizen may have to claim damages in tort through ordinary proceedings... The amount of such compensation should be determined by the court in its discretion, keeping in view the principles applied in awarding general damages in cases of false imprisonment and exemplary damages in cases of mala fide conduct of public officers under the law (dicta of Kaikaus J in *Nawab Din v Muhammad Yousuf* PLD 1957 Lahore 283 (Pak Lah HC) followed). Special damages sustained by a victim of unlawful imprisonment, however, can only be proved through ordinary civil suit. Compensation ought to be substantial and not nominal.³¹

The Sri Lankan Supreme Court has also awarded compensation in several cases of unlawful arrest and detention constituting a breach of the fundamental right to liberty, such as in *Weerawansa v. Attorney-General & Ors*, *Hewagam Koralalage Maximus Danny v IP Sirinimal Silva & Ors* and *Faiz v. Attorney-General & Ors*.³²

4. Violation of the right to complain of torture and the duty to investigate allegations of torture promptly, impartially and effectively
Bringing charges known to be false as a means of deterring (the pursuit of) complaints about torture constitutes a violation of the right to complain of torture and the state's duty to investigate allegations of torture promptly, impartially and effectively.

Article 13 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment stipulates a right to complain about torture and to have the complaint investigated promptly, impartially and effectively. States have a corresponding obligation under international human rights treaties, such as article 12 of the UNCAT and article 7 of the ICCPR, to conduct such investigations following a complaint or *ex officio*.

Article 13 of the UNCAT expressly requires states to take steps:

“to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

Article 33 (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

"Neither the detained or imprisoned person nor any complainant ... shall suffer prejudice for making a request or complaint."

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law recognise that states should:

"... ensure their [victims and their representatives] safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims." ³³

A person who complains about torture or ill-treatment may subsequently be charged with an offence related to the alleged torture, for example having resisted police officers (and incurred injuries in the process), or any other offence, which may relate to the initial arrest or a separate incident.

Bringing such charges will constitute a violation of the right to complain about torture if the charge is unfounded and the state authorities take such action in response to the complaint and in order to deter the person from pursuing the complaint further. The obstruction of an investigation intended by such conduct will also constitute a violation of the state's duty to investigate a complaint promptly, impartially and effectively. The same reasoning applies to unfounded charges being brought against any person in anticipation of any complaint if it is clear that its purpose is to deter him or her from pursuing a complaint.

The Committee against Torture, in its conclusions and recommendations on Germany's state party report, expressed its concern about:

"Some allegations that criminal charges have been brought, for punitive or dissuasive purposes, by law enforcement authorities against persons who have brought charges of ill-treatment against law enforcement authorities." ³⁴

Fabricated charges brought against the relatives of the complainant or his or her lawyer also constitute a violation of the right to complain if they are aimed at deterring the complainant him or herself from pursuing the complaint.

In the case of *Kurt v. Turkey*, the applicant's son had been forcibly disappeared by soldiers and village guards. Subsequent to the applicant filing a petition to the then European Commission on Human Rights, the Turkish Government charged the applicant's lawyer with aiding and abetting the PKK, which was considered a terrorist organisation in Turkey at the time. The Court held that the bringing of charges constituted an interference with the applicant's right to petition the Commission:

"The Commission concluded that the authorities had not directly coerced the applicant. Nevertheless, and with particular regard to the circumstances of the applicant's two visits to the notary in Bismil, they had applied improper indirect pressure in respect of her complaint to the Convention institutions. Furthermore, the threatened criminal proceedings against the applicant's lawyer also gave rise to a serious interference with the exercise of the right of individual petition.

As to the threat of criminal proceedings invoked against the applicant's lawyer, the Court does not agree with the Government's assertion that these were unrelated to the application lodged with the Commission (see paragraph 157 above). The threat of prosecution concerned the allegations which Mr Şakar made against the State in the application which he lodged on Mrs Kurt's behalf. While it is true that the statement of complaint which was submitted to the Commission contained allegations which were found to be false and which Mrs Kurt herself repudiated, it must be stressed that the task of examining the substance of particular complaints falls to the Commission in the context of its fact-finding powers and having regard to the procedures which the Convention offers the respondent State to challenge the merits of the accusations levelled at it. It is not for the authorities to interfere with that process through the threat of criminal measures against an applicant's representative.

For the above reasons, the moves made by the authorities to institute criminal proceedings against the applicant's lawyer, even though they were not followed up, must be considered an interference with the exercise of the applicant's right of individual petition and incompatible with the respondent State's obligation under Article 25."³⁵

5. Standards for law enforcement officials and prosecutors and abuse of power

The practice of fabricating charges in order to justify arrest and/or detention and/or to dissuade persons from pursuing complaints about police

misconduct, in particular torture, constitutes an abuse of power that violates internationally recognised standards of policing.

International standards on policing are based on the principle that law enforcement officials must adhere strictly to the law and respect national and international human rights standards. Article 1 of the UN Code of Conduct for Law Enforcement Officials³⁶ stipulates that:

“Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.”

According to Article 2 of the Code of Conduct:

“In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”

Any abuse of power, including by means of fabricating charges, with which the police has been vested for the public good is fundamentally incompatible with these principles.³⁷

The European Code of Police Ethics adopted by the Council of Europe³⁸ specifies police duties in the course of the exercise of their functions, in particular criminal investigations, such as that:

“Police must always verify the lawfulness of their intended actions”...“Police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence of crime” and “Police investigations shall be objective and fair...” Moreover, “Public authorities shall ensure effective and impartial procedures for complaints against the police.”

It is evident that the bringing of fabricated charges, be it as a means of justifying arrest and/or detention and/or to secure a conviction or as a means of deterring complainants, violates the fundamental principles laid down in the European Code of Ethics.

The principle of respecting the rule of law and human rights also applies to prosecutors. The Guidelines on the Role of Prosecutors³⁹ stipulate that

"Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

This imposes a specific duty on prosecutors to act where they become aware that charges may have been the result of fabrication. If a prosecutor finds this to be the case, he or she should also seek to establish the methods used to obtain evidence against suspects and other forms of misconduct, and shall investigate and prosecute those responsible accordingly, as stipulated in paragraphs 15 and 16 of the Guidelines:

"Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

1. These rights are guaranteed in particular in articles 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR).
2. *Gusinskiy v. Russia*, (Application no. 70276/01, 19 May 2004), para.53.
3. *Fox, Campbell and Hartley v. the United Kingdom* (Application no. 12244/86; 12245/86; 12383/86, 30 August 1990), para.32.
4. *Fifita & Anor v Fakafanua*, [2000] 1 LRC 733.
5. *Charles v Attorney General*, Constitutional Case No 5 of 1998, unreported; (2002) 3 CHRLD 316.
6. *Hewagam Korallalage Maximus Danny v IP Sirinimal Silva & Ors SC* (Application) No. 488/98, unreported; (2000) 3 CHRLD 210.
7. *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para.9.8.
8. *Case of Gangaram Panday v. Suriname*, (Merits, reparations, and costs), Judgment of January 21, 1994, Series C No. 16, para. 47.

9. *Mukong v. Cameroon*, supra n.7, para.9.8.
10. *Mr. C v. Australia*, Communication 900/1999, UN Doc. CCPR/76/D/900/999, 28 October 2002, para. 8.2: "As to the claims relating to the first period of detention, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification."
11. *Weerawansa v. Attorney-General and others*, [2000] 1 LRC 407; (2000) 3 CHRLD 211.
12. *Faiz v Attorney-General & Ors*, [1996] 1 CHRLD 79.
13. *Mohamad Ezam Bin Mohd. Noor & Ors v Inspector General of Police, Court of Appeal, Malaysia*, (2002) 4 MLJ 449; (2003) 4 CHRLD 91.
14. *Attorney General of Trinidad & Tobago & Anor*, [2004] UKPC 3.
15. Article 6 (2) of the European Convention on Human Rights, Article 8 (2) of the American Convention on Human Rights, and Article 7 (1) (b) of the African Charter on Human and Peoples' Rights.
16. Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para.30.
17. *Case of Acosta Calderón v. Ecuador* (Merits, Reparations and Costs), Judgment of 24 June 2005, Serie C. No.129, para.111.
18. See also Guidelines on the Role of Prosecutors, discussed in more detail below at (5).
19. See in particular article 9 (4) of the ICCPR.
20. *Cagas v. Philippines*, Communication No. 788/1997, UN Doc. CCPR/C/73/D/788/1997, 23 October 2001, para.9.
21. Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para.15.
22. *Bautista de Arellana v Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993, para.8.6.
23. See, for example, *Fernando v. Sri Lanka*, Communication No.1189/2003, UN Doc. CCPR/C/83/D/1189/2003, 10 May 2005, paras. 9.2 and 11; *Rouse v. The Philippines*, Communication No. 1089/2002, UN Doc CCPR/C/84/D/1089/2002, 5 August 2005, paras. 7.7, and 9, and *Marques v. Angola*, Communication No. 1128/2002, UN Doc. CCPR/C/83/D/1128/2002, 18 April 2005, paras. 6.1- 6.6 and 8.
24. Human Rights Committee, General Comment 31, supra n. 21, para.16.
25. *Rakevich v Russia* (Application no. 58973/00, 28 October 2003), paras.50, 52 and 53.
26. *Thompson v Commissioner of Police of the Metropolis; HSU v Commissioner of Police of the Metropolis*, [1997] 2 All ER 762; (1997) 2 CHRLD 161.
27. *Tynes v. Barr*, (1992) 45 WIR 7; [1996] 1 CHRLD 117.
28. *Odugu v. Attorney-General of the Federation & Ors*, [1996] 6 NWLR (PT 456) 508; [1996] 3 CHRLD 432; [2000] 2 HRLA 82.
29. See for example *Samuels v The Attorney General*, Judgment of the Jamaican Supreme Court, [1996] 1 CHRLD 120.

30. *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 (Ind SC).
31. *Mazharuddin v State*, P Cr LJ 1998 1035; (1998) 2 CHLRD 305.
32. *Weerawansa v. Attorney-General & Ors*, supra n.11, *Hewagam Korallalage Maximus Danny v IP Sirinimal Silva & Ors*, supra n.6 and *Faiz v. Attorney-General & Ors*, supra n.12.
33. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 16 December 2005, Principle 12 (b).
34. Conclusions and recommendations of the Committee against Torture: Germany, UN Doc. CAT/C/CR/32/7, 11 June 2004, para.4 (b).
35. *Kurt v Turkey*, (15/1997/799/1002, 25 May 1998), paras.158, 164 and 165.
36. UN Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979.
37. See, for example, commentary to article 7 of the Code of Conduct for Law Enforcement Officials.
38. The European Code of Police Ethics, Recommendation Rec(2001) 10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum.
39. Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.