ACT 40/008/1985

SAFEGUARDS AGAINST TORTURE

A list of preventive and remedial measures

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Safeguards against torture

In response to allegations of torture, governments usually respond (if they respond at all) by denying the facts or by contending that whatever allegations may be true are isolated incidents and the work of a few excessively zealous security agents. They may also point out that torture is against the law but the fact that torture or other ill-treatment occurs in dozens of countries while it is prohibited under the legal systems of at least 112 countries clearly shows that a simple legislative prohibition is not sufficient to ban torture. Where the political will exists, a government can stop torture. Conversely, if few objectively verifiable preventive and remedial measures have been taken, then it is fair to conclude that a government's opposition to torture is less than serious.

The Human Rights Committee, in an authoritative "General Comment" adopted on 27 July 1982, pointed out that it is not sufficient for the implementation of Article 7 of the International Covenant on Civil and Political Rights, the prohibition of torture and of cruel, inhuman or degrading treatment or punishment, for states to make such practices a crime. Since the practices occur despite existing penal provisions, states should take additional preventive and remedial steps to ensure effective control. At the very least, in the Committee's view, these measures should include the following:

> "Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to Article 7 inadmissable in court; and measures of training and instruction of law enforcement officials not to apply such treatment."

Any universally applicable set of measures to stop torture must include those listed by the Human Rights Committee. Based on its own experience, Amnesty International has elaborated a more comprehensive body of safeguards and remedies against torture. The following measures derive from evidence provided by personal testimonies of torture, the work of domestic groups and international organizations combating torture and the lessons learned from the experience of particular countries in curtailing torture.

1. Official directives condemning torture

The head of state, head of government and heads of different security forces should state unequivocally that they will not tolerate, under any circumstances, the ill-treatment of detainees by officials at all levels under their responsibility. Such clear orders from the top, when disseminated to all agents, would be a forceful signal that detainees' rights and the law itself must be respected.

2. Restriction of incommunicado detention

Almost invariably the victims of torture are held incommunicado, both for purposes of interrogation and to allow any marks of torture to disappear. Ensuring prompt and regular access to one's own lawyer, doctor and family and to a court of law would diminish the likelihood of ill-treatment, especially during the first hours and days of detention when, in Amnesty International's experience, ill-treatment is most likely. All prisoners should be brought promptly before a judicial authority to assess the legality and necessity of the detention as well as the treatment of the detainee.

The following questions provide an indication of a government's willingness to provide safeguards against the abuse of incommunicado detention. Does the government allow the courts the independence to enforce writs of *habeas corpus*, *amparo* or similar remedy whenever a detainee is not brought quickly before a court of law? Does the government require that the detaining authorities allow prompt and regular access to the detainee by his or her lawyer as well as prompt and reasonable access by members of the family? Can an independent physician chosen by the family gain access to the detainee upon reasonable request, even if the detainee has not made such a request?

Regular communication and consultation with a lawyer are of the utmost importance to ensure, among other legal guarantees, that statements taken in evidence from the detainee are given freely and not as a result of coercion. Such consultations must occur at a minimum before and between interrogation sessions and in a degree of privacy if the lawyer's presence is to serve as a credible restraint on the interrogators' potential abuse of power.

3. Record-keeping by the detaining authority

In some countries torture takes place in secret centres. Governments should ensure that prisoners are held in publicly recognized places and that accurate information about their whereabouts is made available to relatives and lawyers.

There should be no doubt where and in whose care a prisoner is at a given time. An accurate central register of detainees in each district, in the form of a bound book with numbered pages, with a record of their time of arrest and places of initial and subsequent detention would prevent secret detention and the "disappearance" of people in custody.

It would also give families and lawyers the possibility of locating the detainee. Each detention centre should be required to keep a detailed contemporary record, again bound with numbered pages, of the time of arrest, identities of the authorities who performed the arrest, time of appearance before a judicial authority, times and durations of each interrogation session, times when statements were given, and a complete record of who was present at all of the above instances. All officers present at the taking of a written statement could be required to countersign the statement.

Such records could be supplemented by a personal data sheet giving information about the times of medical examinations, who conducted them, times and places of interrogation, identities of interrogators by name or number, a record of meals and of requests or complaints made by detainees or on their behalf. This data sheet would accompany the detainee when transferred, and the officer in charge of the detainee would sign the data sheet.

Legitimate force used against a detainee or violence by the detainee against guards, interrogators or his or her self could be recorded on this data sheet. Evidence of injuries sustained in custody in the absence of any such record would be an indication that these injuries were more likely to be the result of illegal violence used by officials than of any above-mentioned (but unrecorded) causes.

All records would be available to the detainee and his or her legal adviser.

4. Safeguards during interrogation and custody

Strict procedures are needed to regulate the process of interrogation itself. A clear chain of command within the agency would indicate who is responsible for supervising interrogation procedures and practices and for disciplining officers who violate these procedures. The procedures could include such matters as the regular and personal supervision of interrogation by senior officers, as well as specified limitations on the duration of interrogation sessions and the number of interrogators.

Particular precautions should be taken to avoid the abuse during interrogation of women and juvenile detainees. Procedures should stipulate that a female officer be present during all interrogation of women detainees and that the questioning of juveniles take place in the presence of a parent or guardian. It would be a further commitment to preventing torture if the government published the interrogation procedures currently in force and periodically reviewed both procedures and practices, inviting submissions and recommendations from civil rights groups, defence lawyers, bar associations and other interested parties.

5. Notification to detainees of their rights

At the moment of detention or arrest, or promptly thereafter, detainees should be entitled to know why they have been detained or arrested, where held and by which agency. They should also receive an explanation, orally and in writing, in a language that they understand, of how to avail themselves of their legal rights, including the right to lodge complaints of ill-treatment.

6. Regular system of visits to places of detention

Detention centres should be visited regularly and routinely by individuals independent of the detaining authorities. These individuals may be appointed by independent national bodies, or they may be delegates from international bodies such as the International Committee of the Red Cross. They should be able to communicate with detainees without prison staff being present.

7. Separation of authority over detention and interrogation

Detainees subjected to torture are often held in custody and interrogated by the same agency. The formal separation of these two security functions would allow some protection for detainees by providing a degree of supervision of their welfare by an agency not engaged in interrogating them.

8. Training in human rights norms for all security agents

All personnel involved in law enforcement duties—military, police and prison staff—should receive proper education and training concerning the prohibitions against torture given in the Universal Declaration of Human Rights and other instruments including the UN Code of Conduct for Law Enforcement Officials, the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Declaration against Torture. Domestic laws and regulations against torture should be included. These texts should be translated as necessary and disseminated to all central and local authorities involved in the process of arrest, interrogation, detention or the administration of justice. An absolute prohibition of torture and ill-treatment as crimes under domestic law should be visibly displayed in every detention centre in the country. Law enforcement officials should be instructed that they are obliged to refuse to obey any order to torture.

9. Domestic legislation

The UN Declaration against Torture calls on each state to ensure that torture is an offence under its criminal law (Article 7). The criminal code should treat torture as a crime and establish appropriate penalties for those found guilty. Incitement to torture or complicity in torture should likewise constitute criminal offences. In recognition of the fact that the crime of torture is forbidden by international law, domestic legislation should stipulate that the crime of torture is not subject to any statute of limitations. It should oblige the government to seek the extradition of its own officials accused of torture if they flee to another country to avoid prosecution, and to prosecute or extradite foreign officials accused of torture elsewhere but now residing within its jurisdiction. In some legal systems a law could also allow individuals to initiate criminal proceedings against officials accused of torture if public authorities did not do so, and to have the right to participate fully in the proceedings.

10. Repeal of provisions of emergency legislation that diminish detainees' rights

Provisions of emergency legislation or excessive decrees that weaken safeguards against the abuse of authority – for example, by allowing unchecked periods of incommunicado detention or suspending the right of *habeas corpus* or its equivalent – may facilitate torture. The promulgation and continued enforcement of such legal provisions is often taken as a signal by the security forces that neither the government nor the courts will interfere with their methods. The repeal of such measures would be an objective signal to the contrary.

11. Medical safeguards

The presence and formal independence of a fully qualified doctor at all detention centres can provide protection from ill-treatment. In practice, the government must recognize the principles that it is a serious breach of medical ethics for health personnel to be involved in torture and that the medical officers on duty are responsible for the health of detainees and must have the clinical independence to perform this duty. One indication of independence would be if medical officers were responsible to an authority other than the security forces or prison administration. Further procedures of the medical examinations of all detainees could include the following:

a. the offer of an examination on arrival at a detention centre, before interrogation begins;

b. the offer of an examination every subsequent 24 hours while under interrogation and immediately prior to transfer or release;

c. these offers should be made personally by the medical officer on duty, who would explain the importance of having complete records of the detainee's condition in detention;

d. detainees should be informed in the written notice of their rights about the importance of these examinations;

e. all examinations should be conducted in private by medical personnel only;

f. any refusal by a detainee to have any of these examinations should be witnessed in writing by the medical officer;

g. daily visits to each detainee by a medical officer, and access by the detainee to the medical officer on duty at any time on reasonable request;

h. detailed record-keeping by medical personnel of such matters as the weight of the detainee, marks on the body, psychological state and complaints related to health or treatment;

i. these records should be treated as confidential, as in any doctor-patient relationship, but capable of being communicated at the detainee's request to his or her lawyer or family;

j. examination by the detainee's own doctor at the request of the detainee or of his or her lawyer or family, not in the presence of prison guards.

Governments should make obligatory post-mortem examinations of all individuals who die in custody or shortly after release, from whatever cause. Such post-mortem examinations would need to be conducted by an independent forensic pathologist, with access granted by law to the examination, evidence and any subsequent hearings to a representative of the family, their lawyer and doctor.

12. No use of statements extracted under torture

Governments should ensure that confessions or other evidence obtained through torture may never be invoked in legal proceedings. Prosecuting authorities should be instructed not to submit in evidence confessions or other information which may have been obtained as a result of torture or oppression of the defendant or any other person. Judges should be required to exclude all such evidence.

13. Investigation of complaints and reports of torture

As stated in the UN Declaration against Torture, governments should ensure that all complaints and well-founded reports of torture are impartially investigated. Complainants and witnesses should be protected from intimidation.

Even if some form of official complaints machinery does exist, there may be a reluctance to use it. Victims of torture may fear reprisals from the security forces. Sometimes, ill-treatment is not reported because the victims do not believe that it will do any good. They may believe that the word of a security official will be given more weight in court than their own testimony. They may wish to protect their families from the fear and anxiety caused by the knowledge that they were tortured. In some societies it is thought undignified to admit to having been tortured. In others, it may be particularly difficult for victims, especially women, to reveal that they have been physically or sexually abused. Just as the

existence of allegations cannot be taken as proof of torture, the paucity of official complaints does not demonstrate its absence. Therefore, complaints procedures should provide for an investigation of allegations wherever there is reasonable ground to believe that torture has occurred, even if formal complaints have not been lodged.

Based on its experience, Amnesty International believes that complaints procedures should reflect the following principles:

1. The main *objective* of complaints machinery is to establish, to the degree of certainty possible, whether torture or ill-treatment has occurred. As it is not a criminal inquiry, it should therefore not be necessary to prove beyond reasonable doubt *who* committed the offence in order to conclude that an offence has taken place.

2. The investigating body, however constituted, should be able to demonstrate its formal *independence* from the detaining and interrogating authorities as well as from governmental pressure and influence. In order that its findings prove credible, the government might include among its members persons nominated by independent non-governmental bodies such as the country's bar and medical associations. There is no strong reason to exclude representatives of the general public, especially in countries with systems involving trials by jury, from serving on a board charged with reviewing complaints against the police.

3. The *terms of reference* of the investigating body should include the authority to subpoena witnesses, records and documents, to take testimony under oath, and to invite evidence and submissions from interested individuals and non-governmental organizations. The investigating body should also have powers to review procedures and practices related to the notification of arrest; to visits to detainees by lawyers, family and their own physicians; to medical examinations and treatment and to the admissibility of statements in court allegedly obtained by coercion.

4. The investigating body should be capable of acting on its own initiative, without having to receive formal complaints, whenever there is good reason to believe that torture has occurred. To do so, it must be given the staff and other resources to carry out autonomous investigations.

5. The methods and findings should be *public*.

6. The investigation should be *speedy* if it is to serve the cause of either justice or deterrence.

7. The *right to file a complaint* should be available to all current and former detainees, their lawyers, families and to any other person or organization acting on their behalf.

8. Accurate *records* of complaints filed should be published on a regular basis.

9. Security agents against whom repeated complaints of ill-treatment are filed should be transferred, without prejudice, to duties not directly related to arresting, guarding or interrogating detainees, pending a thorough review by senior officers of their conduct.

10. The investigating body should have available to it the medical documentation resulting from an examination by an independent doctor given immediately after the complaint is filed. Records of any post-mortem examination relevant to a complaint should likewise by available.

14. Prosecution of alleged torturers

The complaints procedures described above are not a substitute for the proper functioning of the courts.

The *jurisdiction of the courts* should extend to the investigation of complaints of torture against any member of the security forces and to the prosecution of any security agent accused of torture. The *subjects* of judicial investigation and prosecution should include not only those who participate in torture but also all those who incite it, attempt it, consciously cover it up, or are otherwise directly implicated in its use. Commanding officers should be held accountable for torture committed by officials under their command. The principle responsibility to instigate criminal prosecutions lies with the state authorities and should be exercised once there is reason to believe that specific agents can be convicted of torture or ill-treatment.

15. Disciplinary measures

Disciplinary procedures within the security forces or relevant professional bodies (e.g. the medical authority that licenses doctors to practise) should be pursued promptly and without prejudice to any form of court action.

16. Civil remedies

A complainant or person acting on his or her behalf should be able to seek damages in *civil proceedings* against individual security agents, the agency, its commanding officer and the state itself. The fact that a previous criminal prosecution on the same charges has not resulted in the conviction of specific agents should not preclude civil actions to obtain damages.

17. Compensation and rehabilitation

Assistance to torture victims by the state should include *medical rehabilitation* as needed and *financial compensation* commensurate with the abuse inflicted and damages suffered. His or her assistance should follow from a finding that torture or ill-treatment has occurred and should be awarded to the detainee without prejudice to any other criminal or civil proceedings. In the event of a detainee's death being shown to be the result of torture or ill-treatment, the deceased's family should receive *compensatory and exemplary damages* against the state without prejudice to any other criminal or civil proceedings.

18. Ratification of international instruments

As a further sign of a government's will to prevent torture all states should ratify the International Covenant on Civil and Political Rights and its Optional Protocol providing for individual complaints.

A further sign would be the declaration by the government that it will cooperate with international inquiries into allegations of torture by appropriate intergovernmental and non-governmental organizations.

A new international instrument against torture

On 10 December 1984 the UN General Assembly adopted by consensus a new Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The 33-article Convention defines torture as a punishable offence and provides guidelines to states parties for action to prevent it and punish those responsible for inflicting it. It also sets up machinery for monitoring the application of the Convention.

The Convention comes into force a month after 20 states have ratified or acceded to it.

The Convention was annexed to resolution 39/46, in which the General Assembly urged all governments to consider signing and ratifying the new instrument as a matter of priority. In the continuing effort to eradicate torture throughout the world, Amnesty International believes that all governments should sign and ratify without reservations the UN Convention against Torture.