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LAWYERS AND TORTURE

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INTRODUCTION

Torture is banned in all circumstances by international law. Yet in many countries, members of the police and security forces - the very people who should uphold the law and protect human rights - are using torture and thereby devastating the lives of their victims.

The fact that torture continues does not excuse anyone who becomes involved in it. Nor does it exonerate any government that allows it to continue. Governments have the duty to introduce effective measures to prevent torture, to punish those who use it, and to give compensation and medical and psychological assistance to victims of torture. Individuals and groups within society also have a role to play in combating torture.

Lawyers can have an important role to play in this respect. By virtue of their profession, practising lawyers may come across cases of torture. They may have to defend clients who claim their confession to a crime was extracted from them under torture. In some cases, co-defendants or other witnesses cited by the prosecution may also have been coerced to make false statements under torture.

This paper aims to help lawyers fight torture, by highlighting what they and lawyers associations can do to help stop it. The paper cites rules against torture set out in international law and the safeguards required by law to help prevent torture. These international standards were drafted to apply to all legal systems in the world and take into account the rich diversity of legal procedures – they set out the **minimum guarantees** that all legal systems should provide. This paper also cites provisions against torture in Chinese law and China's international obligations on this issue.

1. WHY HELP TO COMBAT TORTURE?

The idea of deliberately inflicting severe physical or mental pain on people who are deprived of their liberty and who are at the mercy of their jailers is abhorrent to most people. Torture devastates the lives of its victims. The international community has recognized that torture is a crime and that there is no justification for it under any circumstances. There are also compelling ethical arguments against it. Among other reasons to fight torture are the following ones.

- **Torture does not serve justice**

The use of torture can never serve the interest of justice. On the contrary, it can corrupt the justice system and result in numerous miscarriages of justice. The use of torture does not guarantee truth – rather it shows how vulnerable individuals are to pain and pressure. People who are tortured are more likely to do as they are told, than necessarily to tell the truth.

Every government has the duty to bring to justice those responsible for crimes. However, when people are tortured or ill-treated by law enforcement officials, when innocent individuals are convicted on the basis of confessions extracted under torture, or when trials are manifestly unfair, justice cannot be served and the justice system itself loses credibility. Unless human rights are upheld in the police station, the interrogation room, the detention centre, the court and the prison cell, the government and, all those who enforce the law, have failed in their duties and betrayed their responsibilities.

- **Torture is universally condemned**

While some governments publicly justify some practices in their country which violate certain international human rights standards, there is no government in the world who openly defends the use of torture.

Indeed, torture is banned by international law in all circumstances. The right of individuals to be protected against torture and ill-treatment is absolute and cannot be derogated from in any circumstance. This right applies to all people. It may never be suspended even during times of war, threat of war, internal political instability, or states of emergency. No circumstances may be used to justify torture or other cruel, inhuman or degrading treatment or punishment.

- **Everyone has the right to promote and protect universally recognized human rights:**

On 8 December 1998, the General Assembly of the United Nations (UN) adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.¹ When it adopted this declaration, the General Assembly reaffirmed “the importance of the observance of the purposes and principles of the Charter of the United Nations for the promotion and protection of all human rights and fundamental freedoms for all persons in all countries of the world”.

The declaration asks each State to adopt legislative, administrative or other necessary steps “to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed”.² Like other member States of the United Nations, China has endorsed the principles set out in this declaration. These principles include the following:

¹ See UN General Assembly document A/RES/53/144, 8 March 1999.

² See *Ibid.*, Article 2, paragraph 2.

Article 1:

“Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”

Article 6:

“Everyone has the right, individually and in association with others:

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

(c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.”

2. PROVISIONS AND STANDARDS AGAINST TORTURE IN DOMESTIC AND INTERNATIONAL LAW

- **International standards:**

Attached in the appendix are extracts from a reference manual on fair trials which was published by Amnesty International in 1998. The *Fair Trials Manual* is a guide to international and regional standards for fair trial which are incorporated in human rights treaties and non-treaty standards. It was compiled in order to, amongst other things, help lawyers, judges and others to understand international standards for the protection of the right to a fair trial.

The extracts which are cited in the appendix are those particularly relevant to the prevention of torture.

- **Provisions against torture in Chinese law:**

China’s Criminal Law includes provisions which criminalize the use of “Torture to Coerce a Confession” (*xingxun bigong*), “Extorting Testimony by Violence” (*baoli quzheng*) and “Ill-treating Prisoners” (*nuedai beijianguanren*). While these provisions have a more limited scope of application than those set out in the UN Convention against Torture, they prohibit “judicial officers”, including police officers, procurators and judges, as well as “custody and supervisory personnel” (*jianguan rennyuan*), from a range of acts which constitute torture and ill-treatment.

Criminal Law of the People's Republic of China (amended on 14/03/1997):

(Article 247)

“Any judicial officer who extorts confession from a criminal suspect or defendant by torture or extorts testimony from a witness by violence shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law.”

(Article 248)

“Any police or other officer of an institution of confinement like a prison, a detention house or a custody house who beats a prisoner or maltreat a prisoner by subjecting him/her to corporal punishment, if the circumstances are serious shall be sentenced to fixed-term imprisonment of no more than three years or criminal detention; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of no less than three years but no more than 10 years. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law.

Any police or other officer who instigates a person held in custody to beat or maltreat another person held in custody by subjecting him/her to corporal punishment, shall be punished in accordance with the provisions of the preceding paragraph.”³

In addition, China's Judges Law, Procurators Law and Police Law also include provisions that strictly prohibit the use of torture to coerce confessions, in particular by judges, procurators, and police officers.⁴

- **China's international obligations:**

China has ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988. As a State Party to the Convention, it has the obligation to implement the provisions of the Convention and to report periodically to the UN Committee Against Torture (CAT), which monitors implementation of the Convention, on the measures it has taken to ensure implementation.

Since ratification, China has submitted three periodic reports to CAT.⁵ The last report submitted by China was examined by CAT in May 2000. In its concluding observations on this report, CAT made eight recommendations to China, including:

123. The Committee recommends that the State party incorporate in its domestic law a definition of torture that fully complies with the definition contained in the Convention.

125. The Committee recommends that the State party continue the process of reform, monitor

³ See also the Criminal Procedure Law of the People's Republic of China, Article 43.

⁴ See the Judges Law of the People's Republic of China, Article 30; the Procurators Law of the People's Republic of China, Article 33; the Police Law of the People's Republic of China, Article 22.

⁵ See Committee Against Torture (CAT) documents CAT/C/7/Add.5, December 1989; CAT/C/20/Add.5, 15 February 1996; CAT/C/39/Add.2, 3 January 2000.

the uniform and effective implementation of new laws and practices and take other measures as appropriate to this end.

126. The Committee recommends that the State party consider abolishing the requirement of applying for permission before a suspect can have access for any reason to a lawyer whilst in custody.

127. The Committee recommends that the State party consider abolishing all forms of administrative detention, in accordance with the relevant international standards.

128. The Committee recommends that the State party ensure the prompt, thorough, effective and impartial investigation of all allegations of torture.

129. The Committee encourages the State party to continue and to intensify its efforts to provide training courses on international human rights standards for law enforcement officers.

3. WHAT LAWYERS AND PROFESSIONAL ASSOCIATIONS OF LAWYERS CAN DO?

Lawyers and professional associations of lawyers have an important role to play in combating torture. They can for example:

- Take action to bring their clients' claims of torture to the attention of the judicial authorities and request that these claims be impartially investigated and those responsible be brought to justice.
- Promote the introduction of standards which may not exist in their country's national legislation but which are known to be essential safeguards against torture and ill-treatment, such as immediate access of detainees to lawyers and doctors.
- Call for effective measures to ensure that safeguards which exist in national law but are often ignored in practice are implemented.
- Incorporate standards which are relevant to the prevention of torture in their professional codes of ethics and conduct.

None of this may be easy. In individual cases, for example, some judges may refuse to consider a defendant's allegations of torture unless the defence lawyer can "prove" that torture has occurred. Some judges may simply accept without further examination statements made by the police denying that torture has occurred. This, however, should not be a reason preventing lawyers from raising their clients' allegations and requesting an investigation. Lawyers associations can also intervene and point out to the judiciary and other relevant authorities that accepting a simple denial that torture has occurred by interested parties, such as the police or prosecution, does not constitute an acceptable standard of justice. They can also point out that it is both inappropriate and unreasonable to place the burden of proof on the defence in such cases. Indeed, many expert studies carried out in a variety of countries show that it is extremely difficult to find indisputable proof in cases of torture and ill-treatment by State officials and it would be unreasonable to expect the defence to be able to do so. One such study states:

“There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the police or the armed services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authorities, whether the police or armed services or the ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those institutions that had no knowledge of the activities of the agents against whom the allegations are made.”⁶

On the issue of the burden of proof, the UN Special Rapporteur on Torture, an independent expert who advises the UN on the issue of torture, has recommended that:

“Where allegations of torture or ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and ill-treatment.”⁷

Case example

In China, seven youths (Wang Hongtao, Liu Yunzhi, Chen Zhengnan, Lin Yong, Sun Zhenglei, Zhao Zhongzhuo, and Jiao Tieliang), most of them secondary school students, were arrested and charged with robbing 19 students of a school in Shuangliao City of Jilin Province in October 1995. Under the “strike hard” anti-crime campaigns, the youths were swiftly further charged with organizing a series of serious robbery in Shuangliao City.

*Parents of the youths sought help from six lawyers, namely Liu Deyi, Li Zuoshan, Shen Yixie, Zhang Junyong, Xia Jin-fan, and Sun Xue-xin. When the lawyers visited the youths in detention on 23 July 1995, they found that the evidence presented by the police contained inconsistencies and discrepancies; and the youths reported that their confessions had been extorted from them by deceit, enticement, and torture. On 5 August 1995 some of the defence lawyers reported the case to the Jilin Province Lawyers Association and also to the Lawyers Management Bureau of the Provincial Department of Justice. On 23 August 1996, during a hearing by the Shuangliao City Court, the defence lawyers claimed that the police had tortured and ill-treated the young defendants, in violation of the provisions in the Criminal Procedure Law of China which prohibits the use of torture. In 1997 the defendants were released on bail. Finally, on 28 April 1998, the Political and Legal Committee of Shuangliao City Communist Party Committee decided, after investigation, that the police should drop all charges against them.*⁸

⁶ *Greek Case* (5 November 1969, YB 12, p. 196), cited in K. Angelopoulou, *Police Stations: <Black Holes in the European Universe?>*, Ant. N. Sakkoulas Publishers, Athens, 2001, p. 24.

⁷ Report of the Special Rapporteur on Torture to the UN General Assembly, UN Document A/56/156, 3 July 2001, paragraph 39(j).

⁸ See *Fazhi Tiandi*, 1999, Vol. 8, pp. 8-13.

Some of the other steps that lawyers associations can take are described in more detail below.

- **Promote key safeguards against torture:**

The following measures are internationally recognized as being key protections against torture. More information about these and other measures is given in the Appendix.

- Ensuring that notification of custody is given promptly to the family and legal representative of any person taken into custody;
- allowing access to lawyer promptly after detention and regularly thereafter, particularly during interrogation, and guaranteeing the right to confidential communication between lawyers and their clients;
- allowing access to the family;
- allowing access to doctors of the detainees' choice at all stages of the legal process, and ensuring that doctors who examine detainees are trained in documenting signs of torture;
- introducing rules for the conduct of interrogation, including written records and tape-recording of interrogation, and mechanism to ensure that these rules are respected, including by allowing the suspect's legal representative to be present during interrogation;
- respecting the right not to be compelled to confess guilt or to testify against oneself, and introducing the right to silence, in line with the principle of the presumption of innocence;
- excluding unambiguously the use of any statement obtained as a result of torture or ill-treatment from evidence in court.

- **Promote standards set out in the Basic Principles on the Role of Lawyers:**

The UN Basic Principles on the Role of Lawyers were adopted by the *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, held in Havana, Cuba, from 27 August to 7 September 1990. The preamble to the Basic Principles requests governments to respect and take into account these principles within the framework of their national legislation and practice, and to bring them to the attention of lawyers and other persons, such as judges, prosecutors, members of the executive and the legislature, as well as the public in general.

The Basic Principles contain 29 articles dealing with issues such as Access to lawyers and legal services, Special safeguards in criminal justice matters, Duties and responsibilities of lawyers, and Guarantees for the functioning of lawyers. The following articles set out standards that are particularly relevant to the prevention of torture and to ensuring that lawyers can exercise their duties and responsibilities without fear of harassment or reprisals:

“(Article 1) All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

(Article 7) Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

(Article 8) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

(Article 14) Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

(Article 16) Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”

APPENDIX: EXTRACTS FROM THE FAIR TRIAL MANUAL

The Fair Trial Manual (a reference manual on international and regional standards for fair trial, published by Amnesty International in 1998) cites the names of human rights standards and bodies in an abbreviated form. We list below the full names of those cited in the extracts of the Manual presented here, with their abbreviated form given first:

| ABBREVIATED FORM | FULL NAME |
|--|---|
| African Charter | African Charter on Human and Peoples' Rights |
| African Commission | African Commission on Human and Peoples' Rights |
| American Convention | American Convention on Human Rights |
| American Declaration | American Declaration of the Rights and Duties of Man |
| Basic Principles for the Treatment of Prisoners | Basic Principles for the Treatment of Prisoners (United Nations) |
| Basic Principles on the Use of Force and Firearms by Law Enforcement Officials | Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (United Nations) |
| Body of Principles | Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (United Nations) |
| Code of Conduct for Law Enforcement Officials | Code of Conduct for Law Enforcement Officials (United Nations) |
| Committee against Torture | Committee against Torture (United Nations) |
| Convention against Torture | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations) |
| Declaration against Torture | Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations) |
| Declaration on Disappearance | Declaration on the Protection of All Persons from Enforced Disappearance (United Nations) |
| European Convention | (European) Convention for the Protection of Human Rights and Fundamental Freedoms |
| European Court | European Court of Human Rights |
| European Prison Rules | European Prison Rules |
| Guidelines on the Role of Prosecutors | Guidelines on the Role of Prosecutors (United Nations) |
| Human Rights Committee | Human Rights Committee (United Nations) |
| ICC Statute | Statute of the International Criminal Court (United Nations) |
| ICCPR | International Covenant on Civil and Political Rights (United Nations) |
| Inter-American Commission | Inter-American Commission on Human Rights |
| Inter-American Convention on Disappearance | Inter-American Convention on Forced Disappearance of Persons |
| Inter-American Convention on Torture | Inter-American Convention to Prevent and Punish Torture |
| Principles of Medical Ethics | Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of |

| | |
|--|--|
| | Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations) |
| Rwanda Rules | Rules of Procedure and Evidence, International Tribunal for Rwanda (United Nations) |
| Rwanda Statute | Statute of the International Criminal Tribunal for Rwanda (United Nations) |
| Special Rapporteur on the independence of judges and lawyers | Special Rapporteur on the independence of judges and lawyers (United Nations) |
| Standard Minimum Rules | Standard Minimum Rules for the Treatment of Prisoners (United Nations) |
| Universal Declaration | Universal Declaration of Human Rights (United Nations) |
| Yugoslavia Rules | Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (United Nations) |
| Yugoslavia Statute | Statute of the International Criminal Tribunal for the former Yugoslavia (United Nations) |

EXTRACTS FROM CHAPTER 9 (Fair Trial Manual)

Rights during interrogation

People suspected of or charged with criminal offences are vulnerable to human rights violations, including torture and other cruel, inhuman or degrading treatment, during the investigatory stages of criminal proceedings. People held in detention for questioning by law enforcement officials are particularly at risk. This chapter examines detainees' rights during interrogation.

9.1 Safeguards for people undergoing interrogation

There are several rights which aim to safeguard people during the investigation of an offence. These include the presumption of innocence, the prohibition against torture and cruel, inhuman and degrading treatment, the prohibition against compelling people to confess guilt or testify against themselves, the right to remain silent and the right of access to counsel.

There are additional safeguards during interrogation. Key is the presence of a lawyer during interrogation (See **Chapter 3.11, The right to a lawyer in pre-trial stage**).

The UN Special Rapporteur on the independence of judges and lawyers has stated that “it is desirable to have the presence of an attorney during police interrogation as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse...”⁹

“The Inter-American Commission considers that in order to safeguard the rights not to be compelled to confess guilt and to freedom from torture, a person should be interrogated only in the presence of their lawyer and a judge.”¹⁰

Among other things, international standards require the authorities not to take undue advantage of the situation of a detained person during interrogation. [Principle 21 of the Body of Principles.]

The authorities must keep records of the interrogation process. [Principle 23 of the Body of Principles.]¹¹ Statements obtained as a result of torture or ill-treatment must be excluded from evidence, except at trials of alleged torturers. [Article 15 of the Convention against Torture, Article 12 of the Declaration against Torture.] See **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion**.

9.2 Prohibition against coerced confessions

No one who is charged with a criminal offence may be compelled to confess guilt or testify

⁹ Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc. E/CN.4/1998/39/add.4, para 47, 5 March 1998.

¹⁰ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983, at 100.

¹¹ Human Rights Committee General Comment 20, para 11.

against themselves. [Article 14(3)(g) of the ICCPR, Article 8(2)(g) of the American Convention, Principle 21(2) of the Body of Principles, Article 21(4)(g) of the Yugoslavia Statute, Rwanda Statute 20(4)(g), Article 55(1)(a) of the ICC Statute.] See **Chapter 16, The right not to be compelled to testify or confess guilt.**

This right is applicable at both the pre-trial and trial stages. The Human Rights Committee has stated that coercion to provide information, coercion of confessions, and extraction of confessions by torture or ill-treatment are all prohibited.

The Human Rights Committee has stated that “the wording of Article 14(3)(g) [of the ICCPR] -- i.e. that no one shall be compelled to testify against himself or to confess guilt -- must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. *A fortiori*, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession.”¹²

The European Court made clear, however, that the right not to incriminate oneself does not extend to excluding from criminal proceedings material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as *inter alia*, documents, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.¹³

Recognizing the vulnerability of people in detention, Principle 21 of the Body of Principles provides

“1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

“2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or judgment.” [Principle 21 of the Body of Principles.]

See **Chapter 10.4, Freedom from torture and ill-treatment, Chapter 10.4.3, Physical pressure during interrogation** and **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion.**

9.3 The right to silence

The right of an accused to remain silent during the investigation phase and at trial is inherent in the presumption of innocence and an important safeguard of the right not to be compelled to confess guilt or testify against oneself. See **Chapter 16, The right not to be compelled to testify or confess guilt.** The right to remain silent is vulnerable during the interrogation of

¹² *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991; *Conteris v. Uruguay*, (139/1983), 17 July 1985, 2 Sel. Dec. 168; *Estrella v. Uruguay*, (74/1980), 29 March 1983, 2 Sel. Dec. 93.

¹³ *Saunders v. United Kingdom*, (943/1994/490/572), European Court, 17 December 1996.

people detained on criminal charges, as law enforcement officials often do their best to extract a confession or incriminating statements from the detainee, and a detainee's exercise of their right to remain silent frustrates these efforts.

The right to silence is incorporated into many national legal systems. Although it is not expressly guaranteed in international human rights treaties, it has been deemed to be implicit in the European Convention and is set out as a right in the rules of the international tribunals for the former Yugoslavia and Rwanda and the ICC Statute.

The European Court has stated that “[a]lthough not specifically mentioned in article 6 of the [European] Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6.”¹⁴ The Court found, however, that whether or not drawing adverse inferences against an accused for remaining silent violates fair trial rights is to be determined in light of all the circumstances of a case.

The European Court ruled that the introduction into evidence at a criminal trial for the purpose of incriminating the accused of transcripts of statements made under compulsion to non-prosecutorial inspectors violated the right not to incriminate oneself.¹⁵

In another case, the European Court found that when a man was prosecuted for refusing to hand over documents to customs officials, this constituted an “attempt to compel the accused to provide the evidence of offences he had allegedly committed” and was “an infringement of the right of anyone charged with a criminal offence... to remain silent and not to contribute in incriminating himself”.¹⁶

Rule 42(A) of the Yugoslavia Rules expressly sets out the right to silence. It provides that “[a] suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:... (iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.” Rule 42(A) of the Rwanda Rules is identical. Article 55(2)(b) of the ICC Statute provides that where a suspect is about to be questioned by the ICC Prosecutor or by national authorities, the suspect must be informed of the right to “remain silent, without such silence being a consideration in the determination of guilt or innocence”.

9.4 Right to an interpreter

[...]

¹⁴ *Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996, at 20.

¹⁵ *Saunders v. United Kingdom*, (943/1994/490/572), European Court, 17 December 1996.

¹⁶ *Funke v. France*, (82/1991/334/407), 25 February 1993, at 18.

9.5 Records of interrogation

Records of any interrogation of a detained or imprisoned person must be kept. The records are to contain the duration of each interrogation, the intervals between interrogations and the identities of the officials conducting the interrogation and other persons present. These records should be accessible to the detainee or their counsel. [Principle 23 of the Body of Principles.] The Human Rights Committee has also stated that the time and place of all interrogations should be recorded, and that this information should be available for judicial or administrative proceedings.¹⁷

The Yugoslavia and Rwanda Rules require video or audio recordings of interrogations. [Rule 43 of the Yugoslavia Rules, Rwanda Rules 43.]

9.6 Review of interrogation rules and practices

International standards require that states regularly and systematically review rules and instructions for the conduct of interrogations, interrogation methods and practices. [Article 11 of the Convention against Torture.]

¹⁷ Human Rights Committee General Comment 20, para.11.

EXTRACTS FROM CHAPTER 10 (Fair Trial Manual)**The right to humane conditions of detention and freedom from torture**

The right to a fair trial cannot be realized if detention conditions interfere with the ability of the accused to prepare for trial, or if the accused is tortured or ill-treated.

10.1 The right to humane conditions of detention

The right of all people deprived of their liberty to be treated humanely is protected by many international standards. While the broader standards are found in human rights treaties, many of the specific requirements are found in non-treaty standards, including the Body of Principles, the Standard Minimum Rules, the Principles for Medical Ethics and the European Prison Rules.

Everyone has the right to liberty and security of the person (see Chapter 1, **The right to liberty**), the right to be treated with humanity and respect for the inherent dignity of the human person, the right to freedom from torture or ill-treatment (see below) and the right to be presumed innocent until proved guilty beyond reasonable doubt in the course of a fair trial (See Chapter 15, **The presumption of innocence**).

All people deprived of their liberty are entitled to be treated with “humanity and with respect for the inherent dignity of the human person”. [Article 10 of the ICCPR, Article 5 of the American Convention, Article XXV of the American Declaration; see Articles 4 and 5 of the African Charter.]

These international standards impose a duty on states to ensure minimum standards of detention and imprisonment and to protect every detainee’s rights while he or she is deprived of liberty.

The Human Rights Committee has stated that people deprived of their liberty may not be “subjected to any hardship or constraint other than that resulting from the deprivation of their liberty... Persons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment.”¹⁸

The Human Rights Committee has also said that the duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment. States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs.¹⁹

These essential needs include food, washing and sanitary facilities, bedding, clothing, medical care, access to natural light, recreation, physical exercise, facilities to allow religious practice and communication with others including those in the outside world.

¹⁸ Human Rights Committee General Comment 21, para.3).

¹⁹ *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991; *P 鵬k 醬yi v. Hungary* (410/1990), 27 July 1992, Report of the HRC, (A/47/40), 1992.

Article 10 of the ICCPR imposes a duty on states to treat detainees humanely, while Article 7 of the ICCPR prohibits torture and ill-treatment. Conditions of detention which violate Article 10 may or may not also violate Article 7. “[I]nhuman treatment within the meaning of Article 10 evidences a lower intensity of disregard for human dignity than that within the meaning of Article 7.”²⁰

The Human Rights Committee found a violation of Article 10(1) of the ICCPR when a detainee claimed he had been held in a 500-year-old prison infested by rats, lice and cockroaches, where men, women and children were held 30 people to a cell. Detainees were exposed to the cold and the wind. There was excrement on the floor and sea water was used for showers and often for drinking. Detainees were given urine-soaked mattresses and blankets, despite the existence of new bed linen. There was a high incidence of suicide, self-mutilation, fights and beatings.²¹

The Human Rights Committee has also stated that failure to provide adequate food and recreational facilities constitutes a violation of Article 10 of the ICCPR, unless there are exceptional circumstances.²²

The African Commission found that refugee women, children and elderly people were held in deplorable conditions in Rwanda, in violation of Article 5 of the African Charter.²³

Anyone detained or imprisoned has the right to request improvements in their treatment or to complain about their treatment. The authorities must reply promptly, and if the request or complaint is refused, it may be brought to a judicial or other authority. [Principle 33 of the Body of Principles.]

The Human Rights Committee expressed concern that there was little if any investigation of most complaints of ill-treatment of detainees in France, “resulting in virtual impunity”. The Committee recommended the establishment of an independent mechanism to monitor detainees and to receive and deal with individual complaints of ill-treatment by law enforcement officials.²⁴

10.1.1 The right to be held in a recognized place of detention

To ensure that detainees have access to the outside world and as a safeguard against human rights violations such as “disappearance” and torture, all detained people have the right to be held only in an officially recognized place of detention, located if possible near their place of residence, under a valid order committing them to detention. [Principles 11(2) and 20 of the Body of Principles, Article 10 of the Declaration on Disappearance, Rule 7(2) of the Standard Minimum Rules, Rule 7(1) of the European Prison Rules, Article XI of the Inter-American

²⁰ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 186.

²¹ *Griffin v. Spain*, (493/1992), UN Doc. CCPR/C/57/1, 23 August 1996, p. 52, paras 3.1 and 9.2.

²² *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, para. 5.

²³ *Organisation mondiale contre la torture, Association internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'homme v. Rwanda*, (27/89, 46/91, 49/91, 99/93 respectively), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th.

²⁴ Concluding Observations of the HRC: France, UN doc.: CCPR/C/79/Add.80, 4 August 1997, para.16.

Convention on Disappearance.]

10.1.2 Records of detention

The authorities must keep and maintain up-to-date official registers of all detainees, both at each place of detention and centrally. The information in such registers must be made available to courts and other competent authorities, members of the detainee's family, their lawyer and any person with a legitimate interest in the information. [Article 10(2) and (3) of the Declaration on Disappearances, Rule 7 of the Standard Minimum Rules, Principle 12 of the Body of Principles; see Article XI of the Inter-American Convention on Disappearance, Rules 7(2) and 8 of the European Prison Rules.]²⁵

10.1.3 The right to adequate medical care

States are obliged to provide quality medical care to people in custody, as they cannot readily obtain such care for themselves. They should be given access to the health services available in the country without discrimination on the grounds of their legal situation. [Principle 9 of the Basic Principles on the Treatment of Prisoners.]

Law enforcement officials are responsible for protecting the health of people in their custody. [Article 6, Code of Conduct for Law Enforcement Officials.]

[...]

Amnesty International believes that a detainee or prisoner should have prompt access to a doctor when an allegation of torture or ill-treatment is made or when there is suspicion that torture or ill-treatment has taken place. Such access should not be dependent on the institution of an official investigation of the allegation of torture or ill-treatment.

Amnesty International believes that any female detainee who alleges that she has been raped or sexually abused must be given an immediate medical examination, preferably by a female doctor. This is a crucial measure in obtaining evidence for prosecution of the perpetrator.

[...]

Records must be kept of every medical examination of a detainee, and access to these records must be ensured. [Principle 26 of the Body of Principles.]

[...]

10.4 Freedom from torture and ill-treatment

No one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [Article 5 of the Universal Declaration, Article 7 of the ICCPR, Principle 6 of the Body of Principles, Article 5 of the African Charter, Article 5(2) of the American

²⁵ See Human Rights Committee General Comment 20, para. 11.

Convention, Article 3 of the European Convention.]

This right is absolute and non-derogable. It applies to all people. It may never be suspended even during times of war, threat of war, internal political instability, or states of emergency. Article 4 of the ICCPR, Article 27(2) of the American Convention, Article 15 of the European Convention. See **Chapter 31.3, Rights that may never be restricted.** No circumstances may be used to justify torture or other cruel, inhuman or degrading treatment or punishment. [See Article 2(2) of the Convention against Torture, Article 3 of the Declaration against Torture, Principle 6 of the Body of Principles, Article 5 of the Code of Conduct for Law Enforcement Officials, Article 5 of the Inter-American Convention on Torture.]²⁶

This right is of particular importance to people deprived of their liberty.

All law enforcement officials are prohibited from inflicting, instigating or tolerating torture or other cruel, inhuman or degrading treatment or punishment of any person. The fact that they were ordered to do so by their superiors may not be used as a justification; in fact, they are bound by international standards to disobey such orders and to report them. [See Article 2(3) of the Convention against Torture, Articles 5 and 8 of the Code of Conduct for Law Enforcement Officials, Article 3 of the Inter-American Convention on Torture.] The fact that a person is considered dangerous does not justify torture. [Article 5 of the Inter-American Convention on Torture.]

The prohibition against torture and cruel, inhuman or degrading treatment or punishment includes acts which cause mental as well as physical suffering to the victim. [Article 1 of the Declaration against Torture, Article 1 of the Convention against Torture, Article 2 of the Inter-American Convention on Torture.]

Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments are completely prohibited as punishments for disciplinary offences. [Rule 31 of the Standard Minimum Rules.] See also **Chapter 25.4, Corporal punishment.**

The Human Rights Committee has instructed states to ensure that all places of detention are free from any equipment liable to be used for inflicting torture or ill-treatment.²⁷

| Relevant Standards |
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| <p>Article 5 of the Universal Declaration of Human Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”</p> <p>Article 7 of the ICCPR: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”</p> |

²⁶ See Human Rights Committee General Comment 20, para. 3.

²⁷ Human Rights Committee General Comment 20, para. 11.

Principle 6 of the Body of Principles:

“No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”

10.4.1 Prolonged solitary confinement

The Human Rights Committee has stated that prolonged solitary confinement may amount to a violation of the prohibition against torture and ill-treatment in Article 7 of the ICCPR.²⁸ (See also **Chapter 4.1.1, Incommunicado detention.**)

Principle 7 of the Basic Principles on the Treatment of Prisoners provides that states should undertake efforts to abolish solitary confinement as a punishment or to restrict its use.

The Inter-American Commission has stated: “Prolonged solitary confinement is not a measure considered by the law to be a sentence, and therefore there is no justification for its frequent use”.²⁹

10.4.2 Use of force

[...]

10.4.3 Physical pressure during interrogation

The Committee against Torture has stated that the application of “moderate physical pressure” as an authorized mode of interrogation of detainees “is completely unacceptable”. It ruled that even if a suspect is believed to have information about imminent attacks against the state which may involve loss of civilian life, the following methods of interrogation may not be used as they violate the prohibition on torture and ill-treatment: restraining a person in very painful conditions; hooding; prolonged playing of loud music; prolonged sleep deprivation; threats, including death threats; violent shaking; and using cold air to chill the detainee. The Committee against Torture recommended that interrogations by Israeli security officers applying these methods “cease immediately”.³⁰ See also **Chapter 9, Rights during interrogation.**

10.4.4 Use of restraints

International standards regulate the use of restraints, including handcuffs, chains, irons and strait-jackets, on detained and imprisoned people. They state that the central prison administration is to decide on the pattern and manner of use of instruments of restraint. Restraints are not to be used as punishment and chains and irons are not to be used as restraints. When used, restraints must not be applied for longer than is strictly necessary. [Rules 33 and 34 of the Standard Minimum Rules, Principle 5 of the Principles of Medical

²⁸ Human Rights Committee General Comment 20, para. 6.

²⁹ Annual Report of the Inter-American Commission, 1981-1982, OEA/Ser.L/V/II.57, doc. 6 rev. 1, 1982, p. 124, Uruguay.

³⁰ UN Doc. CAT/C/SR.297/Add.1 at 3, para. 8.

Ethics, Rule 39 of the European Prison Rules.]

Principle 5 of the Principles of Medical Ethics specifies that “[i]t is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, or of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.” [Principle 5 of the Principles of Medical Ethics.]

Restraints must be removed when a detainee or prisoner appears before a judicial or other authority -- they may have a bearing on the presumption of innocence. [Rule 33 of the Standard Minimum Rules.]

10.4.5 Body searches

Personal and body searches of detainees or prisoners should be carried out by people of the same sex and in a manner consistent with the dignity of the person being searched.³¹

10.4.6 Medical or scientific experimentation

International standards specifically prohibit medical or scientific experimentation without the free consent of the person concerned. [Article 7 of the ICCPR.]³² This prohibition is absolute, regardless of consent, if such experimentation may be detrimental to a detainee’s or prisoner’s health. [Principle 22 of the Body of Principles, Rule 27 of the European Prison Rules.]

| Relevant Standards |
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| <p>Rule 33 of the Standard Minimum Rules: “Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances: (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority; (b) On medical grounds by direction of the medical officer; (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.”</p> |

10.4.7 Disciplinary offences

[...]

10.4.8 Right to reparation for torture or ill-treatment

³¹ Human Rights Committee General Comment 16, para. 8; see Inter-American Commission, Report No. 38/96, Case 10.506 (Argentina), paras 66,76, 15 October 1996.

³² Human Rights Committee General Comment 20, para 7.

Victims of torture and ill-treatment should have an enforceable right to reparation, including financial compensation. (While the English texts of Article 11 of the Declaration against Torture and Article 14 of the Convention against Torture use the word redress, the French and Spanish texts use the more inclusive term reparation.) [Article 11 of the Declaration against Torture; see Article 14 of the Convention against Torture, Article 9 of the Inter-American Convention against Torture.] Forms of reparation include: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition.³³

³³ Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, UN doc.: E/CN.4/1997/104, being considered by the UN Commission on Human Rights with a view to their adoption by the UN General Assembly, arising from a comprehensive study by Theo Van Boven, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc.: E/CN.4/Sub.2/1993/8.

EXTRACTS FROM CHAPTER 16 (Fair Trial Manual)**The right not to be compelled to testify or confess guilt**

No one charged with a criminal offence may be compelled to testify against themselves or to confess guilt, in accordance with the presumption of innocence (see Chapter 15).

16.1 The right not to be compelled to testify against oneself or confess guilt

No one charged with a criminal offence may be compelled to testify against him or herself or to confess guilt. This prohibition is in line with the presumption of innocence, which places the burden of proof on the prosecution, and with the prohibition against torture and other cruel, inhuman or degrading treatment. [Article 14(3)(g) of the ICCPR, Articles 8(2)(g) and 8(3) of the American Convention, Principle 21 of the Body of Principles, Article 21(4)(g) of the Yugoslavia Statute, Rwanda Statute 20(4)(g), Article 67(1)(g) of the ICC Statute.]

This fundamental right is considered to be inherent in Article 6 of the European Convention, even though it is not expressly set out. The European Court has stated that “[a]lthough not specifically mentioned in Article 6 of the [European] Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6”.³⁴

The prohibition against compelling an accused to testify or confess guilt is broad. It prohibits the authorities from engaging in any form of coercion, whether direct or indirect, physical or psychological. It prohibits torture and cruel, inhuman or degrading treatment. It prohibits treatment which violates the right of detainees to be treated with respect for the inherent dignity of the human person.³⁵ (See **Chapter 10, The right to humane conditions of detention and freedom from torture.**) It also prohibits the imposition of judicial sanctions to compel the accused to testify.³⁶

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| Relevant Standards |
| Article 14(3)(g) of the ICCPR: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:... (g) Not to be compelled to testify against himself or to confess guilt.” |

16.2 The right to silence

The right of an accused to remain silent during police questioning and at trial has been

³⁴ *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, at para. 45.

³⁵ Human Rights Committee General Comment 13, para 14; *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 246.

³⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 264.

deemed to be implicit in two internationally protected rights: the right to be presumed innocent and the right not to be compelled to testify or confess guilt.³⁷

The right of an accused to silence, even when suspected of the worst possible crimes such as genocide, other crimes against humanity and war crimes, is expressly recognized in the Rule 42(A)(iii) of the Yugoslavia Rules, Rwanda Rules 42(A)(iii) and Article 55(2)(b) of the ICC Statute.

The European Court has stated that drawing adverse inferences against an accused for remaining silent would violate the presumption of innocence and the privilege against self-incrimination, if a conviction was based *solely* or *mainly* on the accused's silence. However, the European Court held that the right to silence is not absolute. Rather, the question whether fair trial rights are infringed if a court draws adverse inferences from the accused's silence is to be determined in light of all the circumstances of a case. The European Court ruled that a court *could* draw adverse inferences from an accused's failure to explain his presence at the scene of a crime during police questioning and at trial, without violating the presumption of innocence or the corresponding right not to be compelled to testify. In reaching this conclusion the Court considered the following to be decisive: such inferences were drawn only after the prosecution made out a *prima facie* case against the accused; the judge had discretion about whether or not to draw inferences; the only permissible inferences which could be drawn were "common sense" inferences and the reasons for drawing them were explained in the court's judgment; and the case against the accused was "formidable". However, the European Court did find that the failure to grant the accused access to counsel for the first 48 hours of his detention, when he was being questioned by police and had to decide whether to exercise his right of silence, was a violation of Article 6 of the European Convention.³⁸

See **Chapter 9.3, The right to silence**, in **Chapter 9, Rights during interrogation**.

16.3 Allegations of coercion

If an accused alleges during the course of proceedings that he or she has been compelled to make a statement or to confess guilt, the judge should have authority to consider such an allegation at any stage.³⁹

All allegations that statements have been extracted through torture or other cruel, inhuman or degrading treatment must be promptly and impartially examined by the competent authorities, including judges. [Articles 13 and 16 of the Convention against Torture, Article 8 of the Inter-American Convention on Torture.]

All detainees and prisoners, or lawyers or relatives acting on their behalf, have the right to complain to the authorities of torture or ill-treatment, in confidence. All such complaints should be promptly dealt with and replied to without undue delay. If the complaint

³⁷ *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, at para. 45.

³⁸ *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996.

³⁹ Human Rights Committee General Comment 13, para. 15.

is rejected or inordinately delayed, the complainant is entitled to bring it before a judicial or other authority. The complainant should suffer no prejudice as a result of making a complaint. [Principle 33 of the Body of Principles.]

In addition, whenever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment has been committed, a prompt and impartial investigation must be initiated. [Articles 12 and 16 of the Convention against Torture, Article 8 of the Inter-American Convention on Torture.]

Evidence elicited as a result of torture, cruel, inhuman or degrading treatment, or other coercion, including confessions by the accused, must be excluded by the court except in proceedings brought against alleged perpetrators of torture, ill-treatment or coercion (see **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion**). See also **Chapter 9, Rights during interrogation** and **Chapter 10.4, Freedom from torture and ill-treatment**.

EXTRACTS FROM CHAPTER 17 (Fair Trial Manual)**Exclusion of evidence elicited as a result of torture or other compulsion**

Evidence elicited as a result of torture or other coercion, including confessions by the accused, must be excluded by the court.

17.1 Exclusion of evidence elicited by torture or ill-treatment

Evidence, including confessions by the accused, elicited as a result of torture or other cruel, inhuman or degrading treatment must not be used in any proceedings except those brought against the suspected perpetrators.

Any statement made as a result of torture is inadmissible in evidence, except in proceedings against the alleged perpetrator of the torture. [Article 15 of the Convention against Torture, Article 10 of the Inter-American Convention on Torture.] Other international standards are broader, excluding not only statements elicited as a result of torture, but also those elicited as a result of other cruel, inhuman or degrading treatment. [Article 12 of the Declaration against Torture, Article 69(7) of the ICC Statute, Guideline 16 of the Guidelines on the Role of Prosecutors; see Principle 27 of the Body of Principles.] These standards apply not only to statements made by the accused but also to statements made by any witness.

Relevant Standards**Guideline 16 of the Guidelines on the Role of Prosecutors:**

“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.”

Article 12 of the Declaration against Torture:

“Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.”

Article 15 of the Convention against Torture:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

Article 69(7) of the ICC Statute:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- a) The violation casts substantial doubt on the reliability of the evidence; or
- b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

17.2 Exclusion of evidence elicited under duress

There are forms of duress which do not constitute torture but remain prohibited as methods of eliciting evidence, and taint any evidence so obtained. The Human Rights Committee has expanded the prohibition on the use of evidence obtained under duress by stating that “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.⁴⁰ The Committee has stated that: “[t]he law should require that evidence provided by...any...form of compulsion is wholly unacceptable”.⁴¹ The Committee has also stated that “[c]onfessions obtained under duress should be systematically excluded from judicial proceedings...”.⁴²

The Body of Principles prohibits taking advantage of the situation of detainees to compel them to testify or confess, or using violence, threats or methods of interrogation which impair their capacity of decision or their judgement. [Principle 21 of the Body of Principles.] Principle 27 states that non-compliance with these principles in obtaining evidence must be taken into account in determining the admissibility of such evidence. [Principle 27 of the Body of Principles.]

Amnesty International believes that whenever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman or degrading treatment or duress, a separate hearing should be held *before* such evidence is admitted in the trial. At such a hearing, evidence should be taken on whether the statement in question was made voluntarily. If it is determined that the statement was not made voluntarily, then it must be excluded from evidence in all proceedings except proceedings brought against those accused of coercing the statement.

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 grave violations of the suspect’s human rights, they must take all necessary steps to ensure that those responsible for using such methods are brought to justice. [Guideline 16 of the Guidelines on the Role of Prosecutors.]

17.2.1 Article 8(3) of the American Convention

Article 8(3) of the American Convention, which states that a confession of guilt by the accused shall be valid only if made without coercion of any kind, differs from the standards cited in 17.1 above. It relates only to confessions of the accused, rather than “any evidence”. It *also* requires exclusion of a confession if there was coercion *of any kind*, including any conduct which, while coercive, might not amount to torture or other cruel, inhuman or degrading treatment.

The Inter-American Commission expressed its view that the use of confessions obtained while the accused was detained incommunicado (without access to his

⁴⁰ Human Rights Committee General Comment 20, para. 12.

⁴¹ Human Rights Committee General Comment 13, para. 14.

⁴² Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75 at para.26 (5 May 1997).

counsel) violated the accused's rights under the American Convention.⁴³

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| Relevant Standards |
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| Article 8(3) of the American Convention |
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| “A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.” |
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⁴³ Resolution no. 29/89 of 29 September 1989 (Nicaragua) Annual Report of the Inter-American Commission, 1989-1990, OEA/ Ser. L/V/II.77 doc.7 rev.1.1990, at 73- 96.

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