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JUDGES 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 existence of torture makes everyone who becomes involved in it a criminal. Any government that allows it to continue is also responsible under international law, as well as the perpetrators. 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.

Judges have an important role to play in this respect. By virtue of their profession, judges may come across cases of torture. International human rights law requires that each and every detainee is brought before a judge, to rule on the legality of detention.¹ Judges should also hear and adjudicate on challenges to the legality of detention, such as habeas corpus.² They may have to try cases in which defendants claim their confession to a crime was extracted from them under torture. In some cases, co-defendants or witnesses may also have been coerced to make false statements under torture. In all these situations, judges should be vigilant and take appropriate action when detainees show signs of torture. These may include, but are not confined to, physical marks – they can also include distress, anxiety, and fear, particularly in the presence of police or other officials who are responsible for the detention. In such cases, judges should not ignore these signs.

This paper highlights why everyone – particularly judges - should help to fight torture and what judges can do to help stop torture, in particular when they hear cases in which allegations of torture are made. The paper cites rules against torture set out in international law and the safeguards required by law to help prevent torture. These international standards

¹ See the International Covenant on Civil and Political Rights, Article 9(3); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 4; the Declaration on the Protection of All Persons from Enforced Disappearance, Article 10(1).

² See the International Covenant on Civil and Political Rights, Article 9(4); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32.

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 refers to provisions against torture in Chinese law and to 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.

- **Torture is prohibited by Chinese law**

China's Criminal Law (as amended on 14/03/1997) 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. These include:

(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

- **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.⁵ 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”.⁶ Like other member States of the United Nations, China has

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

⁶ See Ibid., Article 2, paragraph 2.

endorsed the principles set out in this declaration, including the basic principle set out in Article 1 that:

“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.”

2. INTERNATIONAL STANDARDS AND CHINA’S INTERNATIONAL OBLIGATIONS

- **International standards**

Attached in the appendix are extracts from a reference manual on fair trials which was published by Amnesty International in 1998. The extracts which are cited in the appendix are those particularly relevant to the prevention of torture and to the responsibility of judges in this respect.

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 standards it cites include essential safeguards for the prevention of torture.

- **China’s international obligations**

China has ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter Convention against Torture) 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.⁷ 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 the following ones:

“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 [...]

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 [...]

⁷ 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.

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

China should also abide by and implement the various standards endorsed by the member states of the United Nations, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Body of Principles), the Basic Principles on the Role of Lawyers, and the Basic Principles on the Independence of the Judiciary.

3. THE ROLE OF JUDGES

Judges have a special responsibility to ensure that all allegations of torture which come to their attention at any stage of the judicial process are subject to prompt and impartial investigation by competent and independent bodies. Another important responsibility of judges is to ensure that statements extracted under torture or ill-treatment are not invoked as evidence in court proceedings, in line with international standards. These and other safeguards against torture which are described in more detail below are among the key standards which judges should help to implement.

- **Examine all allegations of torture or coercion**

If a defendant alleges during the course of judicial proceedings – whether at pre-trial hearings, or at the trial itself - 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.

All allegations that statements have been extracted through torture or ill-treatment must be promptly and impartially examined by the competent authorities, including judges, and the alleged perpetrators brought to justice where admissible evidence of torture is found. This is in line with Article 13 of the Convention against Torture, to which China is a state party. Article 13 also requires that “*steps shall be taken 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.*”

- **Place the burden of proof on the prosecution**

When hearing cases in which defendants claim that they were tortured during investigation, some judges refuse to consider the defendant’s allegations of torture and, instead, ask the defence lawyers to “prove” that their clients have been tortured. Some judges simply accept without further examination the statements made by police denying that torture has occurred. These responses to serious allegations, however, do not constitute acceptable standards of justice. All allegations of torture must be impartially investigated and 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, even in the best of situations, it is extremely difficult to find indisputable proof of torture and ill-treatment carried out by individual state officials and it would be particularly unreasonable to expect defence lawyers to be able to find such proof. 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.”*⁸

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.”*⁹

Establishing safeguards such as frequent access for detainees to doctors, lawyers and families; frequent medical examinations of detainees by doctors trained in documenting torture; detailed custody records and video or audio recording of interrogations can help protect detainees by ensuring that evidence of torture or ill-treatment can be collected and lead to prosecutions. However, the transparency regarding the treatment of detainees by these safeguards can also work in favour of the authorities, by making it clear through evidence when torture and ill-treatment has not taken place.

- **Exclude evidence elicited by torture or ill-treatment**

The Convention against Torture and other international standards require that any statement made as a result of torture or other coercion, including confessions by the accused or statements made by witnesses, be excluded by the court, except in proceedings against the alleged perpetrators of torture. Article 15 of the Convention against Torture states:

“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.”

The exclusion of evidence extracted through torture of any kind should be unambiguously provided by law. There should also be a fair and transparent procedure established for accused persons to apply to have such evidence excluded.

⁸ *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.

⁹ Report of the Special Rapporteur on Torture to the UN General Assembly, UN Document A/56/156, 3 July 2001, paragraph 39(j).

- **Promote 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 himself or herself or to confess guilt. This prohibition is enshrined in Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) and other international human rights standards such as Principle 21(2) of the Body of Principles. It 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.

At present this right is not guaranteed in Chinese law. Article 93 of the Criminal Procedure Law of the PRC states:

“When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.”

However, legal analysts in China argue that the suspect's duty to answer fully and truthfully the investigators' questions puts the suspect at great disadvantage - it legitimises the investigator's use of ill-treatment and demonstrates that the presumption of guilt is still the reality

4. OTHER STEPS THAT JUDGES CAN TAKE

- **Promote key safeguards against torture**

Together with some of the safeguards cited above (notably the right not to be compelled to confess guilt), 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.

- **Promote standards set out in the Basic Principles on the Independence of the Judiciary**

The UN Basic principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

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 judges and other persons, such as lawyers, members of the executive and the legislature, as well as the public in general. The following articles set out standards that are particularly relevant to the prevention of torture and to ensuring that individual judges can exercise their duties and responsibilities without being subject to inappropriate pressure or interference:

“(Article 2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

(Article 3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

(Article 4) There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

- **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 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 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.”

- **Promote standards set out in the Guidelines on the Role of Prosecutors**

The UN Guidelines on the Role of Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990.¹⁰ They include the following principles:

“(Article 12) Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system [...]

(Article 15) 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.

(Article 16) 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.”

¹⁰ See UN Doc. A/CONF.144/28/Rev.1 at 189 (1990).

- **Establish regular visits to places of detention**

In his report to the General Assembly in 2001, the Special Rapporteur on torture recommended that judges should have a special role to play in monitoring conditions regularly in places of detention:

*“Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. In addition, official bodies should be set up to carry out inspections, such teams being composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society...”*¹¹

¹¹ UN Document A/56/156, para. 39(e), 3 July 2001.

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 Commission	European Commission of Human Rights
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 5 (Fair Trial Manual)**The right to be brought promptly before a judge or other officer**

Anyone deprived of their liberty has the right to be brought promptly before a judge or other judicial officer, so that their rights can be protected.

5.1 The right to be brought promptly before a judge or judicial officer

In order to safeguard the right to liberty and freedom from arbitrary arrest or detention, and in order to prevent violations of fundamental human rights, all forms of detention or imprisonment must be ordered by or subject to the effective control of a judicial or other authority. [Principle 4 of the Body of Principles.]

Anyone arrested or detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power. [Article 9(3) of the ICCPR, Article 10(1) of the Declaration on Disappearance, Paragraph 2(C) of the African Commission Resolution, Article 7(5) of the American Convention, Article XI of the Inter-American Convention on Disappearance, Article 5(3) of the European Convention, Article 59(2) of the ICC Statute, Principle 11(1) of the Body of Principles.]

Article 9(3) of the ICCPR applies to people arrested or detained on a criminal charge, but the other standards apply more broadly to all people deprived of their liberty.

The purposes of the review before a judge or judicial authority include:

- to assess whether sufficient legal reason exists for the arrest;
- to assess whether detention before trial is necessary;
- to safeguard the well-being of the detainee;
- and to prevent violations of the detainee's fundamental rights.

Relevant Standards**Article 9(3) of the ICCPR:**

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...”

Principle 11(1) of the Body of Principles:

“A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.”

This procedure often provides the detained person with their first opportunity to challenge the lawfulness of their detention and to secure release if the arrest or detention violated their rights.

The Inter-American Commission has stated that if a court is not officially informed of a detention or is informed only after significant delay, the rights of a detainee are not

protected. It pointed out that such situations lend themselves to other types of abuses, erode respect for the courts and their effectiveness and lead to the institutionalization of lawlessness.¹²

In view of the importance of this right in protecting detainees against serious violations of human rights, including “disappearances”, Amnesty International, in its 14-Point Program for the Prevention of “Disappearances”, calls for all prisoners to be brought before a judicial authority **without delay** after being taken into custody.

5.1.1 Officers authorized to exercise judicial power

If the detained person is brought before an officer other than a judge, the officer must be authorized to exercise judicial power and must be independent of the parties. All those exercising judicial authority must be independent -- they must fulfil the criteria set out in the Basic Principles on the Independence of the Judiciary (see **Chapter 12.4 The right to be heard by an independent tribunal**).

For example, the European Court held that there was a violation of Article 5(3) of the European Convention when the “other officer authorised by law to exercise judicial authority” was an *auditeur militaire* or a public prosecutor who could intervene in subsequent proceedings as a representative of the prosecuting authority.¹³

5.2 What does “prompt” mean?

International standards require that this hearing take place **promptly** after detention. While no time limits are expressly stated within the standards themselves, and they are to be determined on a case by case basis, the Human Rights Committee has stated that “...delays should not exceed a few days”.¹⁴

Members of the Human Rights Committee have questioned whether detention for 48 hours without being brought before a judge is not unreasonably long.¹⁵ In a death penalty case, the Committee ruled that a delay of one week from the time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR.¹⁶

The European Court has ruled that detaining a person for four days and six hours before bringing him before a judge was not prompt access.¹⁷

The Inter-American Commission stated that a person should be brought before a judge or other judicial authority “as soon as it is practicable to do so; delay is

¹² Inter-American Commission, Second Report on the Human Rights Situation in Suriname, OEA/Ser. L/V/II.66, doc. 21 rev. 1, 1985, at 23.

¹³ *Brincat v. Italy*, (73/1991/325/397), 26 November 1992; *De Jong, Baljet and van den Brink*, 22 May 1984, 77 Ser. A 23.

¹⁴ Human Rights Committee General Comment 8, para. 2.

¹⁵ Report of the HRC, vol. I, (A/45/40), 1990, para. 333, Federal Republic of Germany.

¹⁶ *McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6.

¹⁷ *Brogan et al. v. United Kingdom*, 29 November 1988, 145b Ser. A 33 at 62.

unacceptable”.

¹⁸ It stated that in Cuba, “in theory, the law allows for a detainee to remain in prison for a week without appearing before a judge or court competent to hear his case. In the opinion of the Commission, this is an excessively prolonged period.” ¹⁹

¹⁸ Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc 10, rev.1 at 73, 24 April 1997.

¹⁹ Inter-American Commission, Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, doc.29, rev.1, at 41.

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..."²⁰

"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."²¹

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.]²² 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 against themselves. [Article 14(3)(g) of the ICCPR, Article 8(2)(g) of the American

²⁰ 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.

²¹ 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.

²² Human Rights Committee General Comment 20, para 11.

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.”²³

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.²⁴

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 people detained on criminal charges, as law enforcement officials often do their best to

²³ *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.

²⁴ *Saunders v. United Kingdom*, (943/1994/490/572), European Court, 17 December 1996.

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.”²⁵ 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.²⁶

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”.²⁷

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

[...]

9.5 Records of interrogation

Records of any interrogation of a detained or imprisoned person must be kept. The records

²⁵ *Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996, at 20.

²⁶ *Saunders v. United Kingdom*, (943/1994/490/572), European Court, 17 December 1996.

²⁷ *Funke v. France*, (82/1991/334/407), 25 February 1993, at 18.

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.²⁸

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.]

²⁸ Human Rights Committee General Comment 20, para.11.

EXTRACTS FROM CHAPTER 15 (Fair Trial Manual)**The presumption of innocence**

A fundamental principle of the right to fair trial is the right of every person charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.

15.1 The presumption of innocence

Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness. [Article 11 of the Universal Declaration, Article 14(2) of the ICCPR, Principle 36(1) of the Body of Principles, Article 7(1)(b) of the African Charter, Paragraph 2(D) of the African Commission Resolution, Article XXVI of the American Declaration, Article 8(2) of the American Convention, Article 6(2) of the European Convention, Article 21(3) of the Yugoslavia Statute, Rwanda Statute 20(3), Article 66 of the ICC Statute; see also Rule 84(2) of the Standard Minimum Rules, Rule 91 of the European Prison Rules.]

The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. It applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal. (See Chapters **1.5, The presumption of release pending trial; 7, The right to trial within a reasonable time or to release from detention; 9, Rights during interrogation, and 10.2 Additional safeguards for people in pre-trial custody.**)

The right not to be compelled to testify against oneself or confess guilt and the related right of silence are rooted in the presumption of innocence (see **Chapter 16, The right not to be compelled to testify or confess guilt**).

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also applies to all other public officials. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.²⁹ It also means that the authorities have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits.

The presumption of innocence is *not*, however, considered to be violated if the authorities inform the public about criminal investigations and in doing so name a suspect, or state that a suspect has been arrested or has confessed, so long as there is no declaration that the person is guilty.³⁰

²⁹ Human Rights Committee General Comment 13, para. 7.

³⁰ *Krause v. Switzerland*, 13 DR 73, 3 October 1978; see also *Worm v. Austria*, (83/1996/702/894), European Court, 29 August 1997.

15.2 The burden of proof

The requirement that the accused be presumed innocent unless and until proved guilty in the course of a trial which meets all guarantees of fairness has enormous impact at a criminal trial. It means that the prosecution has to prove an accused person's guilt. If there is reasonable doubt, the accused must not be found guilty.

Article 66(3) of the ICC Statute provides: “n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”. Although the standard of proof is not expressly specified in other international standards, the Human Rights Committee has stated “[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.”³¹

In accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial.

In some countries, the law requires the accused (rather than the prosecution) to explain elements of certain offences. For example, the accused may be required to explain their presence in a given location (at or near the place where a crime occurred), or their possession of certain things (such as stolen property or contraband). Such requirements, when incorporated into law, are known as statutory presumptions. These have been challenged on the grounds that they impermissibly shift the burden of proof from the prosecution to the accused, in violation of the presumption of innocence.

The European Court has found that statutory presumptions do not necessarily violate the presumption of innocence, but they must be defined by law and reasonably limited. They must also preserve the right of the accused to a defence -- in other words they must be capable of rebuttal by the accused.³²

The Inter-American Commission considers that the definition of a criminal offence based on mere suspicion or association should be eliminated as it shifts the burden of proof and violates the presumption of innocence.³³

The Inter-American Commission found that Special Tribunals in Nicaragua violated the presumption of innocence as they considered the fact that an accused was a member of the former National Guard or bodies linked to it to be *per se* evidence which warranted a presumption of guilt. According to the Commission, the Special Tribunals began their investigation on the basis that all such accused individuals were guilty until they proved their innocence.³⁴

³¹ Human Rights Committee General Comment 13, para. 7.

³² See *Pham Hoang v. France*, (66/1991/318/390), 25 September 1992, finding that a French customs law which created rebuttable assumptions did not violate the presumption of innocence.

³³ Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc. 7, para.4 p.745, Peru.

³⁴ Report on the Situation of Human Rights in Nicaragua, OEA/ Ser.L/V/II.53, doc. 25, 1981, at 91.

15.3 Procedures impinging on the presumption of innocence

The conduct of the trial must be based on the presumption of innocence. Judges must conduct trials without previously having formed an opinion on the guilt or innocence of the accused and must ensure that the conduct of the trial conforms to this. (See **Chapter 12.5, The right to be tried by an impartial tribunal.**)

Particular attention should be paid that no attributes of guilt are borne by the accused during the trial which might impact on the presumption of their innocence. Such attributes could include holding the accused in a cell within the courtroom, requiring the accused to wear handcuffs, shackles or prison uniform in the courtroom, or taking the accused to trial with a shaven head in countries where convicted prisoners have their heads shaved.

In an attempt to avoid such prejudicial indications, if an accused has no suitable clothing of his or her own, he or she should be provided with civilian clothing in good condition in which to appear in court. [Rule 95(3) of the European Prison Rules; see also Rule 17(3) of the Standard Minimum Rules.]

The European Commission has expressed its view in several cases that informing decision-makers of a person's prior convictions before a verdict is reached does not violate fair trial guarantees including the presumption of innocence. In one case the presiding judge disclosed details of the accused's previous convictions to lay judges before a verdict was reached on a burglary charge; in another the accused's previous convictions for theft were referred to in the course of the trial; in another the public prosecutor informed the court of the accused's numerous previous convictions before the jury reached a verdict on a rape charge.³⁵

³⁵ *X v. Austria*, 3 April 1967, 23 Coll. Dec. 31; *X v. Austria*, 1 April 1966, 19 Coll. Dec. 95; *X v. Denmark*, 14 December 1965, 18 Coll. Dec. 44.

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”.³⁶

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.³⁷ (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.³⁸

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 deemed to be implicit in two internationally protected rights: the right to be presumed

³⁶ *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, at para. 45.

³⁷ 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.

³⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 264.

innocent and the right not to be compelled to testify or confess guilt.³⁹

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.⁴⁰

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.⁴¹

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 is rejected or inordinately delayed, the complainant is entitled to bring it before a

³⁹ *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, at para. 45.

⁴⁰ *Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996.

⁴¹ Human Rights Committee General Comment 13, para. 15.

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”.⁴² The Committee has stated that: “[t]he law should require that evidence provided by...any...form of compulsion is wholly unacceptable”.⁴³ The Committee has also stated that “[c]onfessions obtained under duress should be systematically excluded from judicial proceedings...”.⁴⁴

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 judgment. [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

⁴² Human Rights Committee General Comment 20, para. 12.

⁴³ Human Rights Committee General Comment 13, para. 14.

⁴⁴ 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.⁴⁵

Relevant Standards
Article 8(3) of the American Convention “A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.”

⁴⁵ 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.