

ADVISORY COUNCIL OF JURISTS



THE ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS

...a partnership for human rights in our region

REFERENCE ON TORTURE

**24 – 26 August 2005
Ulaanbaatar, Mongolia**

FINAL REPORT

December 2005

The Asia Pacific Forum of National Human Rights Institutions

The Asia Pacific Forum of National Human Rights Institutions ('APF') is an independent non-profit organisation that supports, through regional cooperation, the establishment and development of national institutions in order to protect and promote the human rights of the peoples of the region.

Established in 1996, the APF is comprised of independent national human rights institutions that have been established in compliance with the minimum standards of the United Nations General Assembly endorsed 'Principles relating to the status of national Institutions' ('**the Paris Principles**').

The APF plays a unique role in developing human rights dialogue, networks and practical programmes of support. With its member institutions the APF is well positioned to directly influence the development of human rights law and practice in the Asia Pacific.

The Advisory Council of Jurists

The Advisory Council of Jurists ('ACJ') advises the APF Forum Council on the interpretation and application of international human rights standards. The ACJ is comprised of eminent jurists who have held high judicial office or senior academic or human rights appointments.

The establishment of the ACJ reflects the Forum Council's recognition of the need for access to independent, authoritative advice on international human rights questions and to develop regional jurisprudence relating to the interpretation and application of international human rights standards. The ACJ has considered five references: torture (2005); anti-terrorism legislation and the rule of law (2004); trafficking of women and children (2002); death penalty (2000); and the regulation of child pornography on the internet (2000).

Further information about the ACJ is available at: www.asiapacificforum.net/jurists/

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TABLE OF CONTENTS

	Page
The Advisory Council of Jurists	1
Acknowledgements	2
Terms of Reference	3
Introduction	5
Sources of International Law on Torture.....	6
List of Abbreviations.....	11
Part A – Executive Summary	14
General Recommendations and Observations.....	14
Minimum Interrogation Standards	20
Summary of Answers to Questions Posed by Reference	24
Recommendations and Observations in Relation to Forum States.....	43
Part B - Commentary on Minimum Interrogation Standards.....	53
Part C – Detailed Answers to Questions Posed by the Reference.....	67
Term of Reference (i)	67
Term of Reference (ii)	100
Term of Reference (iii)	103
Term of Reference (iv)	107
Term of Reference (v)	119
Term of Reference (vi)	122
Term of Reference (vii)	132
Term of Reference (viii).....	143
Term of Reference (ix)	151
Term of Reference (x)	160
Term of Reference (xi)	169
Part D – Position in Forum States.....	173
<i>Afghanistan</i>	173
<i>Australia</i>	178
<i>Fiji</i>	188
<i>India</i>	194
<i>Indonesia</i>	200
<i>Jordan</i>	208
<i>Malaysia</i>	213
<i>Mongolia</i>	223
<i>Nepal</i>	229
<i>New Zealand</i>	237
<i>Palestinian Territories</i>	248
<i>Philippines</i>	254
<i>Republic of Korea</i>	264
<i>Sri Lanka</i>	271
<i>Thailand</i>	281

Appendices

Table 1	291
Table 2	292
Appendix 1: APT: Position Paper	293
Appendix 2: Fiji Medical Standards	299
Appendix 3: APT: Paper on OPCAT	317
Appendix 4: NGO Statement on Torture at the 10 th Annual Meeting.....	326

THE ADVISORY COUNCIL OF JURISTS

ULAANBAATAR, MONGOLIA

24-26 AUGUST 2005

This is the final report of the Advisory Council of Jurists after its meeting on 24 - 25 August 2005¹ to consider the Forum Council's reference on the issue of torture.

The members of the Advisory Council of Jurists are:

- Mr Jugnee Amarsanaa (Mongolia), President of the Council
- Professor Gilliam Triggs (Australia)
- Justice Anthony Gates (Fiji)
- Mr Fali S Nariman (India)
- Professor Jacob E Sahetapy (Indonesia)
- Dato' Mahadev Shankar (Malaysia)
- Hon Mr Daman Nath Dhungana (Nepal)
- Justice Susan Glazebrook (New Zealand)
- Mr Sedfrey A Ordoñez (Philippines)
- Professor Kyong-Wham Ahn (Republic of Korea)
- Mr Rajendra KW Goonesekere (Sri Lanka)
- Professor Vitit Muntarbhorn (Thailand)

¹ Dato' Mahadev Shankar and Hon Mr Daman Nath Dhungana were unfortunately not able to attend the meeting but they have had input into this final report.

ACKNOWLEDGEMENTS

The Advisory Council of Jurists thanks its President, Mr Jugnee Amarsanaa, for his skilful chairmanship of the Advisory Council at its meeting. The Advisory Council also expresses its thanks to Mr Sanduijav Bold for interpreting for Mr Amarsanaa.

The Advisory Council would like to express its sincere gratitude to Ms Jessica Wyndham for the excellent background paper she provided to the Council for its consideration. The Advisory Council also records its appreciation to Justice Susan Glazebrook and the New Zealand Court of Appeal law clerks, Ms Claire McGuinness, Ms Rosara Joseph, Ms Christine Bassett and Mr Malcolm Birdling, for preparing a working draft of the Report for consideration by the Advisory Council and for their work in helping to finalise the report after the meeting.

The Council was greatly aided at the meeting in its deliberations and analysis by Ms Jessica Wyndham of the APF Secretariat, Mr Edouard Delaplace of the Association for the Prevention of Torture and Mr Robert Hesketh, Director, Office of Human Rights Proceedings, New Zealand. The Council would particularly like to acknowledge Ms Wyndham's role in acting as scribe during the meeting.

The Council also wishes to acknowledge the able and expert assistance of the Secretariat, and, in particular, Mr Stephen Clark without whose untiring efforts this Report would not have been completed.

The Council is grateful to the MacArthur Foundation for the financial support it provided for the preparation of the background paper and the meeting of the Council in Mongolia.

TERMS OF REFERENCE

At the Eighth Annual Meeting of the APF held in Nepal in February 2004, Forum Councillors decided to formulate a new reference to the ACJ on the primacy of the prevention of torture during detention and requested the secretariat prepare draft terms of reference for the consideration and approval of the APF.²

In July 2004 draft terms of reference were distributed to APF members for comment. The terms of reference adopted by APF members were as follows:

The Asia Pacific Forum of National Human Rights Institutions refers to the Advisory Council of Jurists to advise and make recommendations as to international law, instruments and standards relevant to torture and other cruel, inhuman and degrading treatment or punishment ('ill-treatment').

In particular the Advisory Council of Jurists is asked to consider:

- (i) how international human rights instruments, standards and mechanisms define 'torture', and other forms of ill-treatment, including with reference to detention, interrogation, medical experimentation and facilities, corporal punishment, gender specific forms and sexual abuse. The Advisory Council of Jurists is asked to develop a list of minimum standards of interrogation in light of the above analysis;
- (ii) the prohibition on torture and other forms of ill-treatment as a rule of customary international law which is reflected in the jurisprudence of international, regional and national tribunals and the statements of academics and such international bodies as the Human Rights Committee and the Committee against Torture;
- (iii) whether the prohibition on torture and other forms of ill-treatment can be derogated from in certain circumstances;
- (iv) the nature and scope of procedural guarantees and other safeguards stipulated by international human rights law aimed at preventing acts of torture and other forms of ill-treatment;

² 'Concluding Statement', Eighth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, 16-18 February 2004, Kathmandu, Nepal, http://www.asiapacificforum.net/annual_meetings/eighth/concluding.htm

- (v) the safeguards stipulated by international human rights law and standards to ensure that any statement which is established to have been made as a result of torture and other forms of ill-treatment shall not be invoked as evidence in any proceedings;
- (vi) remedial measures that should be made available to victims of torture and other forms of ill-treatment, including complaints systems, compensation mechanisms and medical rehabilitation;
- (vii) the nature of the protection to be afforded to persons being forcibly returned to a country in which they may face torture or other forms of ill-treatment;
- (viii) international humanitarian law on torture and other forms of ill-treatment in times of domestic and international conflict;
- (ix) the jurisdiction of national and international tribunals to consider cases of alleged torture and other forms of ill-treatment;
- (x) the jurisdiction of national and international tribunals to consider cases of alleged torture and other forms of ill-treatment by international intervention forces; and
- (xi) the nature and scope of the obligation to protect against violations by non-state actors.

INTRODUCTION

There is an absolute prohibition on torture under international law. The challenges caused by terrorism and other threats call for increased vigilance when articulating and implementing this prohibition. In this report, the ACJ makes a number of recommendations and observations in relation to NHRIs and the protection of individuals from torture. Foremost among these are the proposed Minimum Interrogation Standards, which it is hoped will make an original contribution to the effective implementation of the prohibition on torture and cruel, inhuman and degrading treatment and punishment in the region.

In our deliberations on this reference on torture we were encouraged by the statement of the High Commissioner for Human Rights, Louise Arbour, to this 10th Annual Meeting of the APF. On the question of torture she said:

I am particularly pleased that the absolute prohibition on torture will also be discussed during this Meeting. The need to act is urgent, as the lives of individuals all over the world, their well-being and sense of security continue to be scarred by torture on a daily basis. National human rights institutions have a central role to play in the combat against torture. Our Resident Coordinator here in Mongolia has appropriately highlighted the important work of the Mongolian Human Rights Commission with respect to the prevention of torture. My office is offering a training programme with the assistance of Indonesia's Komnas Ham and our partner the Association for the Prevention of Torture, on national human rights institutions' central role in preventing torture and in ensuring that justice is served, and remedies are provided, to victims of torture. National institutions have an obligation to remind their governments of the imperative of undertaking effective measures to prevent all acts of torture or cruel inhuman or degrading treatment or punishment. They must remind them every step of the way that the right to live free from torture is non-derogable. Similarly, they should stress the importance of prevention and continue to call for the universal ratification of the Convention against Torture and its Optional Protocol.

The High Commissioner also states that one of the challenges of the Asia Pacific region remains the lack of a single human rights instrument reflecting a common regional approach to human rights in the region. The ACJ agrees. We consider that the APF and, in particular, the ACJ are uniquely placed to prepare a draft regional or sub-regional instrument for the region and would recommend that the ACJ be instructed to undertake this task.

SOURCES OF INTERNATIONAL LAW ON TORTURE

The first reference specifically to ‘torture’ in an international or regional human rights instrument was in the Universal Declaration on Human Rights³ which states at Article 5:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The wording of the UDHR has been adopted in subsequent international and regional human rights instruments including article 7 of the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴ and the American Convention on Human Rights⁵. The meaning of ‘torture’, generally and in specific circumstances, has also been elaborated on in particular conventions and international texts, as set out below.

(i) International human rights instruments on torture

Human rights and humanitarian instruments

There are several international human rights treaties relevant to torture. These are:

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁶
- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);⁷

³ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. The American Declaration of the Rights and Duties of Man of 1948, adopted by the Ninth International Conference of American States, 2 May 1948 was the first regional instrument to allude to torture, although it did not refer to torture specifically. The American Declaration stated that ‘every individual deprived of his liberty has the right ... to humane treatment during the time he is in custody’ (Article 25) and that ‘Every person accused of an offence has the right ... not to receive cruel, infamous or unusual punishment’ (Article 26).

⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively.

⁵ Adopted by the Inter-American Specialized Conference on Human Rights on 22 November 1969, entry into force 18 July 1978.

- International Covenant on Civil and Political Rights (ICCPR);⁸
- International Covenant on Economic, Social and Cultural Rights (ICESCR);⁹
- Convention on the Rights of the Child (CRC);¹⁰
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹ and
- Convention relating to the Status of Refugees (Refugees Convention).¹²

The international humanitarian treaties collectively referred to as the Geneva Conventions and their two Additional Protocols, are also relevant to torture. These treaties are:

- Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;¹³
- Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;¹⁴
- Convention relative to the Treatment of Prisoners of War;¹⁵

⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

⁷ Adopted on 18 December 2002 by General Assembly resolution A/RES/57/199. OPCAT was available for signature, ratification and accession as from 4 February 2003.

⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

¹⁰ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

¹¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981.

¹² Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954.

¹³ Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949 for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, entry into force 21 October 1951.

¹⁴ Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949 for the purpose of revising the Xth Hague Convention of October 18, 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, entry into force 21 October 1951.

¹⁵ Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949 for the purpose of revising

- Convention relative to the Protection of Civilian Persons in Time of War;¹⁶
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts;¹⁷ and
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.¹⁸

Finally, the Rome Statute of the International Criminal Court¹⁹ is also a significant international treaty relevant to the prohibition on torture both in times of peace and conflict.

The status of ratifications of these conventions by the fifteen states whose national human rights institutions (NHRIs) are members of the APF is set out in Table 1 (human rights instruments relevant to torture) and Table 2 (humanitarian instruments relevant to torture).

Supplementary instruments

The UN General Assembly and Economic and Social Council have each adopted several additional instruments that relate either generally to the treatment of individuals while in detention or specifically to torture. These are:

- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²⁰

the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, entry into force 21 October 1951.

¹⁶ Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949 for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, entry into force 21 October 1951.

¹⁷ Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, entry into force 7 December 1978.

¹⁸ Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, entry into force 7 December 1978.

¹⁹ Adopted and opened for signature, ratification and accession in Rome on 17 July 1998, entry into force 1 July 2002.

²⁰ Adopted by UN General Assembly resolution 3452 (XXX) of 9 December 1975.

- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²¹
- 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;²²
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;²³
- Standard Minimum Rules for the Treatment of Prisoners;²⁴
- Rules for the Protection of Juveniles Deprived of their Liberty;²⁵
- Code of Conduct for Law Enforcement Officers²⁶; and
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.²⁷

General Comments

Specific provisions in each of the ICCPR, CAT and CRC relating to torture, have been elaborated on in ‘General Comments’.²⁸ The Committee against Torture has prepared one General Comment only. General Comment No. 1 relates to the implementation of Article 3 of CAT (refoulement) in the context of Article 22 (individual complaints mechanism).²⁹ The General Comment provides practical guidance to individuals who wish to bring a communication before the Committee on the issue of non-refoulement.

²¹ Adopted by UN General Assembly resolution 55/89 Annex of 4 December 2000.

²² Adopted by UN General Assembly resolution 37/194 of 18 December 1982.

²³ Adopted by UN General Assembly resolution 43/173 of 9 December 1988.

²⁴ Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

²⁵ Adopted by UN General Assembly resolution 45/113 of 14 December 1990.

²⁶ Adopted by UN General Assembly resolution 34/169 of 17 December 1979.

²⁷ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²⁸ Each of the committees established under international human rights instruments has the power to prepare General Comments. These are designed to guide States Party in how to implement specific requirements of the particular treaty in question.

²⁹ *General Comment No. 01: Implementation of Article 3 of the Convention in the context of Article 22: 21/11/97.* A/53/44, annex IX, Committee against Torture.

Other General Comments on the issue of torture have been issued by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee on the Elimination of All Forms of Discrimination Against Women. These General Comments are as follows:

- CESCR – General Comment No. 14: the right to the highest attainable standard of health (Article 12);
- HRC – General Comment No. 20: prohibition of torture and cruel treatment or punishment (Article 7);
- HRC – General Comment No. 24: reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant;
- HRC – General Comment No. 29: derogations during a State of emergency (Article 4);
- HRC – General Comment No. 31: the nature of the general legal obligation imposed on States Parties to the Covenant; and
- CEDAW Committee – General Comment No. 19: violence against women.

LIST OF ABBREVIATIONS

ACJ	Advisory Council of Jurists
APF	Asia Pacific Forum of National Human Rights Institutions
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, & relating to the Protection of Victims of International Armed Conflicts 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, & relating to the Protection of Victims of Non-International Armed Conflicts 1977
APT	Association for the Prevention of Torture
(UN) Basic Principles on the Use of Force	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
(UN) Beijing Rules	Standard Minimum Rules for the Administration of Juvenile Justice
(UN) Body of Principles	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CAT	Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
UNGA Declaration against Torture	UNGA Declaration on the Protection of All Persons from Being Subjected to Torture, 9 December 1975
ECHR	European Court of Human Rights
EU	European Union
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms

First Geneva Convention	Geneva Convention for the Amelioration of the Condition of the Wounded & Sick in Armed Forces in the Field of 12 August 1949.
Fourth Geneva Convention	Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
(UN) Istanbul Principles	Principles on the Effective Investigation & Documentation of Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment
NGOs	Non-governmental organisations
NHRIs	National Human Rights Institution
OHCHR	United Nations Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
(UN) Principles of Medical Ethics and Torture	Principles of Medical Ethics relevant to the Role and Torture of Health Personnel, particularly Physicians, in the Protection of Prisoners & Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Refugee Convention	Convention relating to the Status of Refugees
Rome Statute	Rome Statute of the International Criminal Court

(UN) Rules for the Protection of Juveniles	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
Second Geneva Convention	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
(UN) Standard Minimum Rules	Standard Minimum Rules for the Treatment of Prisoners
Third Geneva Convention	Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949
UN	United Nations
UNGA	United Nations General Assembly
UDHR	Universal Declaration of Human Rights
Vienna Convention	Vienna Convention on the Law of Treaties

PART A
EXECUTIVE SUMMARY

General Recommendations and Observations

Ratification of relevant international instruments

- NHRI's should stress to their states the vital importance of ratifying all relevant treaties regarding torture, including the ICCPR, its First Optional Protocol, the CAT and the OPCAT.
- In particular, they should stress the importance of ratifying OPCAT and recognising an individual's right to make a complaint to relevant international bodies, by becoming a party to the First Optional Protocol to the ICCPR and making a declaration under article 22 of CAT.

Legislative implementation of international obligations in domestic law

NHRI's should urge their states to:

- include a comprehensive definition of the term "torture" in domestic legislation;
- ensure that torture is a specific criminal offence under domestic laws;
- recognise customary international law as informing domestic law;
- give legislative effect to the non-refoulement principle, including the prohibition of the return (directly or indirectly) of persons to a country in which they may face torture or other cruel, inhuman or degrading treatment or punishment;
- enact legislation asserting jurisdiction over extraterritorial acts of torture committed both by national and non nationals.

Legislative implementation

- Effective implementation of international obligations regarding torture and cruel, inhuman or degrading treatment or punishment requires vigilance and measures additional to the enactment of domestic legislation and the ratification of relevant international standards.
- NHRIs should urge their states to ensure that all allegations of torture and cruel, inhuman or degrading treatment or punishment perpetrated by public officials are subjected to an independent and impartial investigation and that all perpetrators of torture are effectively punished.
- For those states that are not parties to any relevant treaties and that have no specific laws relating to torture and cruel, inhuman and degrading treatment or punishment, existing laws, including under the relevant penal codes, should be used to prosecute perpetrators.
- NHRIs should stress the importance of effective witness and victim protection regimes to ensure that witnesses and victims are not subject to retaliation of any kind. In this regard, the introduction of “whistle blowing” legislation will be of significance.
- Consideration should be given to introducing mandatory reporting regimes where there is any suspicion that a person has been subjected to torture or cruel, inhuman or degrading treatment or punishment.
- NHRIs should promote policy reform to remove any immunity of UN officials and state representatives for torture and cruel, inhuman or degrading treatment or punishment.

International bodies

- NHRIs should encourage their states to issue a standing invitation to the UN Special Rapporteur on Torture and other relevant Rapporteurs of the UN to make visits and reports.
- NHRIs should urge their states to ensure that their reporting requirements under relevant international treaties are up-to-date. They might also consider submitting shadow reports.

- NHRI should urge their states to implement all recommendations and conclusions made in reports prepared by the relevant monitoring committees and special Rapporteurs. In this respect, NHRI have a supportive role to play.

Alternative measures to combat torture

- NHRI should advocate that adequate resources be provided to authorities so that investigative techniques, not involving physical or psychological coercion, can be used, including adequate resources for scientific investigation, such as DNA testing.
- NHRI should work with their governments to improve the current infrastructure of detention facilities so as to ensure that the human dignity of detainees is respected and individual differences and characteristics catered for.
- Relevant detention facilities include all places where people are deprived of their liberty, including police stations, prisons, administrative detention facilities, military detention centres, juvenile detention centres and social care institutions such as psychiatric hospitals and secure geriatric facilities.

Monitoring

- NHRI should also take a proactive role in monitoring detention facilities. In order to facilitate this role, NHRI (and any other monitoring agencies) should have free and unfettered access to all places of detention, the ability to interview persons in private and full access to all relevant documentation. The monitoring team should be multi-disciplinary and include lawyers and medical personnel.
- NHRI should encourage all members of the judiciary involved in making decisions related to detention to visit detention facilities on a regular basis.

Training and education

- NHRIs should take an active role in educating all sectors of the community, for example, lawyers, journalists, doctors, medical personnel, armed forces personnel, teachers, staff of hospitals and care institutions, police, the military, senior public officials, the judiciary and legislators, on the meaning and application of the international law on torture, and cruel, inhuman or degrading treatment or punishment.
- NHRIs should advocate the adoption of codes of conduct that are in conformity with applicable international human rights standards for all relevant officials and assist in their implementation.
- NHRIs should work with the OHCHR to promote awareness of the prohibition on torture and cruel, inhuman or degrading treatment or punishment in the Asia Pacific region. In particular, the findings of the ACJ should be incorporated into the training workshops being developed by the OHCHR.

Minimum Interrogation Standards

- NHRIs should promote the Minimum Interrogation Standards (MIS) developed by the ACJ and work to make sure that all public officials involved in interrogations are fully informed with regard to those MIS and trained to use them effectively.
- The MIS should be translated into national and other languages and disseminated to all relevant public officials as well as to the general public.
- The MIS should be distributed to all those involved in the justice system, and, in particular, the judiciary and the legal profession. Training should also be provided to these groups.
- The full implementation of the MIS may require extra resources. NHRIs should seek the necessary funding.

Reporting

- NHRI should report on a regular basis to the OHCHR and other relevant national and international bodies on the extent to which the authorities, including police, military, prison and hospital personnel and educators, fail to comply with the prohibition on torture and cruel, inhuman or degrading treatment or punishment.
- NHRI should ensure that there is a systematic recording of complaints received specifically alleging torture or cruel, inhuman or degrading treatment or punishment. NHRI should include reference to such complaints in their annual report to Parliament.

Remedies

- NHRI should promote redress (including reparation, rehabilitation and compensation) for victims of torture and cruel, inhuman or degrading treatment or punishment and their relatives.
- All information gathered by NHRI relating to allegations of torture and cruel, inhuman or degrading treatment or punishment should be provided to the relevant prosecuting authorities (except, where there are real concerns about the safety of any witness or, in the absence of mandatory reporting regimes, where the victim does not wish that to be done).
- NHRI should press for the prosecution of perpetrators of torture or cruel, inhuman or degrading treatment or punishment. The legal capacity for NHRI to refer cases to the courts would support this role.
- In some states, NHRI have no jurisdiction over the armed forces or their detention facilities. In order to have full coverage of all relevant bodies, NHRI should have jurisdiction over all the armed forces of their states, including when they are deployed offshore.

Earlier references

- The observations and recommendations of the ACJ in relation to the rule of law in combating terrorism also apply in the context of this Term of Reference on Torture, particularly to the extent that laws countering terrorism violate international laws and standards in relation to detention and interrogation.
- The observations of the ACJ in relation to the death penalty also apply in the context of this Term of Reference on Torture, particularly in relation to the restrictions that are required by international human rights law on the manner and method of carrying out the death penalty and the limitations on the duration and conditions of incarceration of persons sentenced to death.

The ACJ acknowledges the recommendations contained within the statement of the Pre Forum NGO Consultation, presented at the APF's 10th Annual Meeting in Ulaanbaatar, Mongolia, 24-26 August 2005. A copy of the statement is available at Appendix 4.

Minimum Interrogation Standards

Interrogation is any questioning by a public official of a person where there is a suspicion that that person is involved in an offence. It applies whether someone is under arrest or detention or is voluntarily subjecting themselves to an interview and includes a situation where someone is interviewed originally as a witness or as someone with relevant information but, during the course of the interview, becomes suspected of involvement in the offence. Most of these standards will also apply by analogy to other types of questioning.

1. States must ensure that torture and cruel, inhuman or degrading treatment or punishment are not employed before, during or after any interrogation. Nor must these practices be employed to compel witnesses to give information about or evidence against another.
2. Interrogation should never take place at secret interrogation centres. If a person is detained for interrogation, relatives or a third person of the person's choice and, where applicable, consular authorities should be informed immediately of the fact and place of detention and/or that of interrogation.
3. Individuals should only be interrogated for a reasonable period, taking into account the individual characteristics of the interrogated person and, if extending for a lengthy period, regular breaks should be provided.
4. Persons subject to interrogation must be given adequate food, sleep, exercise, changes of clothing, washing facilities and, if needed, medical treatment taking into account any particular characteristics of the individual including age, gender, religion, ethnicity, medical needs, mental illness and any disabilities or other vulnerabilities.
5. There should never be a threat of the removal of basic necessities such as hygiene provisions, food, exercise, rest, sleep, in exchange for information or cooperation. Neither should there be a threat of any reprisals against a third person (and in particular a relative).

6. No method of interrogation should be employed that impairs a person's capacity of decision-making or judgement. Save in exceptional circumstances, no interrogation should take place at night.
7. All interrogations should be conducted in an age and gender appropriate manner and take into account any other relevant characteristics of an interrogated person including, for example, religion, ethnicity, medical needs, intellectual disability, mental illness, personality disorder or any other vulnerability.
8. A person under the age of 18 who is suspected of involvement in any offence should not be questioned without an adult of their choice present.
9. At the time of any arrest or detention (and before any interrogation) a person should be given the right to undergo a medical examination by a competent and impartial medical practitioner in order to provide a point of reference as to their condition before the commencement of any interrogation. The time and findings of the medical examination should be recorded.
10. An individual for whom the language of interrogation is not his or her first language or who is deaf, should always (and before any interrogation) be informed of his or her right to have a competent and impartial interpreter for any interrogation.
11. If there are any issues about the person's understanding of his or her rights or of the interrogation process or of any questions asked, an interpreter should be provided, whether requested by the person being interrogated or not. Interpreters should also be available in detention facilities so that a person's basic needs can be communicated.
12. Before any interrogation commences, the interrogated person should be informed (in a manner that is understandable to him or her) of the reason for the interrogation and any charges against him or her.

13. Every interrogated person should, before any interrogation begins, be told (in a manner that is understandable to him or her) of his or her right to consult a lawyer of his or her choice without delay and in private.
14. The person should also be told of his or her right not to be compelled to testify against him or herself or to confess guilt. Where a person (or his or her lawyer) has indicated that the person intends to exercise the right to silence, no further questioning should take place.
15. Those who are arrested or detained should be told of their right to consult a lawyer at the time of arrest or detention. All detainees should also be given the right forthwith to challenge the lawfulness and conditions of their detention.
16. Officials have an obligation to facilitate contact with a lawyer of choice, for example by providing a list of available lawyers, access to a telephone and reasonable conditions of privacy for any consultation.
17. The provision of a lawyer should be free of charge if the person does not have the means to pay for his or her services and the person should be told (before any interrogation begins) that a lawyer can be provided at no cost in such circumstances.
18. Where a person has indicated a wish to consult a lawyer no further questioning should take place until that consultation has taken place.
19. The person's lawyer must be physically present and within earshot during any interrogation and have the right to intervene in the interview to ensure that the law is complied with (but not otherwise to interfere with the interrogation). The interrogated person should also have the right, if requested during the course of the interview, to consult with his or her lawyer in private.
20. Where a lawyer is not available, or the interrogated person does not want to have a lawyer present, the person should be given the opportunity to have present at any

interrogation a representative from a relevant non-governmental organisation or a relative or friend of his or her choice. Except to ensure the law is complied with, those persons should not otherwise interfere with the interrogation.

21. The time of arrest or detention and/or the arrival at the place of interrogation should be recorded. The name of any arresting officer and all others who have any contact with the interrogated person should be recorded, as well as the nature and time of that contact.
22. Each interrogation should begin with the identification of all persons present and the recording of their names and any official position held as well as the place of interrogation. The time the interrogation began and finished and the timing of and reasons for any breaks should also be recorded.
23. All interrogation sessions should be recorded. This should be by way of video (or audio) recording unless, for reasons which should be recorded in writing, this is not possible or if the interrogated person does not wish to be recorded in that manner. In cases where there is no video or audio recording, a comprehensive contemporaneous written record should be kept.
24. Procedures should be instituted to ensure the integrity of interrogation records, including proper storage. Evidence from non-recorded interrogations should be excluded from court proceedings (ie no 'verballing').
25. The recording should be made available to the interrogated person and his or her lawyer of choice. Where the record is in writing, the interrogated person and his or her lawyer should be given the opportunity to correct it.
26. After any interrogation, the interrogated person should have the right to request a medical examination by a competent and impartial medical practitioner.
27. Appropriate penalties should exist (including the inadmissibility of evidence) and be enforced for any breach of these standards.

**SUMMARY OF ANSWERS TO QUESTIONS
POSED BY THE REFERENCE**

(i) how international human rights instruments, standards and mechanisms define ‘torture’ and other forms of ill-treatment, including with reference to detention, interrogation, medical experimentation and facilities, corporal punishment, gender specific forms and sexual abuse. The Advisory Council of Jurists is asked to develop a list of minimum standards of interrogation in light of the above analysis.

- Torture is prohibited under international law. The prohibition is applicable to all states, irrespective of whether they are parties to any relevant treaties.
- The ICCPR, article 7, and the UDHR, article 5, provide that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. However, these terms are not defined.
- The four Geneva Conventions of 1949 and the two Additional Protocols of 1977 prohibit torture and related practices (see for example, article 3 of the Geneva Conventions). Torture is not defined.

Definition of torture

- The following definitions are not intended to be exhaustive and concepts of what is included in torture or cruel, inhuman or degrading treatment or punishment can evolve over time to encompass a wider range of conduct.
- Article 1 of CAT defines torture to include the following basic aspects:
 - the intentional infliction of severe pain or suffering;
 - the pain or suffering can be physical or mental;
 - it must be committed by persons exercising public authority; and
 - it must have a purpose, such as the obtaining of information or a confession, or the infliction of punishment, or be based on discrimination; but

- such pain or suffering must not arise only from, or be inherent in or incidental to, lawful sanctions.
- This definition reflects the definition of torture under customary international law, except that customary international law does not require the involvement of a public official.

Cruel, inhuman or degrading treatment and punishment

- According to case law, ‘cruel and inhuman treatment’ must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, religion, age and state of health of the victim. However, the treatment need not be intended to cause suffering.
- According to case law, ‘degrading treatment’ requires treatment of sufficient severity which involves some form of gross humiliation or debasement. However, it is not necessary that the treatment have this particular purpose.
- The difference between cruel and inhuman treatment and degrading treatment on the one hand and torture on the other relates more to the purpose of the perpetrator rather than any gradation in suffering.

Detention

- Regardless of whether a state is a party to any relevant treaty, the general international law prohibition on torture and cruel, inhuman and degrading treatment or punishment applies to all persons under detention.
- CAT and Article 7 of the ICCPR also apply to persons under detention, whether the detention is lawful or unlawful.
- In addition, Article 10(1) of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- More specific requirements for detention are set out in the (UN) Principles of Medical Ethics and Torture; the (UN) Principles for Persons under Detention; the Standard

Minimum Rules; and the Rules for the Protection of Juveniles. Breach of these standards may constitute a breach of the general prohibition relating to torture under international law or lead to breaches of CAT or Article 7 and/or Article 10(1) of the ICCPR.

- An institution's failure to meet certain basic requirements of detention may constitute torture or cruel, inhuman or degrading treatment or punishment. In addition, a detainee's personal circumstances or special characteristics may impose particular obligations where a detainee may require individualised treatment.
- Lengthy periods of detention without charges being laid or without trial may, as well as being a violation of Article 14(3)(c) of the ICCPR, also constitute torture or cruel, inhuman or degrading treatment or punishment, depending upon the combination of circumstances both of the detention and the individual.
- In some circumstances, solitary confinement may constitute torture or cruel, inhuman or degrading treatment or punishment.

The use of force and security measures

- The use of force and security measures may constitute torture or cruel, inhuman or degrading treatment or punishment.
- The (UN) Code of Conduct for Law Enforcement Officers and the (UN) Basic Principles on the Use of Force contain specific guidelines on the use of force and security measures.
- Law enforcement and prison officials may use force only when strictly necessary and to the extent required for the performance of their duty.
- Force may be necessary for the prevention of crime, including crimes committed in detention, or to effect lawful arrest, but no force going beyond that may be used and any force used must be proportionate to the objective to be achieved.
- The use of restraints (such as shackles) during detention can constitute a violation of the prohibition against torture, cruel, inhuman or degrading treatment or punishment under general international law as well as a breach of articles 7 and/or 10(1) of the ICCPR. Similar considerations apply to non-voluntary solitary confinement.

Medical treatment and facilities

- Article 12 of the ICESCR provides that every person has the right to the enjoyment of the highest attainable standards of physical and mental health.
- All persons in detention should have prompt access on request and free of charge to proper medical and dental care and treatment that is appropriate to them.
- The denial of proper medical treatment and facilities (particularly to persons in detention) may constitute torture or cruel, inhuman or degrading treatment or punishment.
- Where necessary, persons should be transferred to specialist medical facilities such as a hospital.
- Practical standards have been developed in relation to medical facilities for psychiatric patients (see for example World Health Organisation Guidelines for the Promotion of Human Rights of Persons with Mental Disorders).

Medical and scientific experimentation

- Article 7 of the ICCPR gives as a particular example of torture or cruel, inhuman or degrading treatment or punishment, the subjection of a person, without his or her free consent, to medical or scientific experimentation.
- International law has evolved so that any consent also has to be fully informed consent.

Interrogation

- No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, whether prior to, during or subsequent to interrogation.
- The (UN) Principles of Medical Ethics and Torture prohibit health personnel from applying their knowledge and skills in order to assist in the interrogation of detainees in a manner that may adversely affect their physical or mental health or condition.

- The ACJ has developed minimum standards of interrogation designed to ensure that the prohibition on torture and cruel, inhuman or degrading treatment or punishment is adhered to.

Gender-based violence

- There is an overlap between gender-based violence and gender-specific forms of torture and cruel, inhuman or degrading treatment or punishment.
- Gender-based violence (including family violence and sexual abuse and exploitation) may constitute torture or cruel, inhuman or degrading treatment or punishment. Similarly, honour killings and female genital mutilation will usually constitute torture.
- Article 2 of CEDAW condemns discrimination against women. CEDAW Committee General Recommendation No. 19 states that gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms (including the right to freedom from torture and cruel, inhuman or degrading treatment or punishment) is discrimination under the definition of discrimination set out in Article 1 of CEDAW.
- The General Assembly in its Declaration on the Elimination of Violence Against Women condemns any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
- Violence directed against other groups on the basis, for example, of race, age, disability, sexual orientation, indigeneity, ethnicity or religion, would be subject to similar principles.

Corporal punishment

- It is generally accepted that article 19 of the CRC gives rise to a general prohibition on corporal punishment against children.

- International law has evolved so that there is also a general prohibition on corporal punishment against adults on the basis that it constitutes torture or cruel, inhuman or degrading treatment or punishment (see for example General Comment 20 of the HRC).
- Judicial sentences involving corporal punishment, regardless of whether they are permissible under domestic law, will therefore violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment.
- Torture or cruel, inhuman or degrading treatment or punishment can arise in the context of the death penalty at several stages, including the method of execution, failure to follow procedural requirements and conditions and length of time on death row.
- There is evolving authority for the proposition that the implementation of the death penalty *per se* breaches the prohibition against torture and/or cruel, inhuman or degrading treatment or punishment.

(ii) the prohibition on torture and other forms of ill-treatment as a rule of customary international law which is reflected in the jurisprudence of international, regional and national tribunals and the statements of academics and such international bodies as the Human Rights Committee and the Committee against Torture.

- The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is a rule of customary international law.
- The prohibition on torture is a peremptory norm or *jus cogens* (see for example General Comment 24 of the HRC; *Prosecutor v Furundzija*, 10 December 1998 of the ICTY; *R v Bow Street Magistrate, ex parte Pinochet (No.3)* [2000] 1 AC 147; and *Attorney General v Zaoui*, [2005] NZSC 38 at [51]).
- Customary international law is derived from state practice. When states all act in a certain way, reflecting a generally held belief that to act that way is required by law, this is the basis of customary international law.
- Where a norm is accepted and recognised by the international community of states as a norm from which no derogation is permitted and which can be modified only by a

subsequent norm of general international law having the same character, this is referred to as a peremptory norm or *jus cogens* (article 53, Vienna Convention on the Law of Treaties).

- Customary international law and peremptory norms/*jus cogens*, are binding on all states regardless of whether they have ratified any of the relevant treaties including the ICCPR and CAT.

(iii) whether the prohibition on torture and other forms of ill-treatment can be derogated from in certain circumstances.

- The prohibition on torture and cruel, inhuman or degrading treatment or punishment cannot be derogated from in any circumstances.
- This means that torture and cruel, inhuman or degrading treatment or punishment are absolutely prohibited, including in the context of war, countering terrorism or in dealing with any public emergency. They are also absolutely prohibited even when authorised by domestic legislation or by order of a superior.
- It is a principle of international law that there shall be no impunity for perpetrators of torture and cruel, inhuman or degrading treatment or punishment. This means that there should be criminal responsibility imposed on the perpetrators of torture.
- The establishment of a new regime does not eliminate the responsibility of the State to prosecute acts of torture.

(iv) the nature and scope of procedural guarantees and other safeguards stipulated by international human rights law aimed at preventing acts of torture and other forms of ill-treatment.

- There are various treaty-based requirements and evolving standards which establish procedural guarantees and other safeguards that may help prevent acts of torture and other

forms of ill-treatment. These include safeguards with respect to persons who are detained and/or interrogated and monitoring and training requirements.

Detention

- With regard to detention, articles 7, 9 and 10 of the ICCPR are relevant, as well as other standards, including the Standard Minimum Rules and Body of Principles.
- These suggest the following particular procedural safeguards should be followed when an individual has been detained:
 - relatives or a third person of the detainee's choice and consular authorities of the State of origin of a detained foreigner shall be informed in a timely manner of his or her arrest or detention and the place of detention;
 - secret places of detention should be abolished under law;
 - all detainees should be given the ability to challenge the lawfulness of their detention forthwith;
 - every person at the beginning of detention must be given the right to undergo a medical examination;
 - a person shall be given the opportunity to have access to a lawyer of their choice immediately upon being detained; and
 - a person who is detained must be informed of their rights in respect of each of these issues in a language they understand.
- The minimum interrogation standards developed by the ACJ and set out above should be adhered to when an individual is being questioned (whether in detention or not).
- Article 11 of CAT also requires states to conduct systematic reviews of the rules and practices relating to the interrogation and treatment of detainees with a view to preventing any cases of torture.

Monitoring requirements

- Regular and unannounced visits by independent monitoring bodies (including NHRIs) to places of detention play an important proactive role in preventing torture.
- Any monitoring bodies must have all the powers required to conduct professional monitoring, including access to all relevant information, the right to conduct interviews in private and unrestricted access to premises.
- Monitoring must cover all places where persons are deprived of liberty, including police stations, prisons, administrative detention facilities, military detention centres, juvenile detention centres and social care institutions such as psychiatric hospitals. The monitoring team should be multi-disciplinary and include lawyers and medical personnel.
- Particular issues to be considered when monitoring places of detention include treatment, protection measures, material conditions, regimes and activities, medical services, prison staff and detention by police.
- OPCAT will establish a system of regular visits to places of detention carried out by complementary international and national independent expert bodies.
- At the national level, state parties will establish national preventive bodies. These could include NHRIs. At the international level the relevant body is a sub-committee of the Committee against Torture which is also mandated to advise the relevant national bodies.

Training

- Articles 10(1) and 16(1) of the CAT require states to provide education and information regarding the prohibition against torture and cruel, inhuman or degrading treatment or punishment to law enforcement personnel, civil or military, medical personnel, public officials and any other persons involved in the custody, interrogation or treatment of persons who are detained.
- The state's involvement in the training of all relevant personnel plays an important role in the fulfilment of a state's obligation to prevent torture and cruel, inhuman or degrading treatment or punishment.

- In particular, medical personnel who examine those who complain about torture and cruel, inhuman or degrading treatment or punishment should be adequately trained to carry out their functions. The template for the examination of such persons, developed by the Fiji Human Rights Commission (in conjunction with Physicians Against Torture), may provide a useful template for training (see Appendix 2).

Trade in equipment

- States can take positive steps to reduce the risk of torture by restricting the trade in equipment and products that can be used for torture.

(v) **the safeguards stipulated by international human rights law and standards to ensure that any statement which is established to have been made as a result of torture and other forms of ill-treatment shall not be invoked as evidence in any proceedings.**

- It is implicit from the absolute prohibition against torture under international law that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. Depending on the circumstances, this principle is likely also to apply to statements made as a result of cruel, inhuman or degrading treatment or punishment.
- Article 15 of CAT stipulates that any statement that 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 14(3)(g) of the ICCPR provides that no person shall be compelled to testify against him or herself or to confess guilt.
- Jurisprudence of both the HRC (for example in the case of *Singarasa v Sri Lanka*) and Committee against Torture (for example *P.E. v France*), states that, where torture is

alleged, the onus is on the prosecution to prove that the confession was made without duress.

(vi) the remedial measures that should be made available to victims of torture and other forms of ill-treatment, including complaints systems, compensation mechanisms and medical rehabilitation.

- Under international law there exists a general right to reparation for breach of an international wrong. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed (see *Chorzow Factory Case* (1928) of the Permanent Court of Arbitration).
- Article 2(3) of the ICCPR requires states to ensure that persons whose rights have been violated have an effective remedy.
- Article 12 of CAT provides that states must ensure that the relevant authorities conduct a prompt and impartial investigation whenever there are reasonable grounds to believe an act of torture has been committed in its jurisdiction (see also Principle 11 of the Istanbul Principles).
- Article 13 of CAT provides that any individual who alleges torture must have the right to complain and have his or her case promptly and impartially examined by the relevant authorities. Steps must be taken to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of the complaint or any evidence given.
- Article 14 of the CAT requires states to ensure that effective remedies are available to victims of torture.
- The UN Commission on Human Rights recently adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. According to Principle 11, remedies for violations of international human rights law include: the victim's right to equal and

effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparations mechanisms.

- Under section IX of the Basic Principles the four general types of reparation are identified as restitution (restoring the victim to the position before the violation occurred); compensation (monetary payment for economically assessable damage resulting from violations); rehabilitation (including, as necessary, medical and psychological care and relevant social services); and satisfaction and guarantees of non-repetition (including public acknowledgement of the violation and criminal and/or administrative sanctions against those responsible for the violations).
- One of the important international remedial measures is the individual complaint mechanisms of international bodies, including under article 22 of CAT and the First Optional Protocol of the ICCPR.
- Whether or not states have ratified relevant treaties, individuals may at any time (whether the relevant state has consented or not and whether or not domestic remedies have been exhausted) seek the assistance of the (UN) Special Rapporteur on Torture who can advocate redress from the relevant states on behalf of the aggrieved person.

(vii) the nature of the protection to be afforded to persons being forcibly returned to a country in which they may face torture or other forms of ill-treatment.

- International law prohibits forcible return ('non-refoulement') of a person to a country where he or she has a well-founded fear of persecution.
- There are possible exceptions with regard to a person who is a danger to the security of the country where he or she is, or one who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to that country. This is the position according to the Refugee Convention 1951 and its 1967 Protocol.
- The principle of non-refoulement applies in the case of torture and cruel, inhuman or degrading treatment or punishment.

- International law prohibits a State from expelling, returning, extraditing or transferring in any other way a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. This is an absolute prohibition, permitting of no exceptions. In addition to being an obligation under customary law, this is also a requirement under article 3 of CAT and article 7 of the ICCPR.
- The same prohibition applies in the case of extraordinary renditions, referring to the practice of transferring a person, with the involvement of the state or its agents, to another state.
- The relevant state for the purpose of determining where torture may occur is any state to which the individual concerned is being expelled, returned, extradited or transferred, as well as any state to which he or she may be *subsequently* expelled, returned or extradited.
- In order to constitute ‘substantial grounds’ as above, the risk of torture must be a necessary and foreseeable consequence of deportation, but it need not be highly likely to occur.
- The level of the danger of being subjected to torture is considered at the time when the decision-maker is deciding whether to expel, return, extradite or transfer a person.
- The principle of non-refoulement may also apply where the danger of being subjected to torture emanates from persons who are not public officials. This has been confirmed by judicial decisions (see for example *Prosecutor v Kunarac, Kovac and Vukic*, Appeals Chamber of the ICTY).
- Diplomatic assurances (or the equivalent) which are formal guarantees from a Government of return or transfer that a person will not be subjected to torture upon return or transfer will not be sufficient where the person is at a real risk of torture are also prohibited because of the principle of non-refoulement (see for example the decision of the Committee against Torture in *Agiza v Sweden*).
- A diplomatic assurance may be legitimate where the government of the receiving country provides an unequivocal guarantee that is meaningful and verifiable and a

system to monitor the treatment of the persons concerned (see the Interim report of the Special Rapporteur on Torture to the General Assembly 2 July 2002).

(viii) international humanitarian law on torture and other forms of ill-treatment in times of domestic and international conflict.

- International humanitarian law applies in times of armed conflict. It concerns the protection of person in international and non-international armed conflicts.
- The basic international instruments relating to international humanitarian law include:
 - The Hague Conventions with Respect to the Laws and Customs of War on land and related regulations 1899;
 - The Hague Conventions with Respect to the Laws and Customs of War on Land and related regulations 1907;
 - The four Geneva Conventions 1949; and
 - The two Additional Protocols to the four Geneva Conventions 1977.
- These instruments prohibit torture and related practices in international and non-international armed conflicts. The prohibition is part of customary international law and is non-derogable, applying in war and peace.
- Violations give rise to individual criminal responsibility; this falls under the principle of universal jurisdiction which enables states everywhere to prosecute those responsible for crimes anywhere.
- Individual criminal responsibility has been further concretised by the establishment of various international criminal courts. In particular, the Rome Statute 1998 which established the ICC encompasses torture as a component of various international crimes, including genocide, crimes against humanity and war crimes. The ICC's jurisdiction is based on the principle of complementarity which enables it to take action where the national authorities are unable or unwilling to act.

- Under international humanitarian law, the involvement of a state official in the process of torture is not necessary for the offence to constitute torture (see for example *Prosecutor v Kunarac, Kovac and Vukic*, Appeals Chamber of the ICTY).

(ix) the jurisdiction of national and international tribunals to consider cases of alleged torture and other forms of ill-treatment.

- Typically, states apply their laws on two primary jurisdictional grounds: nationality of the accused and the commission of the criminal act within their territory, the so-called nationality and territorial principles. States generally avoid applying their laws extraterritorially to acts occurring beyond the limits of their jurisdiction.
- In addition to these bases of state jurisdiction, international law permits a state to assert jurisdiction over certain crimes that are considered so heinous that they offend the moral principles of all humanity, including piracy, slave trading and genocide. Torture attracts the universal basis of jurisdiction so that any state, regardless of where the criminal acts took place, or whether they were committed by non-nationals, may prosecute the offence under its domestic courts.
- Apart from under international humanitarian law as set out in the four Geneva Conventions and their Additional Protocols, universal jurisdiction does not exist at customary international law in respect of other forms of ill-treatment not amounting to torture.
- Because universal jurisdiction exists at customary law, universal jurisdiction over acts of torture does not depend on whether the state of nationality of the accused has ratified CAT.
- The ICJ in the *Congo v Belgium* case, while recognising universal jurisdiction, observed that states rarely rely solely on universality in practice, preferring to found jurisdiction on traditional territorial and nationality principles. The Court concluded that states are not required by customary law to assert jurisdiction. In short, universal jurisdiction is permissive but not obligatory.

- The ICJ in the *Congo v Belgium* case recognised the right of a serving minister of government to immunity from universal jurisdiction even in respect of accusations of torture. The decision in this aspect has been much criticised, partly for arguably extending the immunity of heads of state to other members of government.
- It may be that in the future an act of torture can never be an official act and will therefore not be protected by sovereign immunity.
- States have an obligation under article 4 of CAT to ensure that acts amounting to torture are rendered criminal under domestic laws. The same applies to attempts to commit torture and complicity or participation in torture.
- Article 5 of CAT provides that jurisdiction over torture in terms of article 4 should be asserted:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state;
 - (b) When the alleged offender is a national of that state;
 - (c) When the victim is a national of that state if that state considers it appropriate.
- CAT requires states to assert jurisdiction and submit a person for prosecution, in the cases contemplated in article 5, when the alleged offender is present within the State and not extradited for trial in another state (Article 7(1)).
- Complementing the jurisdiction of national tribunals over international crimes are the jurisdictions of international courts including the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the International Court of Sierra Leone.
- The 99 states which have ratified the Rome Statute have ‘delegated’ their universal jurisdiction to the ICC which may prosecute when a state chooses not to exercise its own jurisdiction to prosecute crimes such as torture as a crime against humanity and as a war crime.
- When states are parties to the ICCPR and CAT, additional monitoring powers may be exercised by the HRC and the Committee against Torture.
- These bodies may consider individual complaints when the states of which they are a national have accepted the First Optional Protocols to the ICCPR and made a declaration

under Article 22 of CAT. State to state complaints under CAT may be made where the relevant state has made a declaration under article 21.

- The Committee against Torture can conduct inquiries on its own initiative (Article 20 of CAT).
- The UN Special Rapporteur on torture also has a mandate to monitor violations, including in regard to states that are not parties to CAT.

(x) the jurisdiction of national and international tribunals to consider cases of alleged torture and other forms of ill-treatment by international intervention forces.

- The concept of an ‘international intervention force’ has no formal legal meaning in international law but may be understood as including the following kinds of intervention:
 - Forces authorised by the UN Security Council;
 - Forces authorised under bilateral, regional or multilateral agreements; and
 - Unauthorised unilateral, regional and multilateral use of force, whether as an act of self-defence or illegal use of force.
- When a force has UN Security Council authorisation, typically a peace keeping force, all military personnel will be subjected to the UN Rules of Engagement, UN Code of Blue Helmets, Standard Operating Procedures or bilateral Memoranda of Understanding.
- While international humanitarian law applies to such military personnel, the UN Convention on the Privileges and Immunities of 1946 may operate to prevent prosecution within the territory.
- The UN has established no rules on jurisdiction. The State of nationality of the accused may apply its criminal laws extraterritorially to prosecute.
- When an intervention force is authorised by agreement between the relevant state parties, jurisdiction over crimes and acts will normally be determined under the terms of a Status of Forces agreement. The state of nationality of the accused will invariably assert

jurisdiction over any criminal acts committed on foreign territory and trials will usually be conducted by military commissions.

- When criminal acts are committed by unauthorised forces, a distinction should be made between acts committed during and after conflict. The rules of international humanitarian law apply to international and non international conflicts. Torture is a ‘grave breach’ of the four Geneva Conventions of 1949 and their Additional Protocols. States are bound to prosecute for breaches.
- Once the conflict is over, the intervention force is termed a ‘belligerent occupant’ of the territory and articles under the Hague Regulations of 1907 apply to regulate the respective responsibilities of the occupying and occupied states.
- The 2004 Advisory Opinion of the ICJ in the *Israeli Wall* case confirms that international humanitarian law continues to apply to occupied territory and the occupying State will be internationally responsible for all breaches including acts of torture.
- As torture attracts universal jurisdiction, all states may assert jurisdiction over those alleged to have committed this offence during occupation. The ICC under the Rome Statute would also have jurisdiction over acts committed as a crime against humanity and as a war crime when the territorial state or state of nationality of the accused has ratified the treaty.
- Controversially, the Rome Statute gives jurisdiction to the ICC over the national of a non party where the international criminal act committed by the individual took place in the territory of a State party.
- Similarly, the ICC has jurisdiction when the Security Council refers a matter to it, as in relation to Darfur.

(xi) the nature and scope of the obligation to protect against violations by non-state actors.

- States have an obligation to protect persons against acts of torture and cruel, inhuman or degrading treatment or punishment committed by non-state actors where the state has

effective administrative control and the actions of those non-state actors can be attributed to the state.

- Under the international law principles of state responsibility all states must take all reasonable measures to ensure that individuals are not subject to torture or cruel, inhuman or degrading treatment or punishment, including that administered by non-state actors.
- Non-state actors remain subject to international and national criminal law with regard to any acts of torture or cruel, inhuman or degrading treatment or punishment committed by them.
- Non-state actors will be also responsible for acts of torture committed during armed conflict under the general principles of international humanitarian law.

RECOMMENDATIONS IN RELATION TO FORUM STATES

Afghanistan

The ACJ recommends that the Afghan Independent Human Rights Commission (AIHRC) urges its Government to address the following issues:

- The need for Afghanistan to become a party to the First Optional Protocol, the OPCAT, and the Refugee Convention.
- The existence of torture in detention facilities as identified in the 2003-2004 Annual Report of the AIHRC.
- the capacity of of the Government of Afghanistan to submit periodic reports to the UN treaty monitoring bodies;
- the necessity for the courts of Afghanistan to recognise customary international law as a source of law applicable in Afghanistan;
- the practice of forcing individuals to sell their property, including their houses;
- the practice referred to as ‘BAD’ involving the exchange of women and girls to resolve disputes;
- the need for the Government of Afghanistan to protect individuals who have been returned to Afghanistan from torture and other ill-treatment.

Australia

The ACJ recommends that the Human Rights and Equal Opportunity Commission (HREOC) urges its Government to address the following issues:

- the necessity to sign and ratify OPCAT;
- the restrictions placed on persons who have been detained under the ASIO Amendment Act, including in relation to accessing a lawyer, the communication between a lawyer and

their client, the requirement that a detainee answer all questions asked of him or her and the rights of a detained person to communicate with their family;

- the practice of detaining children in immigration detention, including for prolonged periods;
- the conditions in immigration detention facilities;
- the necessity to monitor the safety of those deported after not being recognised as refugees;
- the need to have proper procedural safeguards in immigration matters to ensure Australia's non-refoulement obligation is fulfilled; and
- the need to monitor prison facilities regularly.

Fiji

The ACJ recommends that the Fiji Human Rights Commission (FHRC) urges its Government to address the following issues:

- the need for Fiji to become a party to the ICCPR, the ICESCR, the CAT, the First Optional Protocol, the OPCAT and the Protocols to the Geneva Conventions.
- the need to establish minimum standards of interrogation for use by the police and other disciplinary authorities;
- the need to adopt video-recorded interview procedures to corroborate police evidence, to ensure the voluntariness of confessions and to eradicate the use of torture or "softening up" techniques prior to or during interrogations;
- the need to ensure legal protections to persons forcibly returned to a country in which they may face torture or other forms of ill-treatment;
- the continuing low standards of hygiene, health care, food, housing and other basic services provided in correctional facilities;
- the need to implement the recommendations of the Fiji Law Reform Commission when it has completed its review of prison laws and regulations; and
- the promotion of the *National Security and Human Rights Handbook*.

India

The ACJ recommends that the National Human Rights Commission of India (NHRCI) urges its Government to address the following issues:

- the need for India to sign and/or ratify the First Optional Protocol, CAT, the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions and the Rome Statute;
- the provision of the Prevention of Terrorism Act which prevents the legal practitioner of a detainee to remain present through the period of interrogation;
- section 376(B) of the Indian Penal Code which seems on its face to apply only in the case of public servants who are male and who have sexual intercourse with a woman in custody but not in the case of female public servants who have sexual intercourse with a male in custody;
- the promotion of the NHRCI handbook on human rights for judicial officers;
- the continuation of human rights training for the police, the paramilitary, the armed forces and public servants;
- strengthening the role of human rights cells in State police headquarters; and
- ensuring the guidelines set by the Supreme Court on arrest and detention are met.

Indonesia

The ACJ recommends that the Indonesian National Commission on Human Rights (Komnas HAM) urges its Government to address the following issues:

- the need to sign and ratify the ICCPR, the ICESCR, the First Optional Protocol, the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions and the Rome Statute.
- the necessity for the definition of ‘torture’ in Article 1(4) of Legislation No. 39 of 1999 ‘Concerning Human Rights’ to be fully consistent with the definition in article 1(1) of CAT;

- the comprehensive recommendations made by the Committee against Torture in relation to Indonesia, including the establishment of a reliable independent complaints system, the proper investigation of allegations of torture, reducing the length of pre-trial detention, police reform, measures, human rights training of public officials and the rehabilitation of torture victims;
- reports of systematic torture by Indonesian military against detainees suspected of supporting the armed separatist Free Aceh Movement; and
- the comprehensive recommendations made by Human Rights Watch in relation to torture and also the position of domestic workers in Indonesia.

Jordan

The ACJ recommends that the Jordan National Centre for Human Rights (JNCHR) urges its Government to address the following issues:

- the need for Jordan to become a party to the First Optional Protocol, the OPCAT and the Refugee Convention.
- The need to address the recommendations of the Committee against Torture and the HRC;
- the lack of a definition of torture in Jordanian law;
- the failure to subject all allegations of torture to an independent and impartial investigations;
- the sentencing to death or imprisonment of individuals on the basis of confessions allegedly extracted after torture;
- the continuing application of corporal punishment;
- the expulsion by Jordan of individuals to countries in which they may face torture or other ill-treatment;
- the lack of education and training of police and other disciplinary services in relation to the prohibition on torture and ill-treatment;
- the need to eliminate incommunicado detention; and
- the practice of 'honour' crimes

Malaysia

The ACJ recommends that the Human Rights Commission of Malaysia (SUHAKAM) urges its Government to address the following issues:

- the need to become a party to the ICCPR, the First Optional Protocol, the ICESCR, the CAT, the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions, and the Rome Statute.
- the circumstances in which derogations to fundamental rights are permitted by the Constitution extend well beyond a situation of public emergency which threatens the life of the nation as required by article 4 of the ICCPR;
- the provisions of the Internal Security Act extend the period of police investigation for 60 days, denying the detainee the right to be released on bail and permitting a Ministerial order for detention at any time after arrest without any possibility of judicial review and merely on suspicion that a person may commit an offence;
- the provisions of the Internal Security Act extend the period during which a person may be detained to two years;
- the Internal Security (Detained Persons) Rules 1960 restrict a person's rights to be visited by and communicate with family;
- the apparent failure to provide a legislative definition of torture;
- the reluctance of Malaysian courts to recognise customary international law;
- reports of human rights violations by law enforcement officers and the abuse of powers by government agencies;
- the continued practice of caning in schools; and
- the need to ensure the implementation of the recommendations of the Royal Commission on the Malaysian police.

Mongolia

The ACJ recommends that the National Human Rights Commission of Mongolia (NHRCM) urges its Government to address the following issues:

- the need for Mongolia to become a party to the OPCAT and the Refugee Convention;
- the 14 day detention period under the *Criminal Procedure Codes* for a suspect;
- the need to legislate the inadmissibility of confessions obtained through torture;
- the need to ensure domestic legislation conforms with international standards with regard to torture and detention;
- the need to continue the training programmes instituted by the Mongolian NHRC;
- the abuses recorded by the NHRC of Mongolia in relation to interrogation and detention;
- the failure to provide adequate conditions of detention in detention centres and prisons; and
- the need to implement the recommendations which will arise from the current public inquiry on torture.

Nepal

The ACJ recommends that the National Human Rights Commission of Nepal (NRCHP) urges its Government to address the following issues:

- the need to become a party to the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions and the Rome Statute.
- the narrow definition of torture in both the Constitution and the Torture Compensation Act, including the failure to define torture as a criminal offence;
- the absence of any provision for the rehabilitation of victims of torture;
- the absence of any witness protection provisions;
- inadequate accountability provisions and ineffective punishment provisions;
- the absence of any capacity to conduct impartial and independent investigation of cases of torture;

- the time-consuming process that must be undertaken in order for a detainee to receive a medical examination under the Torture Compensation Act.

New Zealand

The ACJ recommends that the New Zealand Human Rights Commission (NZHRC) urges its Government to address the following issues:

- The need to complete the process needed in order to ratify the OPCAT;
- the need for the Police to complete its current review of interviewing procedure, and incorporate the appropriate torture standards and protections in any resulting policies;
- the conclusions of the NZHRC made in its report titled *Human Rights in New Zealand Today* including: concerns about the use of non-voluntary segregation, the excessive periods of lock-down and the need for independent review of practice in these areas; issues of staff-to-prisoner ratios; the lack of human rights training; the continued mixing of youth and adult offenders and New Zealand's continued reservation to the CRC on this point;
- the recommendations made by the Committee against Torture in relation to the periodic report of New Zealand, including the need to legislate the non-refoulement obligation.

Palestinian Territories

The ACJ recommends that the Palestinian Independent Commission for Citizens' Rights (PICCR) urges the Palestinian Territories to address the following issues:

- the application by Israel of international human rights law, including human rights treaties, to Palestine;
- the apparent failure to provide a legislative definition of torture;
- the hearing of cases against civilians in military courts;
- reports of torture by militant groups of persons suspected of being 'collaborators';
- the failure to investigate and prosecute individuals following allegations of torture;

- the recommendations made by the PICCR in its report titled Ill-treatment of Detainees in Police Holding facilities in the Northern West Bank;
- reports of mistreatment by officials of detainees in detention centres and prisons.

Philippines

The ACJ recommends that the Philippines Commission on Human Rights (PCHR) urges its government to address the following issues:

- the need for the Philippines to become a party to the OPCAT and the Protocols to the Geneva Conventions.
- the lack of definition of torture in Philippines law;
- the inadequate remedies available to victims of torture;
- reports of persistent and widespread torture;
- the burden of proof on victims to prove that a confession was made as a result of torture;
- persistent reports of ill-treatment and abuse of children;
- the detention of children together with adults in conditions that may amount to cruel, inhuman and degrading treatment;
- the tolerance by prison wardens of the practice of ‘basagan’;
- impunity in the investigation and prosecuting of perpetrators of torture’
- the need to address the 2003 recommendations of the HRC; and
- the need to address the overcrowding and poor conditions in detention facilities.

Republic of Korea

The ACJ recommends that the National Human Rights Commission of the Republic of Korea (NHRCK) urges its government to address the following issues:

- the need for the Republic of Korea to sign and ratify the OPCAT;
- Ensuring compliance with the Code of Interrogation for Human Rights Protection 2003;
- the 10 day detention period under the Criminal Procedure Act for detained persons;

- the constitutional limitation on the prohibition on torture to ‘citizens’;
- the apparent failure to provide a legislative definition of torture;
- persistent allegations of ill-treatment perpetrated by law enforcement officials;
- the need to ensure the continued upgrading of conditions in detention facilities
- ensuring training on and compliance with the NHRC’s handbooks for the Police, the Prosecutors’ Office and Correctional Institutions;
- the need to support and strengthen the Police’s Centre for Human Rights and the Army’s Human Rights Committee; and
- implementing the National Action Plan on human rights when it is completed.

Sri Lanka

The ACJ recommends that the Human Rights Commission of Sri Lanka (HRCSL) urges its government to address the following issues:

- the need for Sri Lanka to become a party to the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions, and the Rome Statute.
- the lack of consistency of the definition of torture in the Torture Act with that in Article 1(1) of CAT;
- section 17 of the Prevention of Terrorism Act overriding the provisions of the Evidence Ordinance which render confessions extracted by torture or while a person is in custody inadmissible;
- delays experienced in the handing down decisions of the Supreme Court of Sri Lanka in cases of torture;
- the increase in complaints of torture made to the Human Rights Commission of Sri Lanka;
- reports of instances of torture in the context of the Prevention of Terrorism Act and in police stations following arrests made on private complaints as well as general reports that torture by the police is ‘endemic’;
- the need for the authorities to prevent acts of torture
- the need to institute proper witness protection programmes;

- the conclusions made in the report of the Asia Legal Resource Centre titled *Article 2 – Special report: Torture Committed by the Police in Sri Lanka*.

Thailand

The ACJ recommends that the National Human Rights Commission of Thailand (NHRCT) urges its government to address the following issues:

- the need for Thailand to become a party to the First Optional Protocol, CAT, OPCAT, the Refugee Convention, the Protocols to the Geneva Conventions, and the Rome Statute.
- the Constitutional provision allowing for derogation from the rights recognised in the Constitution on the basis of ‘necessity’;
- the need to provide a legislative definition of torture;
- the decision of Thai courts not to recognise customary international law except to the extent that it is reflected in domestic laws;
- the limitation on the extra-judicial jurisdiction of Thai courts to offences ‘affecting Thailand’;
- the need to have set minimum standards of interrogation for police and other disciplinary forces except for those provided in the Constitution;
- reports of persons located on the Thai border being forcibly returned to their country of origin;
- reports of overcrowding and sub-standard conditions in Thai prisons;
- the inconsistency of the recent emergency decree with human rights obligations and the Constitution.

PART B
COMMENTARY ON MINIMUM INTERROGATION STANDARDS

Introduction

Torture and cruel, inhuman or degrading treatment or punishment is prohibited under international law. The prohibition is applicable to all states whether or not they are parties to any relevant treaties and cannot be relaxed under any circumstances. It is an absolute prohibition even in times of war, public emergency or in compliance with the orders of a superior.

The ACJ has developed these Minimum Interrogation Standards (MIS) which are designed to protect those being interrogated from torture and from cruel, inhuman or degrading treatment or punishment. They apply primarily to those being questioned because they are suspected of possible involvement in criminal offending.

Minimum Interrogation Standards

Interrogation is any questioning by a public official of a person where there is a suspicion that that person is involved in an offence. It applies whether someone is under arrest or detention or is voluntarily subjecting themselves to an interview and includes a situation where someone is interviewed originally as a witness or as someone with relevant information but, during the course of the interview, becomes suspected of involvement in the offence. Most of these standards will also apply by analogy to other types of questioning.

1. States must ensure that torture and cruel, inhuman or degrading treatment or punishment are not employed before, during or after any interrogation. Nor must these practices be employed to compel witnesses to give information about or evidence against another.

Commentary

As indicated above, torture and cruel, inhuman or degrading treatment or punishment is absolutely prohibited at international law under any circumstances.

The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is a rule of customary international law and, as such binding on all states.

The prohibition on torture is a peremptory norm or jus cogens. This is a norm accepted and recognised by the international community of states as a norm from which no derogation is permitted. It can be modified only by a subsequent norm of general international law having the same character.³⁰

In addition, Article 7 of the International Covenant on Civil and Political Rights (ICCPR)³¹ and Article 5 of the Universal Declaration of Human Rights (UDHR)³² both prohibit torture and cruel, inhuman or degrading treatment or punishment in the following terms:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The four Geneva Conventions of 1949³³ and the two Additional Protocols of 1977³⁴ (relating to armed conflict) also prohibit torture and related practices.

Torture, under Article 1 of the Convention Against Torture (CAT),³⁵ is defined as being:³⁶

³⁰ Article 53, Vienna Convention on the Law of Treaties.

³¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

³² Adopted and proclaimed by General Assembly resolution 217A(III) of 10 December 1948.

³³ The four humanitarian treaties known as the “Geneva Conventions” are: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention relative to the Treatment of Prisoners of War; Convention relative to the Protection of Civilian Persons in Time of War.

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

³⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

- *the intentional infliction of severe pain or suffering;*
- *the pain or suffering can be physical or mental;*
- *it must be committed by persons exercising public authority; and*
- *it must have a purpose, such as the obtaining of information or a confession, or the infliction of punishment, or be based on discrimination; but*
- *such pain or suffering must not arise only from, or be inherent in or incidental to, lawful sanctions.*

Outside the scope of CAT the involvement of a public official is not, however, required.

Inhuman treatment:

- *must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, religion and state of health of the victim; but*
- *the treatment need not be intended to cause suffering.*

Degrading treatment:

- *must be of sufficient severity; involving some form of gross humiliation or debasement; interfering with the dignity of the person; but*
- *it is not necessary that the purpose of the treatment was to humiliate or debase the victim.*

2. Interrogation should never take place at secret interrogation centres. If a person is detained for interrogation, relatives or a third person of the person's choice and, where applicable, consular authorities should be informed immediately of the fact and place of detention and/or that of interrogation.

³⁶ For a more detailed discussion on how international human rights instruments, standards and mechanisms define torture, please refer to the Advisory Council of Jurists *Reference on Torture: Final Report* at 68 – 100.

Commentary

Places of interrogation which are not available for proper scrutiny can become instruments of oppression and places of torture and can lead to “disappearances”.³⁷ Such disappearances can constitute torture or cruel inhuman or degrading treatment or punishment for relatives as well as the person involved.³⁸ Secret places of detention should thus be abolished under law and it should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.³⁹

Relatives or a third person of an arrested person’s choice should always be notified at the time of any arrest, detention, imprisonment or transfer. Consular authorities of the State of origin of a detained foreigner should also be informed without delay of his or her arrest or detention or interrogation.⁴⁰

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| <p>3. Individuals should only be interrogated for a reasonable period, taking into account the individual characteristics of the interrogated person and, if extending for a lengthy period, regular breaks should be provided.</p> |
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³⁷ Please see the discussion of “Safehouses” in the Philippines in the book *In Search of Balms – A Walk Forward to Healing* (2005) Published by the Balay Rehabilitation Centre.

³⁸ See *Kurt v Turkey*, judgment of the ECHR, 25 May 1998, where the ECHR held that the mother of a disappeared person was herself a victim of inhuman and degrading treatment. In *Cakici v Tukey*, judgment of the ECHR, 8 July 1999, the ECHR held that whether a family member of a ‘disappeared person’ is a victim of ill-treatment will depend on the particular circumstances of the case. The ECHR explained that the focus is the authorities’ reactions and attitudes to the situation when it is brought to their attention (at para 98).

³⁹ Office of the High Commissioner for Human Rights ‘*Question of enforced or involuntary disappearances*’ 2003/38, 23 April 2003 at para 14; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ‘*Civil and Political Rights, including the questions of torture and detention*’, Commission on Human Rights, Sixtieth session, E/CN.4/2004/56, 23 December 2003 at para 37. Further, acts of enforced disappearance are crimes against humanity as defined in the Rome Statute of the International Criminal Court (A/CONF. 183/9)

⁴⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ‘*Civil and Political Rights, including the questions of torture and detention*’, Commission on Human Rights, Sixtieth session, E/CN.4/2004/56, 23 December 2003 at [31]. See also Article 36(1) of the Vienna Convention on Consular Relations; and Principle 16(2) of the Principles for Persons under Detention.

4. Persons subject to interrogation must be given adequate food, sleep, exercise, changes of clothing, washing facilities and, if needed, medical treatment taking into account any particular characteristics of the individual including age, gender, religion, ethnicity, medical needs, mental illness and any disabilities or other vulnerabilities.
5. There should never be a threat of the removal of basic necessities such as hygiene provisions, food, exercise, rest or, sleep, in exchange for information or cooperation. Neither should there be a threat of any reprisals against a third person (and in particular a relative).
6. No method of interrogation should be employed that impairs a person's capacity of decision-making or judgement. Save in exceptional circumstances, no interrogation should take place at night.
7. All interrogations should be conducted in an age and gender appropriate manner and take into account any other relevant characteristics of an interrogated person including, for example, religion, ethnicity, medical needs, intellectual disability, mental illness, personality disorder or any other vulnerability.
8. A person under the age of 18 who is suspected of involvement in any offence should not be questioned without an adult of their choice present.

Commentary

It is important that individuals being interrogated are only interrogated for a reasonable period. What is a reasonable period will depend on the individual characteristics of the interrogated person. The length of an interrogation must not impair the interrogated person's ability to exercise proper judgment.

Conditions under which people are interrogated must have proper regard for the dignity of the person and all basic necessities should be provided. There should never be any threat of removal of such basic necessities. In determining what are basic necessities for a person, the

individual characteristics of that person must be taken into account, including age, mental capacity, ethnicity and gender. There should never be any threat of reprisals against third persons, including relatives.

Interrogations should be conducted having proper regard to the special characteristics of the person being interrogated and in a manner which does not impair the person's judgment.

It is especially important to have particular regard to the rights of children. Any person under the age of 18 should not be questioned without an adult of their choice present.

As most people function less well at night than during the day, interrogations should not take place at night except in exceptional circumstances.

The Principles for Persons under Detention⁴¹ provide as follows:

Principle 21

- 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 his judgement.*

<p><i>9. At the time of any arrest or detention (and before any interrogation) a person should be given the right to undergo a medical examination by a competent and impartial medical practitioner in order to provide a point of reference as to their condition before the commencement of any interrogation. The time and findings of the medical examination should be recorded.</i></p>
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Commentary

Principle 24 of the Principles for Persons under Detention states that:⁴²

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

10. An individual for whom the language of interrogation is not his or her first language or who is deaf, should always (and before any interrogation) be informed of his or her right to have a competent and impartial interpreter for any interrogation.
11. If there are any issues about the person's understanding of his or her rights or of the interrogation process or of any questions asked, an interpreter should be provided, whether requested by the person being interrogated or not. Interpreters should also be available in detention facilities so that a person's basic needs can be communicated.
12. Before any interrogation commences, the interrogated person should be informed (in a manner that is understandable to him or her) of the reason for the interrogation and any charges against him or her.

Commentary

Article 14(3)(a) of the ICCPR provides that, in the determination of any criminal charge, a person has the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge or charges against him or her. Article 14(3)(f) of the ICCPR provides that an accused person must have the free assistance of an interpreter if he or she cannot understand or speak the language used in court. A necessary corollary is that a person must be told of the reason for any interrogation and that the interrogation must be conducted in a language that is understandable to him or her.

⁴¹ Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by the UN General Assembly resolution 43/173 of 9 December 1988.

⁴² See also rule 24 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved

13. The person should also be told of his or her right not to be compelled to testify against him or herself or to confess guilt. Where a person (or his or her lawyer) has indicated that the person he or she wishes to exercise the right to silence, no further questioning should take place.

Commentary

Article 14(3)(g) of the ICCPR provides that no person shall be compelled to testify against him or herself or to confess guilt. It follows from this that interrogation should cease if the person indicates that he or she wishes to exercise this right.

14. Every interrogated person should, before any interrogation begins, be told (in a manner that is understandable to him or her) of his or her right to consult a lawyer of his or her choice without delay and in private.

15. Those who are arrested or detained should be told of their right to consult a lawyer at the time of arrest or detention. All detainees should also be given the right forthwith to challenge the lawfulness and conditions of their detention.

16. Officials have an obligation to facilitate contact with a lawyer of choice, for example by providing a list of available lawyers, access to a telephone and reasonable conditions of privacy for any consultation.

17. The provision of a lawyer should be free of charge if the person does not have the means to pay for his or her services and the person should be told (before any interrogation begins) that a lawyer can be provided at no cost in such circumstances.

18. Where a person has indicated a wish to consult a lawyer no further questioning should take place until that consultation has taken place.

by the Economic and Social Council by its resolution 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

19. The person's lawyer must be physically present and within earshot during any interrogation and have the right to intervene in the interview to ensure that the law is complied with (but not otherwise to interfere with the interrogation). The interrogated person should also have the right, if requested during the course of the interview, to consult with his or her lawyer in private.
20. Where a lawyer is not available, or the interrogated person does not want to have a lawyer present, the person should be given the opportunity to have present at any interrogation a representative from a relevant non-governmental organisation or a relative or friend of his or her choice. Except to ensure the law is complied with, those persons should not otherwise interfere with the interrogation.

Commentary

Article 14(3)(b) of the ICCPR requires that an accused person be given the right to communicate with counsel of his or her own choosing.⁴³ Article 14(3)(d) affords an accused person the right to defend him or herself in person or through a lawyer of choice and to be informed of the right to have counsel assigned where the interest of justice require and free of charge if he or she does not have sufficient means to pay for it.

Articles 9(3) and 9(4) of the ICCPR require that anyone arrested or detained on a criminal charge be brought promptly before a judge and that a person deprived of his or her liberty shall be entitled without delay to have the lawfulness of their detention decided upon.⁴⁴

It follows from those principles that all persons who are to be interrogated must be given access to a lawyer. The lawyer should be present during any interrogation, but only to ensure

⁴³ See also principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The right to have access to a lawyer was recognised by the Commission on Human Rights to be one of the basic rights of a person deprived of his or her liberty – see Commission on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment*, E/CN.4/RES/1994/37, 4 March 1994 at para 3(c).

⁴⁴ See also principles 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and report of the Special Rapporteur on Torture to the Commission of Human Rights, E/CN.4/2003/68, 17 December 2002 at para 26(i).

the law is followed and to be available if the person wishes to consult the lawyer in the course of the interrogation.

21. The time of arrest or detention and/or the arrival at the place of interrogation should be recorded. The name of any arresting officer and all others who have any contact with the interrogated person should be recorded, as well as the nature and time of that contact.

22. Each interrogation should begin with the identification of all persons present and the recording of their names and any official position held as well as the place of interrogation. The time the interrogation began and finished and the timing of and reasons for any breaks should also be recorded.

Commentary

The Principles for Persons under Detention provide:

Principle 23

- 1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.*
- 2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.*

23. All interrogation sessions should be recorded. This should be by way of video (or audio) recording unless, for reasons which should be recorded in writing, this is not possible or if the interrogated person does not wish to be recorded in that manner. In cases where there is no video or audio recording, a comprehensive contemporaneous written record should be kept.

24. Procedures should be instituted to ensure the integrity of interrogation records, including proper storage. Evidence from non-recorded interrogations should be excluded from court proceedings (ie no ‘verballing’).

25. The recording should be made available to the interrogated person and his or her lawyer of choice. Where the record is in writing, the interrogated person and his or her lawyer should be given the opportunity to correct it.

Commentary

The Special Rapporteur on Torture has identified certain safeguards that should be adopted to guard against torture during interrogation or interviews. The safeguards are as follows:

- *each interrogation should be initiated with the identification of all persons present;*
- *all interrogation sessions should be recorded and preferably video recorded;*
- *the identity of all persons present should be included in the records;*
- *evidence from non-recorded interrogations should be excluded from court proceedings;*⁴⁵
- *the information recorded should be available to the interrogated person and, when provided by the law, to his or her counsel;*⁴⁶
- *interrogation of detained persons should only take place at official interrogation centres.*⁴⁷

These safeguards can also help protect officials against false allegations of torture or other forms of ill-treatment.

26. After any interrogation, the interrogated person should have the right to request a medical examination by a competent and impartial medical practitioner.

⁴⁵ Interim report by Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment to the General Assembly, A/57/173, 2 July 2002 at para 22.

⁴⁶ Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, ‘Civil and Political Rights, including the questions of torture and detention’, E/CN.4/2004/56, 23 December 2003 at para 34.

⁴⁷ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ‘Question of the human rights of all persons subjected to any form of detention or imprisonment’, Commission on Human Rights, forty-eighth session, E/CN.4/1992/17, 27 December 1991 at 106.

Commentary

This right to a medical examination after interrogation is a corollary of the right to require a medical examination before interrogation. The medical examination should be by a person trained to conduct such examinations. Such examinations also provide protection against false allegations of torture or other ill-treatment while being interrogated.

27. Appropriate penalties should exist (including the inadmissibility of evidence) and be enforced for any breach of these standards.

Commentary

It follows from the fact that torture and cruel, inhuman and degrading treatment or punishment is prohibited by customary international law that appropriate measures be taken to stop torture and related ill-treatment and appropriate redress be given to victims. Measures required involve criminalising the conduct, conducting adequate investigations and providing reparation to victims.⁴⁸ Statements made as a result of torture or other ill-treatment should be excluded from any proceedings.⁴⁹ These principles are also contained in various treaties.

It is a requirement of CAT (Article 4) that acts of torture be criminalised and punishable by appropriate penalties. Article 16 of CAT requires states to prevent, in their jurisdiction, other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture when they are committed by public officials.

Article 11 of CAT requires each state party to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements and treatment for persons in detention, with a view to preventing cases of torture.

⁴⁸ For a more detailed discussion on this issue, please refer to the Advisory Council of Jurists *Reference on Torture: Final Report* at 118 - 127.

⁴⁹ For a more detailed discussion on this issue, please refer to Advisory Council of Jurists *Reference on Torture: Final Report* at 115 – 117.

Articles 12 and 13 of CAT require state parties to carry out a prompt and impartial investigation of allegations of torture and to provide avenues to complain. Proper witness and victim protection measures must be put in place to ensure there is no ill treatment as a result of the complaint or the giving of evidence.

There is a general right, under international law, to reparation. This must wipe out, as far as possible, the consequences of the illegal act⁵⁰. Article 2(3) of the ICCPR requires states to ensure that any persons whose rights are violated there is an effective remedy. Article 14 of CAT provides that victims of torture should receive appropriate redress.

It follows from the fact that torture and other forms of ill-treatment are prohibited by customary international law and that the prohibition against torture is a peremptory norm or jus cogens that a statement made as a result of torture and other ill-treatment should be excluded from any proceedings.

Article 15 of CAT requires state parties to 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 prohibition set out in Article 15 of CAT has been reiterated by the Special Rapporteur on Torture on several occasions.⁵¹

The Body of Principles provides that:

- *Non-compliance with the (UN) Body of Principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.⁵²*

⁵⁰ See Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V Pol.), (1928) P.C.I.J., Sr.A, No.17.

⁵¹ See for example Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Question of the human rights of all persons subjected to any form of detention or imprisonment', Commission on Human Rights, forty-ninth sessions, E/CN.4/1993/26, 15 December 1992, para 587; Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 'Civil and Political Rights, including the questions of torture and detention', E/CN.4/2004/56, 23 December 2003, para 33.

⁵² Principle 27, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

- *Where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.*⁵³

⁵³ Interim report by Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment to the General Assembly, A/57/173, 2 July 2002, paras 22 - 23.

PART C
DETAILED ANSWERS TO QUESTIONS POSED BY THE REFERENCE

- (i) how international human rights instruments, standards and mechanisms define ‘torture’ and other forms of ill-treatment, including with reference to detention, interrogation, medical experimentation and facilities, corporal punishment, gender specific forms and sexual abuse. The Advisory Council of Jurists is asked to develop a list of minimum standards of interrogation in light of the above analysis.**
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Summary

- Torture is prohibited under international law. The prohibition is applicable to all states, irrespective of whether they are parties to any relevant treaties.
- The ICCPR, Article 7, and the UDHR, Article 5, provide that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. However, these terms are not defined.
- The four Geneva Conventions of 1949 and the two Additional Protocols of 1977 prohibit torture and related practices (see for example, common Article 3 of the Geneva Conventions). Torture is not defined.

Definition of torture

- The following definitions are not intended to be exhaustive and concepts of what is included in torture or cruel, inhuman or degrading treatment or punishment can evolve over time to encompass a wider range of conduct.

- Article 1 of CAT defines torture to include the following basic aspects:
 - the intentional infliction of severe pain or suffering;
 - the pain or suffering can be physical or mental;
 - it must be committed by persons exercising public authority; and
 - it must have a purpose, such as the obtaining of information or a confession, or the infliction of punishment, or be based on discrimination; but
 - such pain or suffering must not arise only from, or be inherent in or incidental to, lawful sanctions.
- This definition reflects the definition of torture under customary international law, except that customary international law does not require the involvement of a public official.

Cruel, inhuman or degrading treatment and punishment

- According to case law, ‘cruel and inhuman treatment’ must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, religion, age and state of health of the victim. However, the treatment need not be intended to cause suffering.
- According to case law, ‘degrading treatment’ requires treatment of sufficient severity which involves some form of gross humiliation or debasement. However, it is not necessary that the treatment have this particular purpose.
- The difference between cruel and inhuman treatment and degrading treatment on the one hand and torture on the other relates more to the purpose of the perpetrator rather than any gradation in suffering.

Detention

- Regardless of whether a state is a party to any relevant treaty, the general international law prohibition on torture and cruel, inhuman and degrading treatment or punishment applies to all persons under detention.

- CAT and Article 7 of the ICCPR also apply to persons under detention, whether the detention is lawful or unlawful.
- In addition, Article 10(1) of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- More specific requirements for detention are set out in the (UN) Principles of Medical Ethics and Torture; the (UN) Principles for Persons under Detention; the Standard Minimum Rules; and the Rules for the Protection of Juveniles. Breach of these standards may constitute a breach of the general prohibition relating to torture under international law or lead to breaches of CAT or Article 7 and/or Article 10(1) of the ICCPR.
- An institution's failure to meet certain basic requirements of detention may constitute torture or cruel, inhuman or degrading treatment or punishment. In addition, a detainee's personal circumstances or special characteristics may impose particular obligations where a detainee may require individualised treatment.
- Lengthy periods of detention without charges being laid or without trial may, as well as being a violation of Article 14(3)(c) of the ICCPR, also constitute torture or cruel, inhuman or degrading treatment or punishment, depending upon the combination of circumstances both of the detention and the individual.
- In some circumstances, solitary confinement may constitute torture or cruel, inhuman or degrading treatment or punishment.

The use of force and security measures

- The use of force and security measures may constitute torture or cruel, inhuman or degrading treatment or punishment.
- The (UN) Code of Conduct for Law Enforcement Officers and the (UN) Basic Principles on the Use of Force contain specific guidelines on the use of force and security measures.
- Law enforcement and prison officials may use force only when strictly necessary and to the extent required for the performance of their duty.

- Force may be necessary for the prevention of crime, including crimes committed in detention, or to effect lawful arrest, but no force going beyond that may be used and any force used must be proportionate to the objective to be achieved.
- The use of restraints (such as shackles) during detention can constitute a violation of the prohibition against torture, cruel, inhuman or degrading treatment or punishment under general international law as well as a breach of Articles 7 and/or 10(1) of the ICCPR. Similar considerations apply to non-voluntary solitary confinement.

Medical treatment and facilities

- Article 12 of the ICESCR provides that every person has the right to the enjoyment of the highest attainable standards of physical and mental health.
- All persons in detention should have prompt access on request and free of charge to proper medical and dental care and treatment that is appropriate to them.
- The denial of proper medical treatment and facilities (particularly to persons in detention) may constitute torture or cruel, inhuman or degrading treatment or punishment.
- Where necessary, persons should be transferred to specialist medical facilities such as a hospital.
- Practical standards have been developed in relation to medical facilities for psychiatric patients (see for example World Health Organisation Guidelines for the Promotion of Human Rights of Persons with Mental Disorders).

Medical and scientific experimentation

- Article 7 of the ICCPR gives as a particular example of torture or cruel, inhuman or degrading treatment or punishment, the subjection of a person, without his or her free consent, to medical or scientific experimentation.
- International law has evolved so that any consent also has to be fully informed consent.

Interrogation

- No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, whether prior to, during or subsequent to interrogation.
- The (UN) Principles of Medical Ethics and Torture prohibit health personnel from applying their knowledge and skills in order to assist in the interrogation of detainees in a manner that may adversely affect their physical or mental health or condition.
- The ACJ has developed minimum standards of interrogation designed to ensure that the prohibition on torture and cruel, inhuman or degrading treatment or punishment is adhered to.

Gender-based violence

- There is an overlap between gender-based violence and gender-specific forms of torture and cruel, inhuman or degrading treatment or punishment.
- Gender-based violence (including family violence and sexual abuse and exploitation) may constitute torture or cruel, inhuman or degrading treatment or punishment. Similarly, honour killings and female genital mutilation will usually constitute torture.
- Article 2 of CEDAW condemns discrimination against women. CEDAW Committee General Recommendation No. 19 states that gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms (including the right to freedom from torture and cruel, inhuman or degrading treatment or punishment) is discrimination under the definition of discrimination set out in Article 1 of CEDAW.
- The General Assembly in its Declaration on the Elimination of Violence Against Women condemns any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
- Violence directed against other groups on the basis, for example, of race, age, disability, sexual orientation, indigeneity, ethnicity or religion, would be subject to similar principles.

Corporal punishment

- It is generally accepted that article 19 of the CRC gives rise to a general prohibition on corporal punishment against children.
- International law has evolved so that there is also a general prohibition on corporal punishment against adults on the basis that it constitutes torture or cruel, inhuman or degrading treatment or punishment (see for example General Comment 20 of the HRC).
- Judicial sentences involving corporal punishment, regardless of whether they are permissible under domestic law, will therefore violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment.
- Torture or cruel, inhuman or degrading treatment or punishment can arise in the context of the death penalty at several stages, including the method of execution, failure to follow procedural requirements and conditions and length of time on death row.
- There is evolving authority for the proposition that the implementation of the death penalty *per se* breaches the prohibition against torture and/or cruel, inhuman or degrading treatment or punishment.

Discussion

Prohibition on torture

Torture is prohibited under international law and this prohibition is applicable to all states, irrespective of whether they are parties to any relevant treaties.

Article 7 of the ICCPR⁵⁴ and Article 5 of the UDHR⁵⁵ both prohibit torture in the following terms:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

⁵⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

The four Geneva Conventions of 1949 and the two Additional Protocols of 1977 also prohibit torture and related practices – see the discussion under term of reference (viii) below.

The ECHR has stated on many occasions that Article 3 of the European Convention⁵⁶ (the equivalent of Article 7 of the ICCPR), enshrines one of the most fundamental values of democratic society. It prohibits torture or inhuman or degrading treatment or punishment in absolute terms, irrespective of the circumstances and the victim's behaviour.⁵⁷

Defining 'torture' and other forms of ill-treatment

We note that the definitions of torture and related conduct that follow cannot be considered exhaustive as concepts of what may constitute such conduct can evolve over time and encompass a broader range of conduct than in the past.⁵⁸

For example, increasing concern about the spread of HIV/AIDS led the Special Rapporteur on Torture to state that the prohibition on torture and other ill-treatment would include prohibitions on the intentional transmission of HIV-infected blood and on denying detainees access to HIV-related information and treatment.⁵⁹

Neither the ICCPR nor the UDHR define the term 'torture' or the other forms of ill-treatment. Article 7 of the ICCPR, however, gives an indication of at least some activities that may be prohibited, as it states that, in particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

⁵⁵ Adopted and proclaimed by General Assembly resolution 217A(III) of 10 December 1948.

⁵⁶ 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively. Article 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

⁵⁷ *Latvia v Italy*, judgment of the ECHR, 6 April 2000 at [119].

⁵⁸ *Tyrer v United Kingdom*, judgment of the ECHR, 25 April 1978 at [31].

⁵⁹ Report of the Special Rapporteur on Torture *Civil and Political Rights, including the questions of torture and detention* E/CN.4/2004/56 23 December 2003 at [52]-[55].

Article 1 of CAT⁶⁰ defines the term ‘torture’ for the purposes of that Convention as follows:

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The main elements of this definition are common to most definitions of “torture” and are:

- the intentional infliction of severe pain or suffering;
- the pain or suffering can be physical or mental;
- it must be committed by persons exercising public authority; and
- it must have a purpose, such as the obtaining of information or a confession, or the infliction of punishment, or be based on discrimination; but
- such pain or suffering must not arise only from, or be inherent in or incidental to, lawful sanctions.

However, under customary international law, outside of the scope of CAT, the involvement of a public official is not necessarily required. In *Prosecutor v Kunarac, Kovac and Vukovic*⁶¹ the ICTY stated the following:

146. The Torture Convention was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity...

⁶⁰ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

⁶¹ *Prosecutor v Kunarac, Kovac and Vukovic (Appeals Chamber Judgment)*, Case No. IT-96-23-T and IT-96-23/1-T (22 February 2001).

148...the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside the framework of the Torture Convention.

The Rome Statute⁶² also defines ‘torture’ in the context of crimes against humanity. Article 7 provides that:

1. For the purposes of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

...

(f) Torture;

...

2. For the purpose of paragraph 1:

...

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

Examples of torture

International and regional tribunals have identified certain physical and psychological treatment that amounts to torture when undertaken for interrogation purposes. Examples of such physical torture or ill-treatment are:

- restraining in very painful conditions; hooding under special conditions; sounding of loud music or sleep deprivation for prolonged periods; violent shaking; and using cold air to chill;⁶³
- beating a detainee with batons and electrocuting body parts with a metal bar causing head and rib injuries;⁶⁴

⁶² Adopted and opened for signature, ratification and accession in Rome on 17 July 1998, entry into force 1 July 2002.

⁶³ Concluding observations of the Committee against Torture: Israel. Committee against Torture, 09/05/97. A/52/44 at [257].

- applying electric shocks to a half-naked and wet person, beating him, putting a hood over his head and burning him with lit cigarettes;⁶⁵
- holding a person's head in water until the point of drowning;⁶⁶
- rape;⁶⁷
- tying up and beating all over the body until loss of consciousness; hanging upside down, lacerating, pulling out nails with pincers, burning with cigarettes, breaking legs and fingers;⁶⁸ and
- a “Palestinian hanging”, which involved the detainee being stripped naked with his arms tied together behind his back and suspended by his arms.⁶⁹

Interrogators also use psychological ill-treatment in order to compel detainees to provide information out of fear. Examples of such psychological ill-treatment are:

- mock burials and mock executions;⁷⁰
- threat of rape;⁷¹
- threats of removal of body parts;⁷² and
- death threats.⁷³

Acts that involve the ill-treatment of third parties can still constitute torture of the detainee. For example, in *Khomidova v Tajikistan* the HRC found that the detainee had been subject to ‘psychological torture’. The authorities set fire to the detainee’s house, forced his wife and

⁶⁴ *Khomidova v Tajikistan*, Communication No. 1117/2002: Tajikistan. 25/08/2004. CCPR/C/81/D/1117/2002 at [2.5] and [6.2].

⁶⁵ IACHR Case 10.574, Report No. 5/94, Lovato Rivera (El Salvador), 1 February 1994.

⁶⁶ IACHR Case 9274, Resolution No. 11/84, Roslik (Uruguay), 3 October 1984.

⁶⁷ IACHR Case 10.970, Report No. 5/96, Raque Martín de Mejía (Peru), 1 March 1996.

⁶⁸ *Mulezi v Democratic Republic of Congo*, Communication No. 962/2001: Democratic Republic of Congo. 23/07/2004. CCPR/C/81/D/962/2001 at [2.4].

⁶⁹ *Aksoy v Turkey*, judgment of ECHR, 18 December 1996.

⁷⁰ See for example IACHR Case 7823, Report No 32/82, Solanoa (Bolivia), 8 March 1982.

⁷¹ *Abad v Spain*, Communication No. 59/1996: Spain. 14/05/98. CAT/C/20/D/59/1996 at [8.3].

⁷² IACHR Case 7824, Resolution No 33/82, Barrera (Bolivia), 8 March 1982.

⁷³ IACHR Case 10.508, Report No 25/94, Lissardi & Rossi (Guatemala), 22 September 1994.

children to leave the premises, confiscated his car and furniture, destroyed his father's mill and took away his animals, and beat his father with a rifle butt.⁷⁴

Cruel, inhuman or degrading treatment and punishment

International instruments do not define "other cruel, inhuman or degrading treatment or punishment". However, various bodies have given guidance on whether an act amounts to torture or to a different form of ill-treatment. The distinction between the terms relates principally to the purpose of the perpetrator rather than any difference in the intensity of the suffering inflicted.⁷⁵ In all cases, the suffering can be either physical or mental.

Certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future.⁷⁶

Inhuman treatment:

- must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, religion and state of health of the victim;⁷⁷ but
- the treatment need not be intended to cause suffering.

Degrading treatment:

- must be of sufficient severity; involving some form of gross humiliation⁷⁸ or debasement;⁷⁹ interfering with the dignity of the person;⁸⁰ but
- it is not necessary that the purpose of the treatment was to humiliate or debase the victim.⁸¹

⁷⁴ *Khomidova v Tajikistan*, Communication No. 1117/2002: Tajikistan. 25/08/2004. CCPR/C/81/D/1117/2002 at [2.6] and [6.2].

⁷⁵ See the discussion in Sir Nigel Rodley "The Definition(s) of Torture in International Law" in (2002) 55 *Current Legal Problems* at 491.

⁷⁶ *Selmouni v France*, judgment of the ECHR, 28 July 1999 at [101].

⁷⁷ *Ireland v United Kingdom* (1978) ECHR (Series A) No 25 at [162].

⁷⁸ *The Greek Case* (1969) YBECHR 12 at 186.

⁷⁹ *Campbell and Cosans v United Kingdom* (1982) ECHR (Series A) No 48 at [28].

⁸⁰ *East African Asians v United Kingdom* (3 EHRR 76) 15 December 1973.

Although there is no requirement that either inhuman or degrading treatment result from an intentional act, the absence of intent may be taken into account in the consideration of damages.⁸²

Evidence going to torture:

Whether particular treatment amounts to torture is often a question of degree and will depend on inferences drawn from the circumstances of the case, the available evidence and any resultant injuries.

In *Denizci v Cyprus*⁸³ the ECHR held that the intentional ill-treatment of the applicants, who were detained and beaten by police officers, did not amount to torture. The ECHR was unable to establish whether the officers aimed to extract a confession and unable to determine the precise manner or severity of the beatings. Further, there was no evidence that the ill-treatment had long term effects.

In *Salman v Turkey*⁸⁴ the ECHR found that the suffering of the victim, who was detained in good health and later died, amounted to torture. He sustained bruising and abrasions to his feet and a broken sternum. The ECHR considered the nature and degree of the ill-treatment and drew strong inferences that it occurred during interrogation, particularly since the authorities had provided no other plausible explanation for the injuries.

Detention:

Regardless of whether a state is a party to any relevant treaty, the general international law prohibition on torture and cruel, inhuman and degrading treatment or punishment applies to all

⁸¹ *V v United Kingdom* (1999) ECHR (Series A) No 9 at [71].

⁸² *Price v United Kingdom*, judgment of the ECHR, 10 July 2001 at [34].

⁸³ *Denizci and Others v Cyprus*, judgment of the ECHR, 23 May 2001.

⁸⁴ *Salman v Turkey*, judgment of the ECHR, 27 June 2000.

persons under detention. CAT and Article 7 of the ICCPR also apply to persons under detention, whether the detention is lawful or unlawful.

The ability to detain an individual is, however, recognised by Article 9 the ICCPR and will not amount to ill-treatment *per se* unless it is arbitrary and is not carried out on such grounds and in accordance with such procedure as are established by law. Article 9 provides as follows:

1. Everybody has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Lengthy periods of detention without charges being laid or without trial may, however, as well as being a violation of Article 14(3)(c) of the ICCPR⁸⁵, also constitute torture or cruel, inhuman or degrading treatment or punishment, depending upon the combination of circumstances both of the detention and the individual.

Article 10(1) of the ICCPR is also relevant. It provides that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person

More comprehensive and specific requirements for detention, including safeguards that should be followed in order to ensure that detainees are not tortured or subject to ill-treatment, are set out in the following instruments:

- Principles of Medical Ethics and Torture;⁸⁶
- Principles for Persons under Detention;⁸⁷
- Standard Minimum Rules,⁸⁸ and
- Rules for the Protection of Juveniles.⁸⁹

⁸⁵ Article 14(3)(c) provides for the right to be tried without undue delay.

⁸⁶ Adopted by UN General Assembly resolution 37/194 of 18 December 1982.

⁸⁷ Adopted by UN General Assembly resolution 43/173 of 9 December 1988.

Breach of these standards may constitute a breach of the general prohibition relating to torture under international law or lead to breaches of CAT or Article 7 and/or Article 10(1) of the ICCPR.

An institution's failure to meet certain basic requirements of detention may constitute ill-treatment. The following conditions have been found to violate the prohibition on degrading or inhuman treatment and, in some cases, the prohibition on torture:

- prolonged incommunicado detention in an unknown location;⁹⁰
- displaying a detainee to the media in a cage;⁹¹
- denial of family visits and the inability to receive and send correspondence for a year;⁹²
- lack of bedding, sanitation, artificial light and recreational facilities, confinement for 23 hours a day, inadequate medical services and deplorable food;⁹³
- detention for 10 years alone in a cell measuring 6 feet by 14 feet for 21½ hours a day with no recreational facilities or books;⁹⁴
- prison warders assaulting a prisoner and repeatedly soaking his bedding;⁹⁵ and
- deprivation of food and water for several days, and denial of medical attention after ill-treatment.⁹⁶

⁸⁸ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁸⁹ Adopted by UN General Assembly resolution 45/113 of 14 December 1990.

⁹⁰ See for example *Atachahua v Peru*, Communication No 540/1993: Peru. 16/04/96. CCPR/C/56/D/540/1993 at [8.5] and *N'Goya v Democratic Republic of Congo* Communication No 542/1993: Democratic Republic of Congo. 16/04/96. CCPR/C/56/D/542/1993 at [5.5].

⁹¹ *Polay v Peru* Communication No 577/1994: Peru. 09/01/98. CCPR/C/61/D/577/1994 at [8.5].

⁹² *Polay v Peru*, Communication No 577/1994: Peru. 09/01/98. CCPR/C/61/D/577/1994 at [8.6].

⁹³ *Deidrick v Jamaica*, Communication No. 619/1995: Jamaica. 04/06/98. CCPR/C/62/D/619/1995 at [9.3]. However, in some cases similar conditions will constitute only a violation of Article 10 (see for example *Taylor v Jamaica*, Communication No. 705/1996: Jamaica. 04/06/98. CCPR/C/62/D/705/1996 at [7.4]).

⁹⁴ *Edwards v Jamaica*, Communication No. 529/1993: Jamaica. 19/08/97. CCPR/C/60/D/529/1993 at [8.3].

⁹⁵ *Young v Jamaica* Communication No 615/1995: Jamaica. 17/12/97. CCPR/C/61/D/615/1995/Rev.1 at [5.2].

⁹⁶ *Miha v Equatorial Guinea* Communication No 414/1990: Equatorial Guinea. 10/08/94. CCPR/C/51/D/414/1990 at [6.4].

In *Dougoz v Greece* the ECHR emphasised that the “cumulative effects” of the conditions of detention, as well as of specific allegations, must be taken into account when considering whether the conditions of detention constituted ill-treatment.⁹⁷ The ECHR held that the conditions, in particular the serious overcrowding and absence of sleeping facilities, combined with the length of the period during which Dougoz was detained (17 months), amounted to degrading treatment.

The HRC has also identified certain conditions that may violate Article 7 and/or Article 10 of the ICCPR. Some examples include:

- failure to segregate pre-trial detainees from convicted prisoners;⁹⁸
- lack of medical and dental care, burning of detainee’s personal belongings;⁹⁹
- sharing of mattresses in detention and denial of natural light for 23 hours a day;¹⁰⁰
- failure to provide medical treatment to death row inmates with skin condition;¹⁰¹ and
- deprivation, temporarily or permanently, of the use of any of the detainee’s natural senses, such as sight or hearing, of an awareness of place and time.¹⁰²

Torture or cruel, inhuman or degrading treatment or punishment or a breach of Article 10(1) of the ICCPR may also occur when a detainee requires individualised treatment. The following are examples of situations where the detainee’s personal circumstances imposed particular obligations:

- A detainee was born with phocomelia, a congenital malformation in which the hands and feet are attached to abbreviated limbs. The ECHR held that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed

⁹⁷ *Dougoz v Greece*, judgment of the ECHR, 6 March 2001 at [46].

⁹⁸ *Wilson v Philippines* Communication 868/1999: Philippines. 11/11/2003. CCPR/C/79/D/868/1999 at [7.3].

⁹⁹ *Howell v Jamaica* Communication No. 798/1998: Jamaica. 07/11/2003. CCPR/C/79/D/798/1998 at [6.2].

¹⁰⁰ *Yasseen and Thomas v Guyana* Communication No. 676/1996: Guyana. 07/05/98. CCPR/C/62/D/676/1996 at [7.4] and [7.6]

¹⁰¹ *Lewis v Jamaica* Communication No. 527/1993: Jamaica. 18/11/96. CCPR/C/57/D/527/1993 at [10.4].

¹⁰² See footnote 1 to Principle 6 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988.

is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment.¹⁰³

- Continued detention constituted ill-treatment when the State party was aware of the detainee's mental condition and failed to take the steps necessary to ameliorate his mental deterioration.¹⁰⁴

Detention: use of force

The Code of Conduct for Law Enforcement Officers¹⁰⁵ and the Basic Principles on the Use of Force¹⁰⁶ contain specific guidelines on the use of force and security measures.

Article 3 of the Code of Conduct for Law Enforcement Officials provides that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.” The commentary on Article 3 provides a guide to when force can be used:

- Force may be necessary for the prevention of crime or to effect or assist in the lawful arrest of an offender or suspected offender, but no force going beyond that may be used.
- Any force used must be proportionate to the objective to be achieved.
- However, force used for the purpose of retaining or disciplining a detainee is not referred to.

General Provision 4 of the Basic Principles on the Use of Force states that:

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

¹⁰³ *Price v United Kingdom*, judgment of the ECHR, 10 July 2001 at [30].

¹⁰⁴ *C v Australia*, Communication No 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999 at [8.4].

¹⁰⁵ Adopted by UN General Assembly resolution 34/169 of 17 December 1979.

¹⁰⁶ Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

If the use of force is unavoidable, General Provision 5 of the Basic Principles on the Use of Force states that officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimise damage and injury, and respect and preserve human life;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

In *Robinson v Jamaica* the HRC held that excessive force was used in violation of Articles 7 and 10, as the injuries that the detainee sustained to his head, back, chest and legs went beyond that which was necessary to remove forcefully a difficult prisoner from a cell.¹⁰⁷

Detention: security within detention

The use of restraints (such as shackles) during detention can constitute a violation of CAT or Articles 7 and/or 10 of the ICCPR, depending on the circumstances:

- In *Cabal and Bertran v Australia*,¹⁰⁸ the HRC held that shackling the applicants with 12 or 17 link shackles during transport to and from prison and subjecting them to strips and cavity searches after each visit did not violate the ICCPR. The treatment was justified because the prisoners posed very high flight risks. Further, the detainees were not singled out for searches, the manner of the searches minimised embarrassment and the searches were carried out to ensure the safety and security of the prison.
- In *Mouisel v France*¹⁰⁹ a prisoner developed leukaemia which became progressively more serious. The ECHR found that handcuffing the applicant while he was being escorted to

¹⁰⁷ *Robinson v Jamaica*, Communication No. 731/1996: Jamaica. 13/04/2000. CCPR/C/78/D/731/2000 at [10.3].

¹⁰⁸ *Cabal and Bertran v Australia*, Communication No. 1020/2001: Australia. 19/09/2003. CCPR/C/78/D/1020/2001 at [8.2].

¹⁰⁹ *Mouisel v France*, judgment of the ECHR, 14 November 2002 at [47].

and from hospital for treatment was a disproportionate measure that amounted to inhuman and degrading treatment. The Court took security requirements into account but considered that the applicant's state of health made handcuffing unnecessary.

- In *Iwanczuk v Poland*¹¹⁰ permission for the detainee to vote in parliamentary elections while he was awaiting trial on fraud charges was subject to a body search. The applicant was subjected to humiliating remarks about his body and verbal abuse. Permission to vote was denied when he refused to remove his underpants. The ECHR held that the applicant had been subjected to degrading treatment, as there were no compelling reasons to justify the strip search. The applicant had no previous convictions or history of violence and the search was intended to cause feelings of humiliation and inferiority.

Detention: force-feeding

Force-feeding a detainee involves degrading elements which, in certain circumstances, can contravene the prohibition on torture and other forms of ill-treatment. In *X v Germany* the prisoner was on a hunger strike. The European Commission was satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respecting his will not to accept nourishment, and thereby incurring the risk of injuries or death, or taking action to secure his survival, although such action might infringe the applicant's human dignity.¹¹¹

Detention: blind folding

In *Öcalan v Turkey*¹¹² the applicant was arrested on suspicion of having committed serious terrorist offences. He was blindfolded from the moment of his arrest in Kenya until his arrival in prison in Turkey the following day. The ECHR held that blindfolding the suspect did not amount to inhuman or degrading treatment in the circumstances, as the applicant was blindfolded for reasons of security and was not interrogated while blindfolded.

¹¹⁰ *Iwanczuk v Poland*, judgment of the ECHR, 15 November 2001.

¹¹¹ *X v Germany* (1984) 7 EHRR 152 at [153-154].

¹¹² *Öcalan v Turkey*, judgment of the ECHR, 12 March 2003.

Detention: solitary confinement

There is uncertainty as to whether solitary confinement by itself constitutes torture or cruel, inhuman or degrading treatment or punishment.¹¹³ The HRC has expressed concern about the use of solitary confinement for incarcerated persons following conviction.¹¹⁴ It has commented that solitary confinement is “a harsh penalty with serious psychological consequences”¹¹⁵ and is only justifiable in case of urgent need and for limited periods only. It may otherwise amount to a breach of article 10(1) of the ICCPR. The Committee Against Torture has also identified solitary confinement as a subject of concern, and has said that strict conditions of solitary confinement may, in certain circumstances, amount to acts prohibited by article 16 of the CAT.¹¹⁶

Whether solitary confinement constitutes torture will depend on the particular circumstances of the individual case.¹¹⁷ In each case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.¹¹⁸ The European Commission on Human Rights has declared that absolute sensory isolation combined with absolute social isolation constitutes inhuman treatment for which no security requirements can form a justification.¹¹⁹

Non-voluntary solitary confinement should only ever be used as a punishment if proper processes have been followed. It should never be for prolonged periods and there should be the opportunity for independent review. There may be persons with special characteristics

¹¹³ Lene Wendland *A Handbook on State Obligations under the UN Convention Against Torture* APT Geneva May 2002 at 25.

¹¹⁴ See for example Concluding Observations of the Human Rights Committee: Denmark 31/10/2000 CCPR/CO/70/DNK at [12]; Concluding Observations of the Human Rights Committee: Thailand 28/7/2005 CCPR/CO/84/THA at [16].

¹¹⁵ Concluding Observations of the Human Rights Committee: Denmark 31/10/2000 CCPR/CO/70/DNK at [12].

¹¹⁶ Conclusions and Recommendations of the Committee against Torture: New Zealand 11/06/2004 CAT/C/CR/32/4 at [5(d)]

¹¹⁷ See the discussion in *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (report of first judgment made on 7 April 2004 – judgment was recalled and reissued on 2 September 2004) at [266] – [267] and [316].

¹¹⁸ *Esslin, Baader and Raspe v Federal Republic of Germany* No 7572/76, 14 DR 64 at 109 (1978).

¹¹⁹ *Esslin, Baader and Raspe v Federal Republic of Germany* Yearbook of the European Convention on Human Rights XXI (1978) at 418.

who should not be subject to solitary confinement. When in solitary confinement access to basic necessities, including adequate food, light and exercise should never be denied. The same principles apply to solitary confinement for security reasons or protective purposes.

Disappearances – ill-treatment of remaining family

The disappearance of a person in circumstances engaging the responsibility of the State may constitute ill-treatment of close relatives of the disappeared individual. However, international bodies have been careful not to establish a general principle that ill-treatment will always be found in such a case.

In *Kurt v Turkey*¹²⁰ the ECHR held that the mother of a disappeared person was herself a victim of inhuman and degrading treatment because she had endured years of inaction on the part of the State authorities and years of knowing nothing of her son's fate.

However, in *Cakici v Turkey*¹²¹ the ECHR held that *Kurt* did not establish any general principle that a family member of a 'disappeared person' is thereby a victim of ill-treatment:

Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond -, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.¹²²

¹²⁰ *Kurt v Turkey*, judgment of the ECHR, 25 May 1998.

¹²¹ *Cakici v Turkey*, judgment of the ECHR, 8 July 1999.

In *Sarma v Sri Lanka*¹²³ army members removed a boy from his family residence in their presence. He was tortured, hooded and forced to identify other suspects. Despite being told that the son was dead, his father saw him in the back of a military truck approximately four months later. When the father sought the Prime Minister's intervention, the military advised that the son had never been taken into custody. Noting the anguish and stress caused to the family by the son's disappearance and by the continuing uncertainty concerning his fate and whereabouts, the HRC found that the family had been subjected to ill-treatment.¹²⁴

Medical treatment and facilities

The ICESCR includes a general right to physical and mental health:

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

In addition, several international instruments contain provisions relating to the provision of medical care and treatment to detainees. The Basic Principles for the Treatment of Prisoners provide that prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.¹²⁵

Principle 24 of the Principles for Persons under Detention states that:

¹²² *Cakici v Turkey*, judgment of the ECHR, 8 July 1999 at [98].

¹²³ *Sarma v Sri Lanka*, Communication No. 950/2000: Sri Lanka. 31/07/2003. CCPR/C/78/D/950/2000.

¹²⁴ *Sarma v Sri Lanka*, Communication No. 950/2000: Sri Lanka. 31/07/2003. CCPR/C/78/D/950/2000 at [9.5].

¹²⁵ Basic Principles for the Treatment of Prisoners, Principle 9.

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

The Standard Minimum Rules contain the following provisions relating to the provision of medical services at penal institutions:

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

26. (1) The medical officer shall regularly inspect and advise the director upon:

(a) The quantity, quality, preparation and service of food;

(b) The hygiene and cleanliness of the institution and the prisoners;

(c) The sanitation, heating, lighting and ventilation of the institution;

(d) The suitability and cleanliness of the prisoners' clothing and bedding;

(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

Particular international standards have also developed in relation to medical facilities for psychiatric patients, including:

- Declaration on the Rights of Mentally Retarded Persons 1971;
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991. These principles clarify that the Principles for Persons under Detention also apply; and

- World Health Organisation Guidelines for the Promotion of Human Rights of Persons with Mental Disorders.¹²⁶

The above Principles expressly forbid intrusive and irreversible treatments without informed consent, including psychosurgery and experimental treatment.¹²⁷ According to the Special Rapporteur on Torture, these practices may constitute ill-treatment or, in certain circumstances, torture.¹²⁸

Medical and scientific experimentation

International instruments also refer to the link between medical experimentation and the prohibition on torture and other ill-treatment. The following provisions relate to medical experimentation:

- The prohibition on torture and other ill-treatment in Article 7 of the ICCPR states that “no one shall be subjected without his free consent to medical or scientific experimentation .” International law has evolved so that any consent must also be fully informed.
- Principle 22 of the Principles for Persons under Detention states that “[n]o detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.”
- Article 8(2)(b)(x) of the Rome Statute defines ‘war crimes’ as including “[s]ubjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons”. In order to

¹²⁶ Division of mental health and prevention of substance abuse, WHO, Geneva, WHO/MNH/MND/95.4.

¹²⁷ Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991, Principle 11.

¹²⁸ Interim report of the Special Rapporteur on Torture, *‘Torture and other cruel, inhuman or degrading treatment or punishment’*, 3 July 2003, A/58/2003 at [47].

classify as a war crime, this treatment must be carried out as part of a plan or policy or as part of a large-scale commission of such crimes.¹²⁹

Interrogation

The prohibition against torture and cruel, inhuman or degrading treatment or punishment applies prior to, during or subsequent to interrogation. The ACJ has developed minimum standards of interrogation designed to ensure that the prohibition on torture and cruel, inhuman or degrading treatment or punishment is adhered to.

We note that the (UN) Principles of Medical Ethics and Torture prohibit health personnel from applying their knowledge and skills in order to assist in the interrogation of detainees in a manner that may adversely affect their physical or mental health or condition.

Gender-based violence

There is an overlap between gender-based violence and gender specific forms of torture. CEDAW¹³⁰ does not refer specifically to violence, abuse, torture or ill-treatment. However, the CEDAW Committee's General Recommendation No. 19 on violence against women refers to torture in the following context:¹³¹

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention. These rights and freedoms include:

...

(a) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;

¹²⁹ Rome Statute, Article 8(1).

¹³⁰ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981.

¹³¹ Similar considerations would apply under CERD.

Violence directed against other groups on the basis, for example, of race, age, disability, sexual orientation, indigeneity, ethnicity or religion, would be subject to similar principles.

A Platform for Action arose from the deliberations of delegates to the Fourth World Conference on Women, which included a comprehensive section on ‘Violence against Women’. This Platform stated that such violence may include physical, sexual and psychological violence occurring in the family, within the general community, or violence perpetrated or condoned by the State.¹³² Although the Platform does not specifically refer to torture or other ill-treatment, these practices are clearly capable of falling within the scope of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment.

The Special Rapporteur on violence against women, its causes and consequences, has identified acts of violence against women which are referred to as ‘cultural practices in the family’. Such acts of violence include honour killings, witch hunting, acts associated with the caste system or preferences for boy children, restrictive practices such as foot binding, practices that violate women’s reproductive rights and incest. The Special Rapporteur stated that many of these practices “involve ‘severe pain and suffering’ and may be considered ‘torture like’ in their manifestation”.¹³³

Custodial violence against women often involves forms of violence that appear gender-neutral but are in fact carried out with gender in mind. For example, rape is often referred to as a gender-specific form of violence, because the vast majority of allegations of rape in custody involve female victims. Human rights bodies have shown little reluctance in labelling such practices as custodial rape as torture or, at minimum, ill-treatment. Other forms of custodial sexual violence against women, include sexual harassment, forced impregnation, virginity testing, forced abortion, forced prostitution and forced miscarriage.¹³⁴

¹³² Platform for Action, Fourth World Conference for Women, Beijing China, September 1995, Section D at [114].

¹³³ Report of the Special Rapporteur on violence against women, its causes and consequences, Commission on Human Rights, Fifty-eighth session, E/CN.4/2002/83, 31 January 2002 at [6].

Gender-specific forms of ill-treatment can also occur on the basis of an individual's real or perceived sexual orientation or gender identity. Examples of how states fail to meet their obligation to prohibit torture and other ill-treatment of sexual minorities are:¹³⁵

- in a number of countries laws punish consensual same-sex relationships and transgender behaviour by corporal punishment;
- rape of a man or of a male-to-female transsexual woman being classified as a lesser charge of 'sexual assault'; and
- the status of sexual minorities may affect the consequences of their ill-treatment in terms of their access to complaint procedures or medical treatment.

Sexual abuse is a broad term encompassing all acts involving one person causing another person to engage in an unwanted sexual act by force or threat. Although sexual abuse is a violation of human rights, international human rights law referring to sexual abuse is very limited. No international human rights instruments or jurisprudence specifically identify sexual abuse as a form of torture or other ill-treatment (with rape as an exception).

However, the Committee on the Rights of the Child continually makes reference to ill-treatment in connection with sexual abuse.¹³⁶ Further, Article 19 of the CRC provides that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, *including sexual abuse*, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child [emphasis added].

*E v United Kingdom*¹³⁷ appears to be the only case in an international tribunal dealing with sexual abuse as a violation of the prohibition on torture and other ill-treatment. The ECHR

¹³⁴ Report of the Special Rapporteur on violence against women, Commission on Human Rights, fifty-fourth session, E/CN.4/1998/54, 26 January 1998 at [130].

¹³⁵ Interim report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, fifty-sixth session, A/56/156, 3 July 2001 at [18]-[20].

¹³⁶ See for example Concluding Observations of the Committee on the Rights of the Child: Fiji. 24/06/98. CRC/C/15/Add.98, Committee on the Rights of the Child at [37].

held that the State breached its responsibilities to protect the individuals in its jurisdiction from inhuman and degrading treatment when it failed to act appropriately in relation to the sexual and physical abuse of the four applicants when they were children. This was because the continued abuse of the children resulted from “the pattern of lack of investigation, communication and co-operation by the relevant authorities” and “proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.”¹³⁸

Corporal punishment

The term ‘corporal punishment’ broadly refers to punishment or discipline that involves inflicting physical violence and pain on a person. Corporal punishment is not specifically mentioned in international human rights instruments. However, the CRC includes the following provisions:

Article 19

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 28

...

States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.

¹³⁷ *E v the United Kingdom*, judgment of the ECHR, 26 November 2002.

¹³⁸ *E v the United Kingdom*, judgment of the ECHR, 26 November 2002 at [100].

This reference in the CRC is complemented by the Rules for the Protection of Juveniles, which make it clear that, for the purposes of the Rules at least, corporal punishment constitutes cruel, inhuman or degrading treatment.¹³⁹

It is generally accepted that Article 19 of the CRC gives rise to a general prohibition on corporal punishment against children.

Other references to corporal punishment as torture or other ill-treatment include:

- In its resolution 2002/38, the Commission on Human Rights reminded governments that “corporal punishment, including of children, *can* amount to cruel, inhuman or degrading punishment or even to torture” [emphasis added].
- The Special Rapporteur on Torture has stated in successive annual reports that corporal punishment is inconsistent with the prohibition on torture and other ill-treatment.¹⁴⁰
- In its General Comment 20, the HRC expressed the view that:

the prohibition [on cruel, inhuman or degrading punishment] must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

Various international human rights bodies have considered whether corporal punishment amounts to torture or other ill-treatment, with the following relevant points emerging:

- The prohibition on corporal punishment exists irrespective of the nature of the crime that is to be punished.¹⁴¹
- In *Tyrer v the United Kingdom* the ECHR noted that the very nature of judicial corporal punishment is one human being inflicting physical violence on another human being, with

¹³⁹ Rules for the Protection of Juveniles, Rule 67.

¹⁴⁰ See for example Interim report by Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, A/57/173, 2 July 2002 at [48].

¹⁴¹ *Pryce v Jamaica*, Communication No. 793/1998: Jamaica. 13/05/2004. CCPR/C/80/D/793/1998 at [6.2].

the involvement of State institutions at all stages.¹⁴² Although the applicant did not suffer any severe or long-lasting physical effects, the ECHR found that his punishment constituted degrading treatment. It follows from this decision that a judicial sentence involving corporal punishment will violate the prohibition on ill-treatment.

- In *Campbell and Cosans v United Kingdom* the ECHR held that a sufficiently real and immediate threat of torture or other ill-treatment may itself constitute a breach of the provision.¹⁴³ However, in this case, threatening two schoolboys with corporal punishment was not sufficiently severe to amount to torture or to inhuman treatment.

In our view, international law has evolved so that there is also a general prohibition on corporal punishment against adults on the basis that it constitutes torture or cruel, inhuman or degrading treatment or punishment (see for example General Comment 20 of the HRC). Judicial sentences involving corporal punishment, regardless of whether they are permissible under domestic law, will therefore violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment.

Death penalty

There is evolving authority for the proposition that the implementation of the death penalty *per se* breaches the prohibition against torture and/or cruel, inhuman or degrading treatment or punishment.

It is accepted, however, that, in any event, torture can arise in the context of the death penalty at several stages, including the method of execution, procedural requirements, conditions on death row and the ‘death row phenomenon’.

Method of execution:

¹⁴² *Tyrer v the United Kingdom*, judgment of the ECHR, 15 March 1978 at [33].

¹⁴³ *Campbell and Cosans v United Kingdom* (1982) ECHR (Series A) No 48 at [26].

- In *Chitat v Canada*¹⁴⁴ the HRC reiterated General Comment 20(44) which stated that the execution of a sentence of death must be carried out in such a way as to cause the least possible physical and mental suffering. In that case, the HRC stated that execution by gas asphyxiation constitutes cruel and inhuman treatment.¹⁴⁵

Procedural requirements:

- Detention on death row will *per se* constitute ill-treatment if the individual was sentenced to death in violation of one of the principles set out in Article 6.¹⁴⁶
- Prolonged delays in the execution of a sentence of death will not constitute torture or other ill-treatment unless there are other “compelling circumstances”.¹⁴⁷
- A 20-hour delay between a stay of execution and removal from a death cell constitutes cruel and inhuman treatment.¹⁴⁸
- Eight hours’ notice of execution when the execution can only take place at least one year after domestic remedies have been exhausted does not constitute torture or ill-treatment.¹⁴⁹

Conditions on death row:

- The general principles applying to detention apply equally to death row inmates.
- The HRC found that a death row detainee was subjected to degrading treatment when he was assaulted by soldiers and warders, who beat him, pushed him with a bayonet, emptied a urine bucket over his head, threw his food and water on the floor and his mattress out of the cell.¹⁵⁰

¹⁴⁴ *Chitat v Canada*, Communication No. 469/1991: Canada. 07/01/94. CCPR/C/49/D/469/1991.

¹⁴⁵ *Chitat v Canada*, Communication No. 469/1991: Canada. 07/01/94. CCPR/C/49/D/469/1991 at [16.4].

¹⁴⁶ See for example *Clive Johnson v Jamaica*, Communication No. 592/1994: Jamaica. 25/11/98. CCPR/C/64/D/592/1994 at [10.4]. The ECHR has reached the same conclusion in relation the European Convention, see *Öcalan v Turkey*, judgment of the ECHR, 12 March 2003 at [211]-[213].

¹⁴⁷ *Howell v Jamaica*, Communication No. 798/1998: Jamaica. 07/11/2003. CCPR/C/79/D/798/1998 at [6.3].

¹⁴⁸ *Pratt and Morgan v Jamaica*, Communication No. 210/1986: Jamaica. 07/04/89. CCPR/C/35/D/210/1987 at [13.7].

¹⁴⁹ *Rolando v Philippines*, Communication No. 1110/2002: Philippines. 08/12/2004. CCPR/C/82/D/1110/2002 at [5.4].

¹⁵⁰ *Francis v Jamaica* Communication No. 320/1988: Jamaica. 12/05/93. CCPR/C/47/D/320/1988 at [12.4].

Death row phenomenon:

- The “death row phenomenon” describes the combination of circumstances which a prisoner is exposed to after a prolonged period on death row. The detrimental conditions on death row are both physical (prisoners are confined in small cells for up to 23 hours a day with few activities) and psychological (mental deterioration resulting from waiting years for one’s own execution).
- In *Soering v United Kingdom*¹⁵¹ the ECHR identified the ‘death row phenomenon’ as a form of treatment that can violate the prohibition on ill-treatment.
- The notion of a “death row phenomenon” may conflict with established case law because prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even if they can be a source of mental strain for the convicted prisoners.¹⁵²
- Further, *Johnson v Jamaica*¹⁵³ held that, although the ICCPR does not prohibit the death penalty, the language of Article 6 suggests that States should be working towards reducing its use. Therefore, measures that may prolong a person’s time on death row should not be discouraged if ultimately this may lead to fewer prisoners being executed. However, the “death row phenomenon” may lead States to believe that they should carry out a capital sentence as expeditiously as possible after it is imposed so as to avoid violating the ICCPR. The HRC considered that this message should be avoided.¹⁵⁴
- In *Bailey v Jamaica* the HRC confirmed that the period of time spent on death row does not *per se* constitute a violation of Article 7.¹⁵⁵ Bearing in mind the fact that the prisoner had killed a police officer, the HRC held that there was no violation in the case of a death row inmate who spent 14 years on death row with a non-parole period of 20 years. This suggests that, had the prisoner been convicted of a lesser offence, the length of time spent on death row may have violated Article 7.

¹⁵¹ *Soering v United Kingdom*, judgement of the ECHR, 7 July 1989.

¹⁵² *Pratt and Morgan v Jamaica* Communication Nos. 210/1986, 225/1987: Jamaica. 07/04/89. CCPR/C/35/D/225/1987 at [13.6].

¹⁵³ *Johnson v Jamaica*, Communication No. 588/1994: Jamaica. 05/08/96. CCPR/C/56/D/588/1996.

¹⁵⁴ *Johnson v Jamaica*, Communication No. 588/1994: Jamaica. 05/08/96. CCPR/C/56/D/588/1996 at [8.3] to [8.5].

- In *Williams v Jamaica*¹⁵⁶ the HRC found that the detainee was subjected to inhuman treatment because he received inadequate medical treatment for his mental condition while on death row.
- *Francis v Jamaica* emphasised that each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.¹⁵⁷

¹⁵⁵ *Bailey v Jamaica*, Communication No. 709/1996: Jamaica. 17/09/99. CCPR/C/66/D/709/1996 at [7.6]

¹⁵⁶ *Williams v Jamaica*, Communication No. 609/1995: Jamaica. 17/11/97. CCPR/C/61/D/609/1995.

¹⁵⁷ *Francis v Jamaica*. Communication No. 606/1994: Jamaica. 03/08/95. CCPR/C/54/D/606/1994 at [9.1].

- (ii) the prohibition on torture and other forms of ill-treatment as a rule of customary international law which is reflected in the jurisprudence of international, regional and national tribunals and the statements of academics and such international bodies as the Human Rights Committee and the Committee against Torture.**
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Summary

- The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is a rule of customary international law.
- The prohibition on torture is a peremptory norm or *jus cogens* (see for example General Comment 24 of the HRC; *Prosecutor v Furundzija*, 10 December 1998 of the ICTY; *R v Bow Street Magistrate, ex parte Pinochet (No.3)* [2000] 1 AC 147; and *Attorney General v Zaoui*, [2005] NZSC 38 at [51]).
- Customary international law is derived from state practice. When states all act in a certain way, reflecting a generally held belief that to act that way is required by law, this is the basis of customary international law.
- Where a norm is accepted and recognised by the international community of states as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character, this is referred to as a peremptory norm or *jus cogens* (Article 53, Vienna Convention on the Law of Treaties).
- Customary international law and peremptory norms/*jus cogens*, are binding on all states regardless of whether they have ratified any of the relevant treaties including the ICCPR and CAT.

Discussion

Is the prohibition on torture a rule of customary international law?

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is a rule of customary international law.¹⁵⁸ The Special Rapporteur on Torture has recognised the customary nature of the prohibition on torture and other ill-treatment.¹⁵⁹

The prohibition on torture is also recognised as a peremptory norm or *jus cogens*. See for example *Siderman de Blake v Argentina*, 965 F 2d 699 (1992) 714-719; *Prosecutor v Anto Furundzija* (Judgment) (10 December 1998) IT-95-17/1-T (Trial Chamber, ICTY) paras 144, 147, 153-154, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198, 275 and 290 and *Attorney-General v Zaoui* [2005] NZSC 38 at [51].

The prohibition against torture and other cruel, inhuman or degrading treatment or punishment is therefore binding on all States, regardless of whether they have ratified the ICCPR, CAT or other relevant conventions and regardless of whether domestic law prohibits such treatment.

Customary international law is derived from state practice. When states all act in a certain way, reflecting a generally held belief that to act that way is required by law (*'opinio juris'*), this is said to be the basis of customary international law.¹⁶⁰

Article 38 of the Vienna Convention explains the practical implication of customary international law on states that do not ratify treaties.

¹⁵⁸ General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, HRI/GEN/1/Rev.7, fifty-second session, 1994 at [8].

¹⁵⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the General Assembly, A/59/324, fifty-ninth session, 1 September 2004, para 15. See also for example *Al-Adsani v United Kingdom*, judgment of the ECHR 21 November 2001 at [61].

¹⁶⁰ See Article 38(1), *Statute of the International Court of Justice*. See also Henry J. Steiner and Philip Alston, *International Human Rights in Context*, Clarendon Press, Oxford, 1996, pp. 27 – 28; and Shaw *International Law* (5ed), Cambridge University Press, 2003, p 80.

Nothing in Articles 34 to 37 [on the applicability of treaties to third states] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

Article 53 of the Vienna Convention on the Law of Treaties¹⁶¹ refers to a peremptory norm (*jus cogens*) as:

a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 53 of the Vienna Convention provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

¹⁶¹ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p.331. Adopted on 22 May 1969 and opened for signature on 23 May 1969 by the *United Nations Conference on the Law of Treaties*. Entered into force on 27 January 1980, in accordance with Article 84(1).

(iii) whether the prohibition on torture and other forms of ill-treatment can be derogated from in certain circumstances.

Summary

- The prohibition on torture and cruel, inhuman or degrading treatment or punishment cannot be derogated from in any circumstances.
- This means that torture and cruel, inhuman or degrading treatment or punishment are absolutely prohibited, including in the context of war, countering terrorism or in dealing with any public emergency. They are also absolutely prohibited even when authorised by domestic legislation or by order of a superior.
- It is a principle of international law that there shall be no impunity for perpetrators of torture and cruel, inhuman or degrading treatment or punishment. This means that there should be criminal responsibility imposed on the perpetrators of torture.
- The establishment of a new regime does not eliminate the responsibility of the State to prosecute acts of torture.

Discussion

Some human rights are non-derogable, while others can be derogated from in certain circumstances, for example during a state of public emergency or war. Whether a human right is derogable depends on the relevant provisions of international human rights instruments and whether the right is a peremptory norm.

According to all relevant international instruments, the prohibition on torture cannot be derogated from under any circumstance, including during a state of emergency.¹⁶² The HRC

¹⁶² See for example Cat, Art 2(2); Declaration against Torture, Art 3; ICCPR, Art 4(2); Principles of Medical Ethics and Torture, Principle 6; Principles for Persons under Detention, Principle 6; Code of Conduct for Law Enforcement Officers, Art 5; and Basic Principles on the Use of Force and Firearms, General Provision 8;

and the Committee against Torture have also reminded State parties that the prohibition on torture is absolute and cannot be derogated from in any circumstances.¹⁶³

The prohibition on torture is a peremptory norm (*jus cogens*).¹⁶⁴ The Vienna Convention¹⁶⁵ explains the effect of a peremptory norm (or *jus cogens*). Article 53 states that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Therefore, the prohibition on torture cannot be derogated from and any treaty purporting to limit the prohibition will be void.

Terrorism and other heinous crimes

The Special Rapporteur on Torture has noted that legal arguments of necessity and self-defence have been put forward as justification for exempting from criminal liability officials who commit or instigate acts of torture against suspected terrorists.¹⁶⁶ The Special Rapporteur reiterated that the absolute prohibition on torture means that no exceptional circumstances whatsoever may be invoked as justification for torture. Torture is not justified in a state of war or threat of war, a time of internal political instability or any other public emergency.¹⁶⁷ Nor

¹⁶³ See for example Concluding Observations of the HRC: Estonia 15/04/2003 CCPR/CO/77/EST at [8]; Concluding Observations of the HRC: United Kingdom 6/12/2001 CCPR/CO/73/UK at [6].

¹⁶⁴ See for example *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex parte Pinochet (No 3)* [2000] 1 AC 147 (HL) at 198 and *Attorney-General v Zaoui* [2005] NZSC 38 at [51].

¹⁶⁵ Adopted on 22 May 1969 and opened for signature on 23 May 1969, entry into force on 27 January 1980.

¹⁶⁶ Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, fifty-ninth session, A/59/324, 1 September 2004. Arguments justifying the use of torture warrants in the context of terrorism have been put forward by Alan M Dershowitz in *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002). See also Mirko Bagaric & Julie Clarke, "Not Enough Official Torture in the World? The Circumstance in Which Torture is Morally Justifiable" (2005) 39 University of San Francisco Law Review 581. Compare Waldron, *Torture and Positive Law: Jurisprudence for the White House* (2005) 105 Columbia Law Review 1681 at 1686.

¹⁶⁷ For example, in *Public Committee Against Torture v Israel* H CJ 5100/94 6 September 1999 the Israeli Supreme Court held that torture was not justified when they were faced with what they conceived as a pressing national emergency.

is torture excusable if it is authorised by domestic law or a head of State, or if lawyers or experts have advised that actions involving torture are permissible.

The ECHR has considered several cases involving torture committed in the context of countering terrorism. In *Aksoy v Turkey*¹⁶⁸ the ECHR stated that '[e]ven in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.'¹⁶⁹

In *Chahal v United Kingdom*¹⁷⁰ the ECHR acknowledged the difficulties faced by States in protecting communities from acts of terror. However, it also confirmed that the European Convention absolutely prohibits torture and other forms of ill-treatment irrespective of the victim's conduct. Accordingly, the Court held that national interests could not override the individual's interests where substantial grounds have been established for believing that the individual would be subject to ill-treatment if expelled.¹⁷¹

Amnesties

It is a principle of international law that there shall be no impunity for perpetrators of torture and cruel, inhuman or degrading treatment or punishment. This means that there should be criminal responsibility imposed on the perpetrators of torture.¹⁷²

Amnesties are legal measures granting exemptions from criminal responsibility for acts committed in the past. Amnesty is often used in the context of national reconciliation or the consolidation of democracy and peace. The establishment of a new regime does not eliminate the responsibility of states to prosecute acts of torture.

¹⁶⁸ *Aksoy v Turkey*, judgment of the ECHR, 18 December 1996.

¹⁶⁹ *Aksoy v Turkey*, judgment of the ECHR, 18 December 1996 at [62].

¹⁷⁰ *Chahal v United Kingdom*, judgment of the ECHR, 15 November 1996.

¹⁷¹ *Chahal v United Kingdom*, judgment of the ECHR, 15 November 1996 at [78]. See also *Ahmed v Austria*, judgment of the ECHR, 17 December 1996 at [40] – [41].

¹⁷² See the discussion in *OR, MM and MS v Argentina*, communications nos, 1-3/1988. Decisions of 23 November 1989.

In the case of *Carmelo Soria Espinoza v Chile*,¹⁷³ the IACHR said that the amnesty law issued during Pinochet's rule in Chile, and its continued application by the democratic governments that followed, was incompatible with the provisions of the American Convention on Human Rights.¹⁷⁴

The HRC reached a similar conclusion in relation to an amnesty established by an incoming democratic regime. In *Rodriguez v Uruguay*¹⁷⁵ the applicant had been tortured by the secret police during a period of military dictatorship. The new democratic government argued that it was not under an obligation to investigate violations of the ICCPR by a prior regime. The democratic government also established an amnesty for military and police personnel alleged to have been engaged in violations of human rights during the previous regime, in an attempt to contribute to the reconciliation, pacification and strengthening of democratic institutions.

The HRC found that the new democratic government had a responsibility to investigate allegations of activities that involved violations of ICCPR rights, especially when these involve allegations of crimes as serious as torture. This was the case regardless of whether the alleged acts occurred under a prior regime.¹⁷⁶

The Committee against Torture has suggested that a failure to prosecute torture due to amnesty laws may violate customary international law because customary international law not only prohibits torture but also impunity in cases of crimes against humanity.¹⁷⁷

¹⁷³ *Carmelo Soria Espinoza v Chile*, IACHR Case 11.725, Report No. 133/99, 19 November 1999.

¹⁷⁴ *Carmelo Soria Espinoza v Chile*, IACHR Case 11.725, Report No. 133/99, 19 November 1999 at [58].

¹⁷⁵ *Rodriguez v Uruguay*, Communication No. 322/1988: Uruguay. 09/08/94. CCPR/C/51/D/322/1988.

¹⁷⁶ *Rodriguez v Uruguay*, Communication No. 322/1988: Uruguay. 09/08/94. CCPR/C/51/D/322/1988 at [12.3].

¹⁷⁷ See, for example, Summary record of the first part of the 399th meeting of the Committee against Torture: Peru. 17/11/99. CAT/C/SR.399 at [23]; Summary record of the first part of the 401st meeting Committee against Torture: Azerbaijan. 18/11/99. CAT/C/SR.401 at [45].

(iv) the nature and scope of procedural guarantees and other safeguards stipulated by international human rights law aimed at preventing acts of torture and other forms of ill-treatment.

Summary

- There are various treaty-based requirements and evolving standards which establish procedural guarantees and other safeguards that may help prevent acts of torture and other forms of ill-treatment. These include safeguards with respect to persons who are detained and/or interrogated and monitoring and training requirements.

Detention

- With regard to detention, articles 7, 9 and 10 of the ICCPR are relevant, as well as other standards, including the Standard Minimum Rules and Body of Principles.
- These suggest the following particular procedural safeguards should be followed when an individual has been detained:
 - relatives or a third person of the detainee's choice and consular authorities of the State of origin of a detained foreigner shall be informed in a timely manner of his or her arrest or detention and the place of detention;
 - secret places of detention should be abolished under law;
 - all detainees should be given the ability to challenge the lawfulness of their detention forthwith;
 - every person at the beginning of detention must be given the right to undergo a medical examination;
 - a person shall be given the opportunity to have access to a lawyer of their choice immediately upon being detained; and
 - a person who is detained must be informed of their rights in respect of each of these issues in a language they understand.

- The minimum interrogation standards developed by the ACJ and set out above should be adhered to when an individual is being questioned (whether in detention or not).
- Article 11 of CAT also requires states to conduct systematic reviews of the rules and practices relating to the interrogation and treatment of detainees with a view to preventing any cases of torture.

Monitoring requirements

- Regular and unannounced visits by independent monitoring bodies (including NHRIs) to places of detention play an important proactive role in preventing torture.
- Any monitoring bodies must have all the powers required to conduct professional monitoring, including access to all relevant information, the right to conduct interviews in private and unrestricted access to premises.
- Monitoring must cover all places where persons are deprived of liberty, including police stations, prisons, administrative detention facilities, military detention centres, juvenile detention centres and social care institutions such as psychiatric hospitals. The monitoring team should be multi-disciplinary and include lawyers and medical personnel.
- Particular issues to be considered when monitoring places of detention include treatment, protection measures, material conditions, regimes and activities, medical services, prison staff and detention by police.
- OPCAT will establish a system of regular visits to places of detention carried out by complementary international and national independent expert bodies.
- At the national level, state parties will establish national preventive bodies. These could include NHRIs. At the international level the relevant body is a sub-committee of the Committee against Torture which is also mandated to advise the relevant national bodies.

Training

- Articles 10(1) and 16(1) of the CAT require states to provide education and information regarding the prohibition against torture and cruel, inhuman or degrading treatment or

punishment to law enforcement personnel, civil or military, medical personnel, public officials and any other persons involved in the custody, interrogation or treatment of persons who are detained.

- The state's involvement in the training of all relevant personnel plays an important role in the fulfilment of a state's obligation to prevent torture and cruel, inhuman or degrading treatment or punishment.
- In particular, medical personnel who examine those who complain about torture and cruel, inhuman or degrading treatment or punishment should be adequately trained to carry out their functions. The template for the examination of such persons, developed by the Fiji Human Rights Commission (in conjunction with Physicians Against Torture), may provide a useful template for training (see Appendix 2).

Trade in equipment

- States can take positive steps to reduce the risk of torture by restricting the trade in equipment and products that can be used for torture.

Discussion

The UN has developed a comprehensive catalogue of principles, codes of conduct and standard minimum rules aimed at preventing torture in particular contexts. State-sanctioned torture usually takes place when a person is detained in a prison or medical institution, during interrogation, or as a form of discipline or punishment. The UN has developed a range of instruments that are intended to prevent acts of torture and other forms of ill-treatment in these specific situations and also to protect particular groups, including women and children.

The most relevant of these are:

- Principles of Medical Ethics and Torture;
- Principles for Persons under Detention;
- Standard Minimum Rules;
- Rules for the Protection of Juveniles Deprived of their Liberty;

- Code of Conduct for Law Enforcement Officers; and
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹

In addition to the international instruments, regional instruments developed to safeguard against torture are also relevant, including:

- the European Prison Rules¹⁷⁸ which supplement the UN documents relevant to detention;
- the Robben Island Guidelines¹⁷⁹ which are designed to assist African States meet their national, regional and international obligations for the effective enforcement and implementation of the universally recognised prohibition and prevention of torture; and
- the regime developed by the European Union aimed at regulating and restricting trade in equipment that can only, or may be able to, be used for torture.

NHRIs play an important reactive role when considering general or specific complaints. NHRIs can also play an important proactive role in preventing torture.¹⁸⁰

Interrogation

The minimum interrogation standards developed by the ACJ and set out above should be adhered to when an individual is being questioned (whether in detention or not).

Article 11 of CAT requires states to conduct systematic reviews of the rules and practices relating to the interrogation and treatment of detainees with a view to preventing any cases of torture.

¹⁷⁸ Council of Europe, Recommendation No. R(87) 3, *European Prisoner Rules*, Adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies.

¹⁷⁹ African Commission on Human and Peoples' Rights, *Resolution on guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*, Adopted by the African Commission at its 32nd ordinary meeting, February 2002.

Detention

The Special Rapporteur on Torture has highlighted particular procedural safeguards that should be followed when an individual has been detained. These safeguards are based on the relevant human rights instruments. These safeguards include:

- relatives or a third person of the arrested person's choice shall be notified at the time of arrest, detention, imprisonment or transfer;
- in all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours;
- consular authorities of the State of origin of a detained foreigner shall be informed without delay of his or her arrest or detention;¹⁸¹
- secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention;
- all detainees should be given the ability to challenge the lawfulness of their detention, for example through habeas corpus. Such procedures should function expeditiously;¹⁸²
- every person under arrest should undergo a medical examination as soon as possible; and¹⁸³
- a person shall be given access to a lawyer not later than 24 hours after being detained.¹⁸⁴

¹⁸⁰ See the comments of the APT, '*Latin America: The Ombudsman: The National Safeguard for the Prevention of Torture and Ill-treatment*', 1998, p. 2 available at: <http://www.apr.ch/pub/library/ppomb.htm>

¹⁸¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, '*Civil and Political Rights, including the questions of torture and detention*', Commission on Human Rights, Sixtieth session, E/CN.4/2004/56, 23 December 2003 at [31]. See also Article 36(1) of the Vienna Convention on Consular Relations; and Principle 16(2) of the Principles for Persons under Detention.

¹⁸² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, '*Civil and Political Rights, including the questions of torture and detention*', Commission on Human Rights, Sixtieth session, E/CN.4/2004/56, 23 December 2003 at [37] – [39]. See also Principle 11 of the Principles for Persons under Detention; and Article 9(4) of the ICCPR.

¹⁸³ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, '*Question of the human rights of all persons subjected to any form of detention or imprisonment*', Commission on Human Rights, forty-fourth session, E/CN.4/1988/17, 12 January 1988 at [81].

¹⁸⁴ Report by the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, '*Question of the human rights of all persons subjected to any form of detention or imprisonment*', Commission on Human Rights, forty-fifth session, E/CN.4/1985/15, 23 January 1989 at [241].

We note that the obligations relating to access to a lawyer and the contacting of relatives are to be performed immediately on detention. The references to time limits by the Special Rapporteur should not be taken as modifying those obligations. The time limits referred to by the Special Rapporteur should be seen as outside limits for compliance where there are insurmountable difficulties in the immediacy requirement.

Classification of detainees

Rule 12 of the European Prison Rules expressly identifies the purposes of classification or reclassification of prisoners as:

- a. To separate from others those prisoners who, by reasons of their criminal records or their personality, are likely to benefit from that or who may exercise a bad influence; and
- b. To assist in allocating prisoners to facilitate their treatment and social resettlement taking into account the management and security requirements.

There are specific safeguards for the protection of women and children in detention. Young persons must be detained in a separate institution from adults or in a separate part of an institution which is also holding adults.¹⁸⁵ Similarly, women must be detained in separate institutions from men or, if that is not possible, the premises allocated to women must be entirely separate from the male premises.¹⁸⁶ Further, female premises must be under the authority of a responsible woman officer and male staff members must be accompanied by a female officer when entering the female premises.¹⁸⁷ Classification should also be made on the basis of whether a prisoner has been convicted or not. Untried prisoners should be kept separate from convicted prisoners.¹⁸⁸

¹⁸⁵ See Rule 26.3 of the Beijing Rules and Rule 8(d) of the Standard Minimum Rules.

¹⁸⁶ Standard Minimum Rules, Rule 8(a).

¹⁸⁷ Standard Minimum Rules, Rule 53.

¹⁸⁸ Standard Minimum Rules, Rules 8(b) and 85(1). See European Prison Rules, Rule 11(3).

Monitoring requirements

Independent monitoring systems consolidate the legal and procedural measures guarding against torture and other ill-treatment. NHRIs can, by monitoring detention facilities, play an important proactive role in preventing torture.

The Association for the Prevention of Torture is an independent NGO based in Geneva. The APT has set out basic guidelines for the way in which NHRIs should conduct monitoring missions of places of detention.¹⁸⁹ Broadly the APT recommends that:

- In order for an NHRI to conduct effective monitoring work, they ought to have unrestricted access to all places where people are deprived of their liberty, including police stations, prisons, administrative detention facilities, military detention centres, juvenile detention centres and social care institutions.
- They should have the full complement of powers required to conduct professional monitoring, namely access to all persons, the right to conduct interviews in private with persons of their choice, as well as access to all relevant information.
- Visits should be conducted by pluralist and multi-disciplinary teams including, if possible, doctors and lawyers.
- Visits to places of detention should be as regular as possible and the monitoring team should be adequately trained.

The ATP recommends that NHRIs should consider the following issues when monitoring a place of detention:¹⁹⁰

- Treatment: torture and ill-treatment, isolation, means of restraint and use of force;

¹⁸⁹ APT Position Paper, *the Role of National Human Rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment or punishment*, February 2005. This is set out in full as Appendix 1.

¹⁹⁰ APT *Monitoring places of detention: a practical guide for NGOs* (Geneva, April 2004).

- Protection measures: detention registers, informing the detainees, inspection, complaints procedures, disciplinary procedures and separation of categories of detainees;
- Material conditions: food, lighting and ventilation, personal hygiene, sanitary facilities, clothing and bedding, overcrowding and accommodation;
- Regimes and activities: contact with family, friends and the outside world, education, outdoor exercise, leisure activities, religion and work;
- Medical services: access to medical care, medical staff, specific health care for mentally ill detainees and specific health care for women and babies;
- Prison staff: generalities and training of personnel;
- Detention by police: fundamental safeguards, registers, interrogation, information and material conditions.

OPCAT was developed pro-actively to prevent torture and other forms of ill-treatment. It sets out criteria and safeguards for the establishment of a mandatory system of regular and follow up visits to places of detention. The visits are carried out by complementary independent international and national bodies.¹⁹¹ At the national level, state parties will establish national preventive bodies, which could include NHRIs. At the international level the relevant body is a sub-committee of the Committee against Torture which is also mandated to advise the relevant national bodies. These bodies work together to conduct regular visits to places of detention and make recommendations to the authorities for improvement in the treatment of persons deprived of their liberty and the conditions of detention.

CAT provisions on training

CAT requires states to provide education and information regarding the prohibition against torture to officials and persons who deal with detainees. CAT also requires states to conduct systematic reviews of the rules and practices relating to the interrogation and treatment of detainees. The relevant provisions read as follows:

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 16(1) of CAT extends the scope of these provisions to encompass cruel, inhuman or degrading treatment or punishment.

Training issues

The state's involvement in the training of all relevant personnel plays an important role in the fulfilment of a state's obligation to prevent torture and cruel, inhuman or degrading treatment or punishment. The HRC and the Special Rapporteur on Torture have highlighted training as an important safeguard against torture and ill-treatment.¹⁹² Training is required to inform the relevant sectors of the existence, meaning and application of relevant human rights standards.

¹⁹¹ OPCAT, Article 1. See also APT, 'The Optional Protocol to the United Nations Convention Against Torture' a practical tool for preventing torture! This is set out in full as Appendix 3.

¹⁹² See for example Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Question of the human rights of all persons subjected to any form of detention or imprisonment', Commission on Human Rights, Forty-ninth sessions, E/CN.4/1993/26, 15 December 1992 at [586]. See also rules 52 and 55 of the European Prison Rules.

The APT reported in 1998 that the Geneva police force had been trained in order to reduce the risk of people in custody being ill-treated. The following measures were adopted:¹⁹³

- making the personnel aware that the use of excessive, unnecessary and sometimes illegal force was an issue of concern;
- creating a University Institute of Legal Medicine to confirm traumatic lesions acquired in the course of police investigations;
- questioning a detainee at the time of leaving the police station to establish whether he or she has been ill-treated by a police officer;
- conducting surprise visits to police stations;
- imposing a mandatory section in police reports to indicate whether violence was used and, if so, under what circumstances and with what effect;
- designating an investigator outside the police force in case of allegations of ill-treatment;
- directives of the Chief of Police on detentions on police premises, searches, meals, right to see a doctor, information to family or third parties, interrogation;
- obligation to inform the accused of his/her rights, text available in multiple languages;
- adoption, in collaboration with the police trade unions, of a code of conduct; and
- training of police officers in human rights, particularly inter-ethnic relations.

Training of medical personnel

Medical personnel who examine those who complain about torture and cruel, inhuman or degrading treatment or punishment should (in particular) be adequately trained to carry out their functions. The template for the examination of such persons, developed by the Fiji Human Rights Commission (in conjunction with Physicians Against Torture), may provide a useful guide for training (see Appendix 2).

Trade in equipment

¹⁹³ 'Geneva works with its police force to safeguard against ill-treatment' APT Journal No. 6 of December 97 – May 98 at 11.

In 1998, the European Union developed a Code of Conduct on Arms Exports. One of the criteria to be considered when exporting arms to a country is “respect for human rights in the country of final destination”, particularly if there is a clear risk that the proposed export might be used for, amongst other things, torture and other cruel, inhuman or degrading treatment.

The European Commission has presented a proposal for a Council Regulation concerning trade in equipment and products which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment. If adopted, the Regulation would establish a ban on all equipment and products which have no, or virtually no, practical use other than for the purposes of capital punishment, torture and ill-treatment. It would also restrict the export of products that could be used for such purposes.¹⁹⁴

States can take positive steps to reduce the risk that the equipment and products they manufacture and produce are used to torture or inflict other ill-treatment, including:

- not to export equipment and products that can *only* be used for torture or other ill-treatment as defined in relevant international treaties;
- not to export or grant licences for dual-purpose equipment if there exists a clear risk of repression in the receiving country;
- to require an end-user certificate, including an indication of the end-use of the goods;
- to set up a system of transfer verification and monitoring to ensure that goods are delivered to their intended recipients;
- to conduct post-export systematic physical inspections at points of transfer and of stockpiles;
- to be particularly vigilant when exporting dual-purpose items as well as spare parts and products suitable for use in cyber warfare or non-lethal human rights abuses; and

¹⁹⁴ The proposed Council Regulation is dated 30 December 2002. The Regulation is being examined by the Trade Questions Working Party and, to date, has not been formally agreed to.

- to apply all these standards to the companies incorporated in each State wherever they operate and to whomever they export.¹⁹⁵

¹⁹⁵ See for example *European Parliament Resolution on the Council's Fifth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (2004/2103(INI))* and *European Parliament Resolution on the Council's Fifth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (2004/2103(INI))*, (P6_TA(2004)0058), 17 November 2004 at [J17] – [21], [29], [30]; and Amnesty International, *Undermining Global Security: the European Union's arms exports*, ACT 30/003/2004 at 73.

- (v) **the safeguards stipulated by international human rights law and standards to ensure that any statement which is established to have been made as a result of torture and other forms of ill-treatment shall not be invoked as evidence in any proceedings.**
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Summary

- It is implicit from the absolute prohibition against torture under international law that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. Depending on the circumstances, this principle is likely also to apply to statements made as a result of cruel, inhuman or degrading treatment or punishment.
- Article 15 of CAT stipulates that any statement that 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 14(3)(g) of the ICCPR provides that no person shall be compelled to testify against him or herself or to confess guilt.
- Jurisprudence of both the HRC (for example in the case of *Singarasa v Sri Lanka*) and Committee against Torture (for example *P.E. v France*), states that, where torture is alleged, the onus is on the prosecution to prove that the confession was made without duress.

Discussion

It is implicit from the absolute prohibition against torture under customary international law that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. (See also Article 15 of CAT). Depending on the circumstances, this principle is likely also to apply to statements made as a result of cruel, inhuman or degrading treatment or punishment.

Article 15 of CAT stipulates that any statement that 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 15 of CAT states as follows:

Each State Party shall ensure that a 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 Committee against Torture has stated that for the purposes of Article 15, “torture” refers to torture carried out not only by state officials, but also by any individual or group.¹⁹⁶ This statement of the Committee against Torture is supported by the case of *A & Ors v Secretary of State for the Home Department*.¹⁹⁷ In that case the House of Lords, in a unanimous decision which overturned an earlier judgment of the English Court of Appeal,¹⁹⁸ found that evidence obtained through torture in third countries is inadmissible in any proceedings before courts in the United Kingdom. Lord Bingham described the admissibility in proceedings of such evidence as:

unreliable, unfair, offensive to ordinary standards of justice and decency and incompatible with the principles that should animate a tribunal seeking to administer justice.¹⁹⁹

There was, however, divided opinion in this case on issues related to the burden and standard of proof. The dissenting minority said that evidence is inadmissible if the court concludes that there is a real risk that the evidence has been obtained by torture.²⁰⁰ The majority held that evidence must be excluded only if it is established on the balance of probabilities that the particular piece of evidence was obtained by the use of torture. If the Court is not so satisfied,

¹⁹⁶ *Concluding Observations*, United Kingdom, CAT/C/CR/33/3, 25 November 2004 at [4(a)].

¹⁹⁷ [2005] UKHL 71

¹⁹⁸ *A & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 1123

¹⁹⁹ *A & Ors v Secretary of State for the Home Department* [2005] UKHL 71, para 52.

²⁰⁰ *A & Ors v Secretary of State for the Home Department* [2005] UKHL 71, para 58, per Lord Bingham. Lord Bingham’s test was endorsed by Lord Nicholls of Birkenhead at [80]; and Lord Hoffman at [98].

then the evidence is admissible. If the Court is left in doubt as to whether such evidence had been obtained through torture, however, the court should take account of this when evaluating the evidence.²⁰¹

We do not consider that the test proposed by the majority is in accordance with international law. In *Singarasa v Sri Lanka*, referring to Article 14(3)(g)²⁰², the HRC considered that “it is implicit in this principle that *the prosecution* prove that the confession was made without duress.”²⁰³ The HRC held that by placing the burden on Mr Singarasa to prove that his confession was made under duress, the State party violated Article 14(2) and (3)(g), Article 2(3) (right to an effective remedy) and Article 7 (prohibition on torture).

²⁰¹ *A & Ors v Secretary of State for the Home Department* [2005] UKHL 71, para 118, per Lord Hope. Lord Hope’s test was adopted by Lord Carswell at [158]; Lord Brown of Eaton-Under-Heywood at [172]; and Lord Rodger of Earlsferry at [145].

²⁰² Article 14(3)(g) of the ICCPR complements Article 15 of CAT and states as follows:

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.

²⁰³ *Singarasa v Sri Lanka*, Communication No. 1033/2001: Sri Lanka. 23/08/2004. CCPR/C/81/D/1033/2001 at [7.4] (emphasis in original).

(vi) the remedial measures that should be made available to victims of torture and other forms of ill-treatment, including complaints systems, compensation mechanisms and medical rehabilitation.

Summary

- Under international law there exists a general right to reparation for breach of an international wrong. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed (see the decision of the Permanent Court of Arbitration in the *Chorzow Factory Case*.²⁰⁴)
- Article 2(3) of the ICCPR requires states to ensure that persons whose rights have been violated have an effective remedy.
- Article 12 of CAT provides that states must ensure that the relevant authorities conduct a prompt and impartial investigation whenever there are reasonable grounds to believe an act of torture has been committed in its jurisdiction (see also Principle 11 of the Istanbul Principles).
- Article 13 of CAT provides that any individual who alleges torture must have the right to complain and have his or her case promptly and impartially examined by the relevant authorities. Steps must be taken to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of the complaint or any evidence given.
- Article 14 of the CAT requires states to ensure that effective remedies are available to victims of torture.
- The UN Commission on Human Rights recently adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. According to Principle 11, remedies for violations of international human rights law include: the victim's right to equal and

²⁰⁴ *Chorzow Factory Case (Germany v Poland) (Merits)* PCIJ, Ser.A, no.17.

effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparations mechanisms.

- Under section IX of the Basic Principles the four general types of reparation are identified as restitution (restoring the victim to the position before the violation occurred); compensation (monetary payment for economically assessable damage resulting from violations); rehabilitation (including, as necessary, medical and psychological care and relevant social services); and satisfaction and guarantees of non-repetition (including public acknowledgement of the violation and criminal and/or administrative sanctions against those responsible for the violations).
- One of the important international remedial measures is the individual complaint mechanisms of international bodies, including under Article 22 of CAT and the First Optional Protocol of the ICCPR.
- Whether or not states have ratified relevant treaties, individuals may at any time (whether the relevant state has consented or not and whether or not domestic remedies have been exhausted) seek the assistance of the (UN) Special Rapporteur on Torture who can advocate redress from the relevant states on behalf of the aggrieved person.

Discussion

Right to an effective remedy

A general right to reparation exists under international law. According to this general principle, reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.²⁰⁵

²⁰⁵ See Permanent Court of Arbitration, *Chorzow Factory Case (Germany. v. Poland.)*, (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States*), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (*United Kingdom v Albania*); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State." (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (ILC draft Articles on State Responsibility)).

The basic measure of compensation is, where possible, reparation in the form of restitution:

The essential principle contained in the actual notion of an illegal act...is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.²⁰⁶

CAT requires each state party to ensure that victims of torture have the right to a proper investigation, protection from the consequences of a complaint and to compensation. Articles 12 - 14 provide that:

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. 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.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this Article shall affect any right of the victim or other persons to compensation which may exist under national law.

²⁰⁶ *Chorzow Factory Case (Germany. v. Poland.)*, (1928) P.C.I.J., Sr. A, No.17, at 47.

In addition, Article 2(3) of the ICCPR requires states to ensure that any person whose rights under the ICCPR are violated has an effective remedy:

3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Even though this clause is not mentioned in the list of non-derogable provisions in article (2), the HRC considers that the right to a remedy constitutes a treaty obligation inherent in the covenant as a whole. Accordingly, the state may adjust its procedures governing remedies during a state of emergency, but it must still comply with the fundamental obligation to provide an effective remedy.²⁰⁷

Further, the Principles for Persons under Detention require an inquiry by a judicial or other authority into the cause of a person's death or disappearance when such occurs during his detention or imprisonment. Principle 34 provides that, when circumstances so warrant, such an inquiry shall also be held whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. Principle 35(1) provides that damage incurred because of acts or omissions of a public official contrary to the rights contained in the Principles shall be compensated according to the applicable rules or liability provided by domestic law.

²⁰⁷ General Comment No. 29: Article 4: Derogations during a state of emergency, HRI/GEN/1/Rev.7, seventy-second session, 2001 at [14].

In addition to these specific provisions, there is a general right to reparation under international law when a convention is breached, regardless of whether this is stated in the international instrument itself.²⁰⁸

Categories of remedy

The UN Commission on Human Rights recently adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.²⁰⁹ The Commission recommended that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of the relevant authorities, victims, human rights defenders, lawyers, the media and the general public. According to Principle 11, remedies for violations of international human rights law include the victim's right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

The four general types of reparation identified by Section IX of the Basic Principles and Guidelines are:

- *Restitution*: Restoring the victim, to the extent possible, to the original situation before the violations of human rights occurred. Restitution includes, where appropriate, restoration of liberty, legal rights, social status, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- *Compensation*: Monetary payment for any economically assessable damage resulting from violations of human rights. This might include physical or mental harm; lost opportunities; material damages and loss of earnings; harm to reputation or dignity; and legal and medical costs.

²⁰⁸ *Chorzow Factory Case (Germany. v. Poland.)*, (1928) P.C.I.J., Sr. A, No.17, at 29.

²⁰⁹ Commission on Human Rights Resolution 2005/35 E/CN.4/Res/2005/35.

- *Rehabilitation*: This should include, as appropriate, medical and psychological care and other services such as legal and social services; and
- *Satisfaction and Guarantees of Non-Repetition*: The range of other measures which may contribute to the broader and longer-term restorative aims of reparations. This may include cessation of continuing violations, public disclosure of the truth, public acknowledgement of the violation, and judicial and administrative sanctions against persons responsible for the violations.

These categories go beyond mere disciplinary and administrative remedies, which the HRC considers cannot constitute adequate and effective remedies for serious violations of human rights.²¹⁰ They also extend beyond solely remedying the particular damage suffered by the individual, as the final category of remedy (satisfaction and guarantees of non-repetition) involves broad measures aimed at preventing future violations of the particular rights at issue.

The Special Rapporteur has also identified remedies that states are under an obligation to provide, setting out the following general principles:²¹¹

1. Under international law, the violation of any human right gives rise to a right of reparation for the victim....
2. Every State has a duty to make reparation in the case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims...
3. Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.

²¹⁰ See for example, *Andreu v Colombia*, Communication No. 563/1993: Colombia. 13/11/95. CCPR/C/55/D/563/1993 at [8.2].

²¹¹ Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms', Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, E/CN.4/Sub.2/1993/8, 2 July 1993 at 56.

4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition...

Torture can have a multiplicity of effects on the victim as well as those people close to them, particularly their family. In recognition of this, courts will often award compensation that goes beyond mere financial compensation. For example, in the case of *Gary Hermosilla et. Al.*,²¹² the Inter-American Court of Human Rights awarded to the families of Chilean victims of the dictatorship the following compensation: a pension not less than the average for Chilean families; expedited procedures to declare a presumption of the victim's death; special attention from the State with regard to health, education and housing, assistance with debts, and exemption from obligatory military service for sons of victims.²¹³

Complaint mechanisms

One of the important international remedial measures is the individual complaint mechanisms of international bodies, including under article 22 of CAT and the First Optional Protocol of the ICCPR.

We also note that, whether or not states have ratified relevant treaties, individuals may at any time (whether the relevant state has consented or not and whether or not domestic remedies have been exhausted) seek the assistance of the (UN) Special Rapporteur on Torture who can advocate redress from the relevant states on behalf of the aggrieved person.

Duty to investigate

The duty to investigate is one of the essential remedies available to victims of torture. CAT requires state parties to ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case

²¹² Gary Hermosilla et. Al., case no. 10.843, *Inter-American Court of Human Rights* 1988.

²¹³ Gary Hermosilla et. Al., case no. 10.843, *Inter-American Court of Human Rights* 1988, at 171, ¶57.

promptly and impartially examined by, its competent authorities. Proper protection measures must also be taken to ensure the safety of the alleged victim and witnesses.²¹⁴

CAT further requires state parties to ensure that its authorities conduct a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed under its jurisdiction.²¹⁵ A specific allegation by the individual concerned, or indeed by any individual, is therefore not necessary. Rather, states are under an obligation to investigate torture and other ill-treatment regardless of the origin of the suspicion.²¹⁶ In *Aksoy v Turkey*, for example, the ECHR stated that the state must provide a plausible explanation for an injury when an individual is taken into police custody in good health but is injured at the time of release.²¹⁷ Such an explanation could only follow a full and effective investigation into the circumstances in which the detainee received their injuries.

An investigation into torture and other ill-treatment must be prompt and impartial. A prompt investigation is essential both to ensure that the victim cannot continue to be subjected to such acts and also to document the physical traces of torture and other ill-treatment before they disappear.²¹⁸ Neither international instruments nor case law set out the exact time at which an investigation should be commenced. However, in *Halimi-Nedzibi v Austria* the Committee against Torture stated that a delay of 15 months before initiating an investigation of allegations of torture was unreasonably long and in violation of Article 12.²¹⁹

The Istanbul Principles recommend particular procedures in order to ensure impartiality in the investigation of torture, including the following:

2...The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry

²¹⁴ CAT, Article 13.

²¹⁵ CAT, Article 12. See also Istanbul Principles, Principle 2.

²¹⁶ For example, see *Abad v Spain*, Communication No. 59/1996: Spain. 14/05/98. CAT/C/20/D/59/1996 at [8.2].

²¹⁷ *Aksoy v Turkey*, judgment of ECHR, 18 December 1996 at [61].

²¹⁸ *Abad v Spain*, Communication No. 59/1996: Spain. 14/05/98. CAT/C/20/D/59/1996 at [8.2].

²¹⁹ *Halimi-Nedzibi v Austria*, Communication No. 8/1991: Austria. 30/11/93. CAT/C/11/D/8/1991 at [13.5].

out such investigations shall meet the highest professional standards and the findings shall be made public.

An investigation into torture or other ill-treatment also must be effective and thorough. Although the steps required will differ from case to case, an investigation should reveal the full facts of the case, including the identification and questioning of the perpetrators and any witnesses, the exact acts committed and the nature of the injuries suffered.

The Istanbul Principles set out the particular powers that the investigating authority must possess. The following powers assist in providing for an effective investigation:

3. (a) The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.

In *Assenov v Bulgaria*²²⁰ the ECHR concluded that the investigation into allegations that a 14 year old was arrested and beaten up by the police was not effective. The investigator failed to cite any evidence to support his conclusion that the victim's father inflicted the injuries. Further, there was no attempt to interview any of the many witnesses in the immediate aftermath to ascertain the truth. Other assumptions were made during the course of the investigation, none of which were based on evidence.

Extraordinary measures will be required in the case of a deceased victim. In *Ristic v Yugoslavia* the Committee against Torture considered that the investigation should have entailed an exhumation and a new autopsy of the deceased victim, allowing the cause of death to be medically established with a satisfactory degree of certainty.²²¹

²²⁰ *Assenov v Bulgaria*, (1998) EHRR 1998-VIII.

²²¹ *Ristic v Yugoslavia*, Communication No. 113/1998: Yugoslavia. 11/05/2001. CAT/C/26/D/113/1998 at [9.6].

The effectiveness of an investigation will also be influenced by how the authorities treat the conclusions and recommendations of the investigation team. Consequently, the Istanbul Principles require the investigation team to prepare a publicly available report.²²² This report shall include the scope of the inquiry, procedures and methods used to evaluate evidence, as well as conclusions and recommendations. The report shall also set out the evidence and describe the events that were found to have occurred. The state is required to reply to the report and, as appropriate, indicate steps to be taken in response.

²²² Istanbul Principles, Principle 5(b).

(vii) the nature of the protection to be afforded to persons being forcibly returned to a country in which they may face torture or other forms of ill-treatment.

Summary

- International law prohibits forcible return ('non-refoulement') of a person to a country where he or she has a well-founded fear of persecution.
- There are possible exceptions with regard to a person who is a danger to the security of the country where he or she is, or one who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to that country. This is the position according to the Refugee Convention 1951 and its 1967 Protocol.
- The principle of non-refoulement applies in the case of torture and cruel, inhuman or degrading treatment or punishment.
- International law prohibits a State from expelling, returning, extraditing or transferring in any other way a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. This is an absolute prohibition, permitting of no exceptions. In addition to being an obligation under customary law, this is also a requirement under article 3 of CAT and article 7 of the ICCPR.
- The same prohibition applies in the case of extraordinary renditions, referring to the practice of transferring a person, with the involvement of the state or its agents, to another state.
- The relevant state for the purpose of determining where torture may occur is any state to which the individual concerned is being expelled, returned, extradited or transferred, as well as any state to which he or she may be *subsequently* expelled, returned or extradited.
- In order to constitute 'substantial grounds' as above, the risk of torture must be a necessary and foreseeable consequence of deportation, but it need not be highly likely to occur.

- The level of the danger of being subjected to torture is considered at the time when the decision-maker is deciding whether to expel, return, extradite or transfer a person.
- The principle of non-refoulement may also apply where the danger of being subjected to torture emanates from persons who are not public officials. This has been confirmed by judicial decisions (see for example *Prosecutor v Kunarac, Kovac and Vukic*, Appeals Chamber of the ICTY).
- Diplomatic assurances (or the equivalent) which are formal guarantees from a Government of return or transfer that a person will not be subjected to torture upon return or transfer will not be sufficient where the person is at a real risk of torture are also prohibited because of the principle of non-refoulement (see for example the decision of the Committee against Torture in *Agiza v Sweden*).
- A diplomatic assurance may be legitimate where the government of the receiving country provides an unequivocal guarantee that is meaningful and verifiable and a system to monitor the treatment of the persons concerned (see the Interim report of the Special Rapporteur on Torture to the General Assembly 2 July 2002).

Discussion

Relevant international instruments

The Refugee Convention contains a non-refoulement provision which prohibits the forcible return of a person to a country where he or she has a well-founded fear of persecution. There are possible exceptions for persons who are a danger to the security of the country he or she is in or those who are dangers to the community because of a conviction of a serious crime. Article 33 states that:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who,

having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The principle against non-refoulement is considered to be a rule of customary international law.²²³ Article 1F is also relevant, as it provides that the Convention does not apply to a person with respect of whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Individuals falling under Article 1F are therefore not entitled to the protections afforded to refugees under the Refugee Convention.

In addition, article 3 of CAT states as follows:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 13 of the ICCPR states as follows:

²²³ See Guy Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996) p 143 and Sir Elihu Lauterpacht QC and Daniel Bethlehem, “The scope and content of the principle of non-refoulement: Opinion” in Feller, Turk and Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge, 2003) para 216. This volume consists of papers and conclusions that were an outcome of the Global Consultations on International protection, organised by the United Nations High Commissioner for Refugees (UNHCR) in 2000 – 2002 to reinvigorate the international refugee protection regime. They are a result of a series of expert roundtables that were held in 2001 as part of the Global Consultations. It has been held,

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The ECHR has explained the interrelationship between CAT and the Refugee Convention:

80. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion...In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees...

Whether a state can return an individual is subject, therefore, to dual systems established under CAT and the Refugee Convention. Accordingly, it is necessary for states to consider both Conventions when determining whether it is permitted to return a refugee. It may be that the state is able to return a refugee under the Refugee Convention but not under CAT, due to a risk of torture.

Principles for determining whether a person can be returned

General Comment No.1 of the Committee against Torture²²⁴ sets out guidelines for the implementation of Article 3 of CAT by the Committee.²²⁵ It relevantly provides as follows:

however, in a New Zealand case that the principle of non-refoulement is not, *jus cogens*: see *Attorney-General v Zaoui* [2005] NZSC 38 at [51].

²²⁴ *General Comment No. 01: Implementation of Article 3 of the Convention in the context of Article 22 21/11/97. A/53/44, annex IX.*

5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party.
6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.
7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter.
8. The following information, while not exhaustive, would be pertinent:
 - (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?
 - (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of [sic] acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
 - (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
 - (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
 - (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
 - (f) Is there any evidence as to the credibility of the author?
 - (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?

Relevant State for the purposes of determining where torture may occur

The relevant state for the purposes of determining where torture may occur is any state to which the individual concerned is being expelled, returned or extradited, as well as to any state

²²⁵ Although these guidelines are only intended to bind states and individuals involved in proceedings before the Committee, they may also form a basic guide for states when implementing their obligations under Article 3.

to which the author *may subsequently* be expelled, returned or extradited.²²⁶ For example, in *Korban v Sweden* the Committee Against Torture held that the risk of expulsion of an Iraqi citizen to Iraq following his return to Jordan, where he did not have a residence permit, imposed an obligation on Sweden not to return him to Jordan.

Evidence

Before one state extradites a person to another state, it must consider whether substantial grounds exist for believing that there is a real risk that the individual will be subject to torture or other ill-treatment.²²⁷ The Committee against Torture has added that the risk must be foreseeable, real and personal, and beyond mere possibility.²²⁸ The HRC has stated that the risk of torture must be the necessary and foreseeable consequence of deportation.²²⁹ However, the risk need not be highly likely to occur.²³⁰

In *ARJ v Australia*²³¹ an Iranian alleged that if Australia deported him to Iran he could be retried for drug-related offences which may have resulted in a sentence of between 20 and 74 lashes. The state relied on information provided by Iran to show that it had no intention to prosecute the individual. Additionally, no prosecution was initiated in Iran in a number of similar cases. Based on this information, the HRC held that a sentence of lashes was not a necessary and foreseeable consequence of deportation to Iran. Consequently, Australia would not have violated Article 7 by deporting the individual in these circumstances.²³²

²²⁶ *General Comment No. 01: Implementation of Article 3 of the Convention in the context of Article 22* 21/11/97. A/53/44, annex IX at [2].

²²⁷ *Cruz Varas v Sweden* (1991) ECHR (Series A) No. 201 at [75].

²²⁸ *EA v Switzerland*, Communication No. 28/1995: Switzerland. 10 November 1997. CAT/C/19/D/28/1995, at [11.3] and [11.5].

²²⁹ *ARJ v Australia*, Communication No. 692/1996: Australia. 11/08/97. CCPR/C/60/D/692/1996 at [6.14].

²³⁰ *EA v Switzerland*, Communication No. 28/1995: Switzerland. 10 November 1997. CAT/C/19/D/28/1995 at [11.3].

²³¹ *ARJ v Australia*, Communication No. 692/1996: Australia. 11/08/97. CCPR/C/60/D/692/1996.

²³² *ARJ v Australia*, Communication No. 692/1996: Australia. 11/08/97. CCPR/C/60/D/692/1996 at [6.14].

Time at which risk must be evaluated

The level of risk involved is considered at the time at which the decision-maker is deciding whether to extradite an individual. However, a court that is reviewing the judgment of the decision-maker may also take into account information that subsequently comes to light.²³³

Risk of torture by non-state actors

In *HLR v France*²³⁴ a Colombian national faced deportation from France to Colombia for drug-related offences. HLR claimed that if he was returned to Colombia he would be exposed to acts of vengeance from drug traffickers who had recruited him. The ECHR stated that:

Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.²³⁵

In this case, however, there was insufficient evidence to prove that HLR would be at personal risk of ill-treatment if returned to Colombia and HLR had not shown that the Colombian authorities were incapable of affording him appropriate protection.

Diplomatic assurances

Diplomatic assurances are essentially formal guarantees from the government in the country of return that a person will not be subjected to torture upon return. HRW (Human Rights Watch) has pointed out that:²³⁶

²³³ *Ahmed v Austria*, judgment of the ECHR, 17 December 1996 at [43] and *Vilvarajah v United Kingdom*, judgment of the ECHR, 30 October 1991 at [107].

²³⁴ *HLR v France*, judgment of the ECHR, 29 April 1997.

²³⁵ *HLR v France*, judgment of the ECHR, 29 April 1997 at [40].

²³⁶ Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, Vol. 16 No. 4 April 2004 at 4.

The dangers of relying on diplomatic assurances as a safeguard against torture are apparent. Where governments routinely deny that torture is practiced, despite the fact that it is systematic or widespread, official assurances cannot be considered reliable. The secrecy surrounding the practice of torture militates against effective post-return monitoring.

Despite the inherent difficulties involved in relying on diplomatic assurances, the Special Rapporteur on Torture has recognised such processes as a legitimate practice and basis for returning an individual to another country. However, such assurances must meet certain requirements before they are acted upon. States should not extradite anyone:

...unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.²³⁷

HRW in its report elaborates on the arrangements that must be made in order to ensure an effective monitoring system. The system must include rigorous and on-going monitoring created by advance agreement between the two states involved. The returning state must ascertain that the objective conditions exist, and will continue to exist, for protection against mistreatment. HRW also points out that any effective post-return monitoring system requires the good faith and the requisite logistical capacity of both governments to provide a reliable safeguard against the risk of torture.²³⁸

States seeking to return an individual to a country that is providing diplomatic assurances must take care to ensure that the government providing the assurances actually has the ability to

²³⁷ Interim report of the Special Rapporteur on Torture to the General Assembly, A/57/173, 2 July 2002.

²³⁸ Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, Vol. 16 No. 4 April 2004, pp. 7 - 8.

monitor the treatment of the individual in question. As the Committee against Torture noted in a report of 1993²³⁹

Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration.

In a state in which torture occurs against state policy and without the knowledge or acquiescence of the state at a central level, diplomatic assurances can give little comfort that the individual in question will not be tortured.

The issue of the effectiveness of diplomatic assurances was considered by the Committee against Torture in *Agiza v Sweden*.²⁴⁰ The Committee found that the combination of several elements, including the receiving country's consistent and widespread use of torture against detainees, led to the conclusion that the individual in question was at a real risk of torture and that the State party's expulsion of the complainant was in breach of article 3 of the CAT. The majority of the Committee found that procurement of diplomatic assurances, which materially provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.²⁴¹ One committee member dissented on this issue, finding that the State party was entitled to accept the assurances from the Egyptian government as to the complainant's proper treatment.

Extraordinary renditions

The term 'extraordinary rendition' refers to the practice of transferring an individual, with the involvement of the state or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or other cruel, inhuman or

²³⁹ Report of the Committee against Torture: Addendum, 'Activities of the Committee against Torture pursuant to Article 20 of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment', General Assembly, Forty-eighth session, A/48/44/Add.1, 15 November 1993, para 39.

²⁴⁰ Communication No. 233/2003 CAT/C/34/D/233/2003 24 May 2005.

²⁴¹ See also *Chahal v United Kingdom* (15 November 1996) where the European Court of Human Rights found that a guarantee provided by the Indian government that the complainant's human rights would be respected was, on its own, insufficient protection against human rights violations.

degrading treatment or punishment.²⁴² Extraordinary renditions are clearly prohibited by international law.

Various extraordinary renditions have allegedly been carried out in the context of anti-terrorism measures since 11 September 2001. For example, in October 2002, Australian citizen Mamdouh Habib was arrested in Pakistan and, reportedly at the request of the United States authorities, flown to Egypt where, allegedly, he was severely tortured. Habib remained in Egypt for six months, after which he was transferred to Guantánamo Bay in Cuba where he was detained until his release in January 2005.²⁴³

Death penalty

In *Soering v United Kingdom*²⁴⁴ the ECHR held that the threatened deportation of a German national from the United Kingdom to the United States would violate the prohibition on torture and other ill-treatment, as Soering risked facing ill-treatment in the form of the ‘death row phenomenon’.

The HRC has not specifically embraced the notion of a death row phenomenon.²⁴⁵ However, the Committee has on occasion found that extradition of a person who will face the death penalty violates Article 7. For example, in *Chitat v Canada*²⁴⁶ the HRC found that Canada had violated its obligations under the ICCPR by extraditing Mr Chitat to the United States to face the death penalty. This was because the HRC considered that execution by gas asphyxiation constitutes cruel and inhuman treatment.²⁴⁷ The HRC has also held that a State’s

²⁴² Bar Association of New York and the Centre for Human Rights and Global Justice of New York University School of Law, ‘*Torture by Proxy: International and Domestic Law Applicable to ‘Extraordinary Renditions’*’ (New York 2004) at 4.

²⁴³ Joint Press Release, Attorney-General The Hon. Daryl Williams AM QC MP and Minister for Foreign Affairs and Trade The Hon. Alexander Downer MP, Mamdouh Habib in United States Custody (18 April 2002), available at <http://www.ag.gov.au/www/attorneygeneralhome.nsf/0/49DF56AF955E312CCA256B9F007F44FA?OpenDocument> (last visited 18 July 2005); *The Trials of Mamdouh Habib* (SBS, Dateline 7 July 2004) (transcript available at <http://news.sbs.com.au/dateline/index.php?page=archive&daysum=2004-07-07> (last visited 18 July 2005)).

²⁴⁴ *Soering v United Kingdom*, judgment of the ECHR, 7 July 1989.

²⁴⁵ *Kindler v Canada*, Communication No. 470/1991: Canada. 18/11/93. CCPR/C/48/D/470/1991.

²⁴⁶ *Chitat v Canada*, Communication No. 469/1991: Canada. 07/01/94. CCPR/C/49/D/469/1991.

²⁴⁷ *Chitat v Canada*, Communication No. 469/1991: Canada. 07/01/94. CCPR/C/49/D/469/1991 at [16.4].

obligation under Article 6 (right to life) would be violated if the decision to extradite without assurances was taken arbitrarily or summarily.²⁴⁸

Subsequently, the Supreme Court of Canada has held that it is contrary to principles of fundamental justice (as protected by section 7 of the Canadian Charter of Rights and Freedoms) for alleged offenders to be extradited without assurances from the receiving country that the death penalty will not be sought.²⁴⁹

Refoulement - Torture as an inability to provide adequate health services

In *D v United Kingdom*²⁵⁰ a St. Kitts national imprisoned in the United Kingdom was diagnosed with AIDS. D challenged his return to St. Kitts upon release on the basis that the paucity of hospital facilities would hasten his death and he would die in inhuman and degrading conditions. The ECHR held that the abrupt withdrawal of the medical treatment and the adverse conditions that awaited D upon his return would reduce his limited life expectancy and would amount to inhuman treatment. The ECHR stressed that the State had assumed responsibility for D's treatment and he had become reliant on this care.

Similarly, in *C v Australia* the HRC held that deporting C to a country where it was *unlikely* that he would receive the treatment necessary for the illness caused, in whole or in part, by the State's violation his rights (failure to act to remove C from detention) would violate Article 7.²⁵¹

²⁴⁸ *Kindler v Canada*, Communication No. 470/1991: Canada. 18/11/93. CCPR/C/48/D/470/1991 at [14.6].

²⁴⁹ *United States v Burns* [2001] 1 SCR 283.

²⁵⁰ *D v United Kingdom* (1997) 24 EHRR No. 423.

²⁵¹ *C v Australia*, Communication No. 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999 at [8.5].

(viii) international humanitarian law on torture and other forms of ill-treatment in times of domestic and international conflict.

Summary

- International humanitarian law applies in times of armed conflict. It concerns the protection of person in international and non-international armed conflicts.
- The basic international instruments relating to international humanitarian law include:
 - The Hague Conventions with Respect to the Laws and Customs of War on land and related regulations 1899;
 - The Hague Conventions with Respect to the Laws and Customs of War on Land and related regulations 1907;
 - The four Geneva Conventions 1949; and
 - The two Additional Protocols to the four Geneva Conventions 1977.
- These instruments prohibit torture and related practices in international and non-international armed conflicts. The prohibition is part of customary international law and is non-derogable, applying in war and peace.
- Violations give rise to individual criminal responsibility; this falls under the principle of universal jurisdiction which enables states everywhere to prosecute those responsible for crimes anywhere.
- Individual criminal responsibility has been further concretised by the establishment of various international criminal courts. In particular, the Rome Statute 1998 which established the ICC encompasses torture as a component of various international crimes, including genocide, crimes against humanity and war crimes. The ICC's jurisdiction is based on the principle of complementarity which enables it to take action where the national authorities are unable or unwilling to act.
- Under international humanitarian law, the involvement of a state official in the process of torture is not necessary for the offence to constitute torture (see for example *Prosecutor v Kunarac, Kovac and Vukic*, Appeals Chamber of the ICTY).

Discussion

International humanitarian law

International humanitarian law applies in times of armed conflict, whether internal or international.

The basic international instruments relating to international humanitarian law include:

- The Hague Conventions with Respect to the Laws and Customs of War on land and related regulations 1899;
- The Hague Conventions with Respect to the Laws and Customs of War on Land and related regulations 1907;
- The four Geneva Conventions 1949; and
- The two Additional Protocols to the four Geneva Conventions 1977.

These instruments prohibit torture and related practices in international and non-international armed conflicts. The prohibition on torture applies both in times of peace and conflict, as it is a rule of customary law and a peremptory norm. Further, under article 2(2) of CAT, no exception to the prohibition on torture is allowed during a state of war, threat of war, internal political instability or any other public emergency.²⁵²

The Rome Statute

Individual criminal responsibility has been further concretised by the establishment of various international criminal courts. In particular, the Rome Statute 1998,²⁵³ which established the ICC, encompasses torture as a component of various international crimes, including genocide, crimes against humanity and war crimes. The ICC's jurisdiction is based on the principle of

²⁵² See also Article 4(2) of the ICCPR which provides that the prohibition on torture cannot be derogated from in a time of public emergency which threatens the life of the nation.

complementarity which enables it to take action where the national authorities are unable or unwilling to act.

Article 7(1)(f) provides that torture is a “crime against humanity” when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. As discussed under Term of Reference (i), Article 7(2)(e) defines “torture” in this context.

Article 8(1) of the Rome Statute gives the ICC jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. The definition of “war crimes” in Article 8(2) includes:

- Torture or inhuman treatment, including biological experiments, against persons protected under the Geneva Conventions.
- In the case of an armed conflict not of an international character, torture, cruel treatment and degrading treatment against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.

Although the genocide provisions of the Rome Statute do not specifically mention torture, the acts referred to would also constitute torture in many cases. Article 6 provides that “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

²⁵³ Statute of the International Criminal Court. The statute came into force on 1 July 2002.

The articles relating to genocide and crimes against humanity do not require that the acts constituting these crimes take place during armed conflict. For example, acts of mass torture and disappearances carried out under a military dictatorship will amount to crimes against humanity and will contravene the Rome Statute.

The Geneva Conventions

The Geneva Conventions and their Protocols, in contrast to the Rome Statute, only apply during times of conflict, whether internal or international. The foundation of the Geneva Conventions system is the principle that persons not actively engaged in warfare should be treated humanely.²⁵⁴ Like the Rome Statute, the Protocols to the Geneva Conventions prohibit torture. However, unlike under the Rome Statute, the Protocols prohibit torture as an isolated incident. There is no need for the torture to take place on a mass scale or as part of a wider plan to destroy a group of people.

All of the Geneva Conventions contain the same Article 3. The relevant portion states that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

...

Outrages upon personal dignity, in particular, humiliating and degrading treatment;

The First Geneva Convention relevantly also states as follows:

Article 12

Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.

They shall be treated humanely and cared for by the Party to the conflict in whose power they may be...Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

The Second Geneva Convention contains the same Article 12, with the exception that it refers specifically to members of armed forces who are at sea and who are wounded, sick or shipwrecked.

The Third Geneva Convention provides that:

Article 17

...

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

...

Article 87

...

Collective punishment for individual acts, corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

...

The Fourth Geneva Convention states that:

²⁵⁴ Shaw *International Law* (5ed 2003) at 1055.

Article 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

The Geneva Conventions all contain similar “grave breaches” articles. The relevant provisions of the First Geneva Convention read as follows:²⁵⁵

Article 49

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts...

Article 50

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments...

Article 75(2) of Additional Protocol I to the Geneva Conventions states as follows:

1. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
 - (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
 - (i) Murder;
 - (ii) Torture of all kinds, whether physical or mental;

²⁵⁵ See also Articles 50 and 51 of the Second Geneva Convention; Articles 129 and 130 of the Third Geneva Convention; and Articles 146 and 147 of the Fourth Geneva Convention.

- (iii) Corporal punishment; and
- (iv) Mutilation;
- (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.
- ...
- (e) Threats to commit any of the foregoing acts.

Article 4 of Additional Protocol II to the Geneva Conventions states as follows:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
 - (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
 - ...
 - (h) Threats to commit any of the foregoing acts.

International humanitarian law, therefore, clearly prohibits torture.

Definition of torture in humanitarian law – non-state actors

The reference to “public officials” as part of the definition of torture in CAT reflects the state-centric nature of international and regional treaty-making. However, the existence of this limitation on the definition of torture in CAT does not apply to the definition of torture for other purposes. As discussed under Term of Reference (i), the ICTY pointed out in *Prosecutor v Kunarac, Kovac and Vukovic* that this definition cannot be regarded as binding regardless of the context in which it is applied.

In *Prosecutor v Krnojelac* the Trial Chamber reiterated the principle established in *Kunarac*, stating that:²⁵⁶

Under international humanitarian law in general, and under Articles 3 and 5 of the Statute in particular, the presence or involvement of a state official or of any other authority-wielding person in the process of torture is not necessary for the offence to be regarded as “torture”.

²⁵⁶ *Prosecutor v Krnojelac (Trial Chamber Judgment), Case No. IT-97-25-T*, (15 March 2002) at [187].

(ix) the jurisdiction of national and international tribunals to consider cases of alleged torture and other forms of ill-treatment.

Summary

- Typically, states apply their laws on two primary jurisdictional grounds: nationality of the accused and the commission of the criminal act within their territory, the so-called nationality and territorial principles. States generally avoid applying their laws extraterritorially to acts occurring beyond the limits of their jurisdiction.
- In addition to these bases of state jurisdiction, international law permits a state to assert jurisdiction over certain crimes that are considered so heinous that they offend the moral principles of all humanity, including piracy, slave trading and genocide. Torture attracts the universal basis of jurisdiction so that any state, regardless of where the criminal acts took place, or whether they were committed by non-nationals, may prosecute the offence under its domestic courts.
- Apart from under international humanitarian law as set out in the four Geneva Conventions and their Additional Protocols, universal jurisdiction does not exist at customary international law in respect of other forms of ill-treatment not amounting to torture.
- Because universal jurisdiction exists at customary law, universal jurisdiction over acts of torture does not depend on whether the state of nationality of the accused has ratified CAT.
- The ICJ in the *Congo v Belgium* case, while recognising universal jurisdiction, observed that states rarely rely solely on universality in practice, preferring to found jurisdiction on traditional territorial and nationality principles. The Court concluded that states are not required by customary law to assert jurisdiction. In short, universal jurisdiction is permissive but not obligatory.
- The ICJ in the *Congo v Belgium* case recognised the right of a serving minister of government to immunity from universal jurisdiction even in respect of accusations of torture. The decision in this aspect has been much criticised, partly for arguably extending the immunity of heads of state to other members of government.

- It may be that in the future an act of torture can never be an official act and will therefore not be protected by sovereign immunity.
- States have an obligation under article 4 of CAT to ensure that acts amounting to torture are rendered criminal under domestic laws. The same applies to attempts to commit torture and complicity or participation in torture.
- Article 5 of CAT provides that jurisdiction over torture in terms of article 4 should be asserted:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state;
 - (b) When the alleged offender is a national of that state;
 - (c) When the victim is a national of that state if that state considers it appropriate.
- CAT requires states to assert jurisdiction and submit a person for prosecution, in the cases contemplated in article 5, when the alleged offender is present within the State and not extradited for trial in another state (Article 7(1)).
- Complementing the jurisdiction of national tribunals over international crimes are the jurisdictions of international courts including the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the International Court of Sierra Leone.
- The 99 states which have ratified the Rome Statute have ‘delegated’ their universal jurisdiction to the ICC which may prosecute when a state chooses not to exercise its own jurisdiction to prosecute crimes such as torture as a crime against humanity and as a war crime.
- When states are parties to the ICCPR and CAT, additional monitoring powers may be exercised by the HRC and the Committee against Torture.
- These bodies may consider individual complaints when the states of which they are a national have accepted the First Optional Protocols to the ICCPR and made a declaration under Article 22 of CAT. State to state complaints under CAT may be made where the relevant state has made a declaration under article 21.
- The Committee against Torture can conduct inquiries on its own initiative (Article 20 of CAT).

- The UN Special Rapporteur on torture also has a mandate to monitor violations, including in regard to states that are not parties to CAT.

Discussion

Typically, states apply their laws on two primary jurisdictional grounds: nationality of the accused and the commission of the criminal act within their territory, the so-called nationality territorial and nationality and territorial principles.²⁵⁷ The territorial principle may apply when the crime is either wholly or partly committed in the territory of a state. States generally avoid applying their laws extraterritorially to acts occurring beyond the limits of their jurisdiction.²⁵⁸

In addition to these bases of state jurisdiction, international law permits a state to assert jurisdiction over certain crimes that are considered so heinous that they offend the moral principles of all humanity, including piracy, slave trading and genocide.

The ICJ in the *Congo v Belgium*²⁵⁹ case, however, while recognising universal jurisdiction, observed that states rarely rely solely on universality in practice, preferring to found jurisdiction on traditional territorial and nationality principles. Three of the judges in their Joint Separate Opinion referred to this situation as ‘the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events’, rather than as true universal jurisdiction.²⁶⁰ The Court concluded that states are not required by customary law to assert jurisdiction. In short, universal jurisdiction is permissive but not obligatory.

The practice of exercising universal jurisdiction under customary international law has been based on either of two premises. The first is the gravity of the crime. Many of the crimes subject to the universality principle are considered so heinous in scope and degree that they

²⁵⁷ See the discussion on territorial jurisdiction in Brownlie *Principles of Public International Law* (6ed 2003) at 299-301; and at 301-302 for a discussion on the nationality principle.

²⁵⁸ See *Al Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] 2 WLR 1401, where the England and Wales High Court (Administrative Decision) held that a State’s jurisdiction within Art 1 of the European Convention for Human Rights is essentially territorial. An exception to this is that such jurisdiction extends to outposts of the state’s authority abroad, such as embassies and consulates and to prisons operated by the state party in the territory of the other state with the consent of that state (at [244] – [280]).

²⁵⁹ ICJ Reports, 2002.

²⁶⁰ ICJ Reports, 2002 at paras 41 and 42, per Judges Higgins, Kooijmans and Buergenthal.

offend the interest of all humanity, and therefore any State may, as humanity's agent, punish the offender. The second premise relates to crimes that occur in territory over which no country has jurisdiction, or in situations in which the territorial state is unlikely to exercise jurisdiction because, for example, the perpetrators are State authorities or agents.²⁶¹

Torture attracts the universal basis of jurisdiction so that any state, regardless of where the criminal acts took place, or whether they were committed by non-nationals, may prosecute the offence under its domestic courts. Apart from under international humanitarian law as set out in the four Geneva Conventions and their Additional Protocols, universal jurisdiction does not exist at customary international law in respect of other forms of ill-treatment not amounting to torture.

Because universal jurisdiction exists at customary law, universal jurisdiction over acts of torture does not depend on whether the state of nationality of the accused has ratified CAT.

We note, however, that some academics have questioned whether universal jurisdiction in relation to non-state party nationals does exist.²⁶² Others argue that the application of universal jurisdiction in relation to non-state party nationals is permissible under international law.²⁶³

We also note that some of their Lordships who presided in the *Pinochet* case tied the principle of universal jurisdiction for crimes involving torture to a State's ratification of CAT. In *Pinochet*, the majority held that torture committed outside the United Kingdom was not a crime punishable under United Kingdom law until the provisions of the CAT were implemented by the Criminal Justice Act 1988 (UK).²⁶⁴ Lord Millett, dissenting, took a different approach. He was of the view that torture was a crime under customary international law with universal jurisdiction, and that since customary international law was part of the

²⁶¹ Michael P. Scharf, 'The ICC's Jurisdiction over the nationals of non-party states: A critique of the US position', *64 Law and Contemporary Problems* 67 (Winter 2001): 68 at 80-81.

²⁶² See for example Cedric Ryngaert, 'Universal Criminal Jurisdiction over Torture: a State of Affairs', *Institute for International Law*, KU Leuven, Faculty of Law, Working Paper No 66 – December 2004.

²⁶³ See Michael P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', *New England Law Review*, Vol. 35(2): 363.

²⁶⁴ *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [2000] 1 AC 147 at 148, 149, 159-160, 188-190, 202, 218-219 and 233.

common law, English courts have always had extraterritorial criminal jurisdiction in respect of universal jurisdiction under customary international law.²⁶⁵

Lord Millett established a two-pronged test to decide whether a crime attracts universal jurisdiction under customary international law. First, the act must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, the act must be so serious and on such a scale that it can justly be regarded as an attack on the international legal order.²⁶⁶

Universal jurisdiction under CAT

In order for universal jurisdiction to be exercised in the context of CAT, two preconditions must be met. First, there is an obligation to make torture must be a crime in the domestic law of the State concerned (Article 4). Secondly, the State must have jurisdiction over the offence (Article 5).

According to Article 5 of CAT, national tribunals must ensure they have jurisdiction to adjudicate cases involving torture which arise in the following circumstances:

- the offence is committed in any territory under the State's jurisdiction or on board a ship or aircraft registered in that State;
- the alleged offender is a national of that State;
- the alleged offender, who is not a national of the State, is present in the jurisdiction of the State and will not be extradited in accordance with the provisions of CAT; or
- the victim is a national of the State if that State considers it appropriate to claim jurisdiction.

Article 7(1) of CAT is also relevant. It provides:

²⁶⁵ *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [2000] 1 AC 147 (HL) at 293.

²⁶⁶ *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [2000] 1 AC 147 (HL) at 275.

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 [torture, or attempt, complicity or participation in an act of torture] is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

International bodies

The HRC and the Committee against Torture are UN bodies of independent experts which monitor the implementation of the ICCPR and CAT respectively by State parties.

The HRC and the Committee against Torture may, under certain circumstances, consider individual complaints or communications from individuals. The First Optional Protocol to the ICCPR gives the HRC competence to examine individual complaints relating to alleged violations of the ICCPR by State parties to the First Optional Protocol. Under CAT, a State party may declare that it recognises the competence of the Committee against Torture to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State party of CAT provisions.²⁶⁷

The ICCPR and CAT also contain provisions to enable State parties to complain to the relevant treaty body about alleged violations of the treaty by another State party. Articles 41 to 43 of the ICCPR set out a procedure for the resolution of disputes between States parties over a State's fulfillment of its obligations, through the establishment of an *ad hoc* Conciliation Commission. The procedure only applies to State parties to the ICCPR which have made a declaration accepting the competence of the Committee in this regard.

Article 21 of CAT sets out a procedure for the Committee against Torture to consider complaints from one State party which considers that another State party is not giving effect to

²⁶⁷ CAT, Article 22.

the CAT provisions. This procedure applies only to States parties who have made a declaration accepting the competence of the Committee in this regard.

CAT provides that disputes between States parties concerning interpretation or application of the Convention shall be resolved in the first instance by negotiation or, failing that, by arbitration.²⁶⁸ One of the States involved may refer the dispute to the ICJ if the parties fail to agree arbitration terms within six months. States parties may exclude themselves from this procedure by making a declaration at the time of ratification or accession, in which case they are barred from bringing cases against other States parties.

In addition, the Committee against Torture may, on its own initiative, initiate inquiries if it has received reliable information containing well-founded indications that torture is being systematically practised in the territory of a State party.²⁶⁹ The Committee must invite the State party to co-operate in the examination of the information by submitting observations. Taking into account any observations submitted by the State party, as well as any other relevant information available to it, the Committee may designate one or more of its members to make a confidential inquiry and to report to the Committee urgently. After examining these findings, the Committee must transmit them to the State party together with any appropriate comments, suggestions or recommendations. A State party may, at the time of signature, ratification or accession, declare that it does not recognise the competence of the Committee in regard to inquiries.²⁷⁰

The International Criminal Court

The ICC is an international criminal court established by the Rome Statute to ensure that the gravest international crimes do not go unpunished. The ICC does not replace national courts, but is complementary to national criminal jurisdictions. The Court will only investigate and prosecute if a State is unwilling or genuinely unable to prosecute.

²⁶⁸ CAT, Article 30.

²⁶⁹ CAT, Article 20.

The Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole, such as the crimes of genocide, crimes against humanity and war crimes. The Court may exercise its jurisdiction with respect to these crimes either when the situation is referred to the Prosecutor by a State Party or by the Security Council, or when the Prosecutor, with the authorisation of the Pre-Trial Chamber, decides to initiate an investigation.

When the situation is referred to the Prosecutor by the Security Council, the Court may exercise its jurisdiction in all cases and no preconditions are applicable. However, in the two other cases the Court may exercise its jurisdiction only if either the State on the territory of which the suspected crime occurred or the State of which the person suspected of having committed the crime is a national is a State Party to the Statute.

If neither of these two States is a party to the Statute, the Court will not be in a position to investigate the suspected crimes, except if either the State of territoriality or the State of nationality of the suspected person accepts the exercise of jurisdiction of the Court.

Immunity

The concept of immunity from jurisdiction for States and their representatives is based upon principles of state sovereignty, equality and non-interference. It is a basic principle of international law that one sovereign state does not adjudicate on the conduct of another foreign state.²⁷¹

²⁷⁰ CAT, Article 28.

²⁷¹ We note the recent decision of the English Court of Appeal in *Jones v Minister of Interior, (Kingdom of Saudi Arabia) and Lt Col Abdul Aziz, Secretary of State for Constitutional Affairs and the Redress Trust intervening and Mitchell v Al-Dali and Others* [2004] EWCA Civ 1394; [2005] 2 WLR 808. The English Court of Appeal ruled that state immunity barred civil proceedings against a foreign state for a claim for compensation in respect of systematic torture but that there was no bar of immunity from civil proceedings brought against three officials in the service of Saudi Arabia. This case is discussed in Fox "Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture" (2005) 121 LQR 353 and Yang "Case and Comment: Universal Tort Jurisdiction over Torture?" (2005) 64 CLJ 1.

Serving heads of state have absolute immunity from the exercise of the jurisdiction of a foreign domestic court in relation to all actions or prosecutions, whether or not they relate to matters done for the benefit of the state.²⁷² A former head of state does not enjoy the same immunity; he or she will have immunity only in relation to official acts done while in office. It is suggested that the definition of “official acts” would exclude acts done in clear violation of international law.²⁷³

In the case of *Pinochet*,²⁷⁴ the House of Lords had to consider whether Augusto Pinochet, as former head of state of Chile, was immune from prosecution for alleged acts of torture, conspiracy to commit torture, hostage taking and murder. All Lords, with the exception of one, considered that Pinochet could not enjoy the benefit of the immunity. The reason was that torture, which is prohibited by international law and constitutes a peremptory norm, could not be a state function.²⁷⁵

The question of whether immunities apply to other governmental persons has been controversial. The ICJ in the *Congo v Belgium*²⁷⁶ case recognised the right of certain holders of high-ranking offices in state (such as the head of state, head of government and minister for foreign affairs) to absolute immunity from universal jurisdiction even in respect of accusations of torture. The decision in this aspect has been much criticised, partly for arguably extending the immunity of heads of state to other members of government.²⁷⁷

It may be that in the future an act of torture can never be an official act and will therefore not be protected by sovereign immunity.

²⁷² See, for example, the discussion of Lord Browne-Wilkinson in *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [2000] 1 AC 147 (HL) at 201-2.

²⁷³ Shaw, *International Law* (5ed 2002) at 658.

²⁷⁴ *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [2000] 1 AC 147 (HL) at 262.

²⁷⁵ *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [2000] 1 AC 147 (HL) at 204-5 (Lord Browne-Wilkinson); 246 (Lord Hope); 262 (Lord Hutton); 266-7 (Lord Saville); 277 (Lord Millett); 290 (Lord Phillips).

²⁷⁶ ICJ Reports, 2002.

²⁷⁷ The International Law Commission has taken a different approach. In its commentary on the Draft Articles on Jurisdictional Immunities (1991) at 24-27, it said that government officials who are not the head of state should enjoy immunity only for official acts done while in office. See also Watts, “The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers” 247 HR, 1994 III at 53 and 102.

(x) the jurisdiction of national and international tribunals to consider cases of alleged torture and other forms of ill-treatment by international intervention forces.²⁷⁸

Summary

- The concept of an ‘international intervention force’ has no formal legal meaning in international law but may be understood as including the following kinds of intervention:
 - Forces authorised by the UN Security Council;
 - Forces authorised under bilateral, regional or multilateral agreements; and
 - Unauthorised unilateral, regional and multilateral use of force, whether as an act of self-defence or illegal use of force.
- When a force has UN Security Council authorisation, typically a peace keeping force, all military personnel will be subjected to the UN Rules of Engagement, UN Code of Blue Helmets, Standard Operating Procedures or bilateral Memoranda of Understanding.
- While international humanitarian law applies to such military personnel, the UN Convention on the Privileges and Immunities of 1946 may operate to prevent prosecution within the territory.
- The UN has established no rules on jurisdiction. The state of nationality of the accused may apply its criminal laws extraterritorially to prosecute.
- When an intervention force is authorised by agreement between the relevant state parties, jurisdiction over crimes and acts will normally be determined under the terms of a Status

²⁷⁸ Information about the laws, regulations and standards applicable to ‘international intervention forces’ and their use in practice was kindly provided by the following experts and practitioners: Bruce Oswald Lecturer in Law, Associate Director Asia-Pacific Centre for Military Law, University of Melbourne; Hank Nichols, Professor, Rule of Law, Peacekeeping and Stability Operations Institute, US Army War College, Carlisle, Pennsylvania provided information based on the OHCHR Training Course On Human Rights For Trainers Of Military Personnel Of Peace Operations, United Nations Training School Ireland, 27 Feb-4 Mar 05; COL Timothy R. Cornett, Aviation, Director, Logistics, Peacekeeping and Stability Operations Institute, US Army War College, Carlisle, Pennsylvania; MAJ Michael Hardy, Center for Strategic Leadership-Operations and Gaming Division, US Army War College, Carlisle, Pennsylvania.

of Forces agreement. The state of nationality of the accused will invariably assert jurisdiction over any criminal acts committed on foreign territory and trials will usually be conducted by military commissions.

- When criminal acts are committed by unauthorised forces, a distinction should be made between acts committed during and after conflict. The rules of international humanitarian law apply to international and non international conflicts. Torture is a ‘grave breach’ of the four Geneva Conventions of 1949 and their Additional Protocols. States are bound to prosecute for breaches.
- Once the conflict is over, the intervention force is termed a ‘belligerent occupant’ of the territory and articles under the Hague Regulations of 1907 apply to regulate the respective responsibilities of the occupying and occupied states.
- The 2004 Advisory Opinion of the ICJ in the *Israeli Wall* case confirms that international humanitarian law continues to apply to occupied territory and the occupying state will be internationally responsible for all breaches including acts of torture.
- As torture attracts universal jurisdiction, all states may assert jurisdiction over those alleged to have committed this offence during occupation. The ICC under the Rome Statute would also have jurisdiction over acts committed as a crime against humanity and as a war crime when the territorial state or state of nationality of the accused has ratified the treaty.
- Controversially, the Rome Statute gives jurisdiction to the ICC over the national of a non party where the international criminal act committed by the individual took place in the territory of a state party.
- Similarly, the ICC has jurisdiction when the Security Council refers a matter to it, as in relation to Darfur.

Discussion

The concept of an ‘international intervention force’ has no formal legal meaning in international law but may be understood as including the following kinds of intervention:

- Forces authorised by the UN Security Council;

- Forces authorised under bilateral, regional or multilateral agreements; and
- Unauthorised unilateral, regional and multilateral use of force, whether as an act of self-defence or illegal use of force.

There are three sources of law that are applicable to authorised international intervention forces:

- the law of the troop-contributing country ('TCC');
- the law of the host country; or
- a combination of the above, as agreed by the parties to a bi-lateral or multi-lateral agreement, including a Status of Forces Agreement ('SOFA').

In practice, the TCC will usually have criminal jurisdiction over its forces and the host will retain some jurisdiction over particular concerns. This is the situation under the UN Model Status-of-Forces Agreement.²⁷⁹ The UN, however, has no standard rules on jurisdiction.

United Nations instruments

International intervention forces created pursuant to Chapter VII of the UN Charter will be subject to the UN Charter, Secretary-General's Bulletins, UN Code of Blue Helmets, and the UN Rules of Engagement. The UN Convention on the Safety of UN and Associated Personnel 1994 and the Convention on the Privileges and Immunities of the United Nations 1946 will also protect forces acting under the UN Charter. While international humanitarian law applies to such military personnel, the UN Convention on the Privileges and Immunities of 1946 may operate to prevent prosecution within the territory.

National law

Military peacekeepers and intervention forces will usually be subject to their own national laws and legal mechanisms, such as military and civilian courts. Codes of military practice

²⁷⁹ 'Model Status-of-forces Agreement for Peacekeeping Operations, A/45/594, 9 October 1990.

and procedures govern the actions of military forces and will usually apply to individuals when they are serving in their own defence forces, when attached to another defence force and when on tour overseas.²⁸⁰ Breaches of national legislation, rules and regulations in the course of duty will usually be dealt with by a specialist military tribunal or court martial.

Host country law

Members of a military intervention force may be subject to the laws of the host country in which they are operating. It is very rare for host countries to have exclusive jurisdiction over foreign troops, but concurrent jurisdiction sometimes arises.

The host country may not be in a position to impose its laws upon any intervention force, particularly where the governmental, administrative and legal structures have deteriorated or effectively disappeared during a period of prolonged internal conflict. Where the host-country has a functioning governmental structure, it is likely that the host country and TCC will negotiate a SOFA.

Bi-lateral or multi-lateral agreements including SOFAs

A SOFA is an agreement which defines the legal position of a visiting military force deployed in the territory of a friendly state. Such agreements may be bilateral or multilateral.

International human rights law

International human rights law will apply to international intervention forces to the extent it applies to the state with jurisdiction. Some rights can be derogated from in times of conflict or other emergency. However, the prohibition on torture cannot be derogated from in any circumstance, including during a state of war or threat of war.

²⁸⁰ See for example section 4 of the New Zealand Armed Forces Discipline Act 1971.

In the absence of any agreement to the contrary, any breaches of these international human rights laws by international intervention forces can be adjudicated by the same courts and tribunals as have the jurisdiction in times of peace, including the HRC.

International humanitarian law

International humanitarian law applies during domestic and international conflicts. The Geneva Conventions and their Protocols apply to states that have ratified them. A breach of a state's obligations under the Conventions or their Protocols is a matter that can be brought by one state against another in the ICJ. To the extent that the Geneva Conventions and their Protocols have been incorporated into domestic legislation, a breach of the relevant Convention provisions may also be a matter for adjudication by national courts.

Rules specifically pertaining to forces under Chapter VII of the UN Charter

The UN has power under Chapter VII to respond to threats to, or breaches of, peace or acts of aggression. Articles 39 to 42 of Chapter VII state as follows:

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The UN Secretary-General has issued two Bulletins of specific concern to members of international intervention forces acting under UN command. These are “Observance by United Nations forces of international humanitarian law”²⁸¹ and “Special measures for protection from sexual exploitation and sexual abuse”.²⁸² Both Bulletins provide that in case of violations of international humanitarian law, members of the military personnel of the UN force are subject to prosecution in their national courts.²⁸³

The Code of Personal Conduct for Blue Helmets regulates the activities of forces under UN. Rules 4 and 5 are the most relevant to the issue of torture and other ill-treatment. They state:

4. Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children.

²⁸¹ Secretary-General’s Bulletin, ‘Observance by United Nations forces of international humanitarian law’, ST/SGB/1999/13, 6 August 1999.

²⁸² Secretary-General’s Bulletin, ‘Special measures for protection from sexual exploitation and sexual abuse’, ST/SGB/2003/13, 9 October 2003.

²⁸³ Secretary-General’s Bulletin, ‘Observance by United Nations forces of international humanitarian law’, ST/SGB/1999/13, 6 August 1999, section 4; Secretary-General’s Bulletin, ‘Special measures for protection from sexual exploitation and sexual abuse’, ST/SGB/2003/13, 9 October 2003, section 5.

5. Respect and regard the human rights of all. Support and aid the infirm, sick and weak. Do not act in revenge or with malice, in particular when dealing with prisoners, detainees or people in your custody.

The Code of Conduct does not specify the action that may be taken against an individual who breaches the Code. In practice, a violation of the Code will usually involve a simultaneous violation of international human rights or humanitarian law, and will therefore engage the jurisdiction of the corresponding national or international tribunal.

SOFAs will be negotiated between each TCC and the UN. According to the Model SOFA for Peacekeeping Operations developed by the UN, TCCs have exclusive criminal jurisdiction over any criminal offences committed by the military members of their forces.²⁸⁴ In addition, the Secretary-General will obtain assurances from states that they will exercise jurisdiction with respect to crimes and offences committed by their nationals serving in peacekeeping operations.²⁸⁵

Other documents regulating forces under UN command include:

- Rules of Engagement - the means by which the UN can provide political direction and guidance to commanders at all levels governing the use of force. They are approved by the UN and may only be changed with their authority.
- Standing/Standard Operating Procedures – instructions covering those features of operations which lend themselves to a definite or standardised procedure.
- Memorandum of Understanding – an agreement between the UN and troop contributing country setting out basic guidelines on issues such as contribution, authority and duties of the UN.²⁸⁶

²⁸⁴ 'Model Status-of-forces Agreement for Peacekeeping Operations, A/45/594, 9 October 1990, Article 47(b).

²⁸⁵ 'Model Status-of-forces Agreement for Peacekeeping Operations, A/45/594, 9 October 1990, Article 48.

²⁸⁶ SGTm 3, 'Legal Framework for UN PKOs', TES/Mil Div/ DPKO, 30 June 2003.

Consideration of international intervention forces by human rights bodies

It is unclear the extent to which international human rights bodies can consider the acts of international intervention forces. The Committee against Torture addressed the issue in its consideration of the United Kingdom's most recent periodic report. The Committee pointed out that CAT protections extend to all territories under the jurisdiction of a state party. In relation to the actions of the United Kingdom's forces abroad, the Committee expressed its view that the reference to 'territories under the jurisdiction of a State party' included all areas under the de facto effective control of the state party's authorities.²⁸⁷

Unauthorised forces

When criminal acts are committed by unauthorised forces, a distinction should be made between acts committed during and after conflict. The rules of international humanitarian law apply to international and non international conflicts. Torture is a 'grave breach' of the four Geneva Conventions of 1949 and their Additional Protocols. States are bound to prosecute for breaches.

Once the conflict is over, the intervention force is termed a 'belligerent occupant' of the territory and articles under the Hague Regulations of 1907 apply to regulate the respective responsibilities of the occupying and occupied states.²⁸⁸

The 2004 Advisory Opinion of the ICJ in the *Israeli Wall* case confirms that international humanitarian law continues to apply to occupied territory²⁸⁹ and the occupying state will be internationally responsible for all breaches including acts of torture.²⁹⁰

²⁸⁷ Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories. 10/12/2004. CAT/C/CR/33/3, 25 November 2004 at [4(b)].

²⁸⁸ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (Hague Regulations of 1907), Section I, Art 1, 4-6; Section III, Art 42-47

²⁸⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall In The Occupied Palestinian Territory*, 9 July 2004, General List, No. 131. See paragraph 101. Available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

²⁹⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall In The Occupied Palestinian Territory*, 9 July 2004, General List, No. 131. See paragraphs 111 and 113. Available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

As torture attracts universal jurisdiction, all states may assert jurisdiction over those alleged to have committed this offence during occupation. The ICC under the Rome Statute would also have jurisdiction over acts committed as a crime against humanity and as a war crime when the territorial state or state of nationality of the accused has ratified the treaty.²⁹¹

Controversially, the Rome Statute gives jurisdiction to the ICC over the national of a non party where the international criminal act committed by the individual took place in the territory of a State party.²⁹²

Similarly, the ICC has jurisdiction when the Security Council refers a matter to it, as in relation to Darfur.²⁹³

²⁹¹ Rome Statute of the International Criminal Court, Part 2, Article 12(1) and (2)

²⁹² Rome Statute of the International Criminal Court, Part 2, Article 12(2)(a); see also Article 12(3)

²⁹³ Rome Statute of the International Criminal Court, Part 2, Article 13(b)

(xi) the nature and scope of the obligation to protect against violations by non-state actors.

Summary

- States have an obligation to protect persons against acts of torture and cruel, inhuman or degrading treatment or punishment committed by non-state actors where the state has effective administrative control and the actions of those non-state actors can be attributed to the state.
- Under the international law principles of state responsibility all states must take all reasonable measures to ensure that individuals are not subject to torture or cruel, inhuman or degrading treatment or punishment, including that administered by non-state actors.
- Non-state actors remain subject to international and national criminal law with regard to any acts of torture or cruel, inhuman or degrading treatment or punishment committed by them.
- Non-state actors will be also responsible for acts of torture committed during armed conflict under the general principles of international humanitarian law.

Discussion

Acquiescence and failure to protect

As the prohibition on torture and other forms of ill treatment is a rule of customary international law, states have an obligation to protect persons against acts of torture and cruel, inhuman or degrading treatment or punishment committed by non-state actors where the state has effective administrative control and the actions of those non-state actors can be attributed to the state.

Under the international law principles of state responsibility, all states must also take all reasonable measures to ensure that individuals are not subject to torture or cruel, inhuman or degrading treatment or punishment, including that administered by non-state actors.

In terms of CAT, in order to constitute “torture” the relevant pain or suffering must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” – see Article 1(1). Article 16 also requires States to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁹⁴ In terms of CAT, acquiescence includes the failure to protect persons from torture and cruel, inhuman and degrading treatment or punishment.

In *Wilson v Philippines*,²⁹⁵ for example, the HRC found that the State had violated its ICCPR obligations when prison guards and inmates tortured Mr Wilson. Because the actions of the inmates occurred upon the instigation of or with the acquiescence of the guards, the HRC held that the Philippines was responsible the actions of both the inmates and the guards.²⁹⁶

In *Dzemajl v Yugoslavia*²⁹⁷ the rape of a young Montenegrin girl by two Roma individuals led to a large group of Montenegrins entering the Roma settlement and destroying their property, including burning their houses. Police were present in the settlement but did not actively try to stop the group from continuing to destroy the settlement. The Committee considered that burning and destroying the houses constituted cruel, inhuman or degrading treatment or punishment. The Committee found that the police failed to provide adequate protection to the victims. The acts therefore took place at the acquiescence of public officials and accordingly constituted a violation of CAT.

In *Z and Others v United Kingdom*²⁹⁸ the United Kingdom violated its obligations under the European Convention when it failed to protect the applicants against inhuman and degrading treatment. Four children were subjected to extreme neglect and ill-treatment by

²⁹⁴ This includes those performing what may be seen as public functions in the care of the elderly, children or the sick.

²⁹⁵ *Wilson v Philippines*, Communication No 868/1999: Philippines. 11/11/2003. CPR/C/79/D/868/1999.

²⁹⁶ *Wilson v Philippines*, Communication No 868/1999: Philippines. 11/11/2003. CPR/C/79/D/868/1999 at [7.3].

²⁹⁷ *Dzemajl v Yugoslavia*, Communication No. 161/2000: Yugoslavia. 02/12/2002. AT/C/29/D/161/2000.

their parents. The family's situation had been brought to the attention of the relevant health officials, social services and the police. However, despite the appalling conditions, the children were not given adequate protection and were not taken into care until five years later.

In concluding that Article 3 had been violated, the ECHR found that States must:

...take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals... These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.²⁹⁹

In *A v United Kingdom*³⁰⁰ a boy's stepfather severely beat him with a cane. The stepfather was acquitted of assault on the grounds that the punishment constituted reasonable chastisement. The ECHR considered that the responsibility of the State was engaged, not because it was directly responsible for the torture, but because the law had failed to provide adequate protection to the applicant against treatment or punishment contrary to article 3.

Societies in state of lawlessness - absence of formal government structure

The Committee against Torture has considered the situation in which there is no stable government or readily identifiable 'public officials'. In this case, the warring factions, particularly any faction that fulfils some of the roles of government, such as the provision of public services, may be taken to be the public authority in control for the purposes of identifying "public officials" under CAT.

In *Elmi v Australia*³⁰¹ a man was threatened with expulsion from Australia to Somalia where, he argued, he would be tortured or killed by the Hawiye militia for failing to join them or provide them with financial assistance. The Committee rejected Australia's argument that the

²⁹⁸ *Z and Others v UK*, judgment of the ECHR, 10 May 2001.

²⁹⁹ *Z and Others v United Kingdom*, judgment of the ECHR, 10 May 2001 at [73].

³⁰⁰ *A v United Kingdom*, judgment of the ECHR, 23 September 1998.

Hawiye clan did not constitute a “public official”. It noted that Somalia had been without a central government for many years and that the international community negotiated with the warring factions, some of which had set up quasi-governmental institutions and provided a number of public services. The Committee found that:

...de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase “public officials or other persons acting in an official capacity” contained in Article 1.³⁰²

Non-state actors

Non-state actors remain subject to international and national criminal law with regard to any acts of torture or cruel, inhuman or degrading treatment or punishment. Non-state actors will be also responsible for acts of torture committed during armed conflict under the general principles of international humanitarian law.

The reference to ‘public officials’ as part of the definition of torture in CAT need not apply to the definition of torture for other purposes. ICTY jurisprudence has established that the involvement of a “public official” is not required under customary international law in relation to the criminal responsibility of an individual for torture outside the CAT framework.³⁰³

³⁰¹ *Elmi v Australia*, Communication No. 120/1998: Australia. 25/05/99. CAT/C/22/D/120/1998.

³⁰² *Elmi v Australia*, Communication No. 120/1998: Australia. 25/05/99. CAT/C/22/D/120/1998 at [6.5].

³⁰³ *Prosecutor v Kunarac, Kovac and Vukovic (Appeals Chamber Judgment)*, Case No. IT-96-23-T and IT-96-23/1-T (22 February 2001) at [146] and [148].

PART D
POSITION IN FORUM STATES

Afghanistan

ACJ Recommendations

The ACJ recommends that the Afghan Independent Human Rights Commission (AIHRC) urges its Government to address the following issues:

- The need for Afghanistan to become a party to the First Optional Protocol, the OPCAT, and the Refugee Convention.
- The existence of torture in detention facilities as identified in the 2003-2004 Annual Report of the AIHRC.
- the capacity of of the Government of Afghanistan to submit periodic reports to the UN treaty monitoring bodies;
- the necessity for the courts of Afghanistan to recognise customary international law as a source of law applicable in Afghanistan;
- the practice of forcing individuals to sell their property, including their houses;
- the practice referred to as ‘BAD’ involving the exchange of women and girls to resolve disputes;
- the need for the Government of Afghanistan to protect individuals who have been returned to Afghanistan from torture and other ill-treatment.

International Law

Afghanistan is a party to the ICCPR,³⁰⁴ ICESCR,³⁰⁵ CAT³⁰⁶ and the CRC.³⁰⁷ Afghanistan is not a party to the First Optional Protocol, OPCAT or the Refugee Convention. Afghanistan is

³⁰⁴ Afghanistan acceded to the ICCPR on 24 January 1983.

a party to the Geneva Conventions of 12 August 1949³⁰⁸ but not their Protocols. Afghanistan is a party to the Rome Statute.³⁰⁹

Although it has ratified these international instruments, the Government of Afghanistan has not submitted any periodic reports in the last twenty years. The Afghan Ministry of Foreign Affairs is currently working to develop its treaty reporting capacity.

National Law

Chapter 2 of Afghanistan's constitution³¹⁰ prohibits torture:

No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest, or imprisoned, or convicted to punishment.

Punishment contrary to human integrity is prohibited.

Article 30 of the Constitution states:

Any statement, testimony, or confession obtained from an accused or of another person by means of compulsion, are invalid.

Article 7 of the Constitution states:

The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

³⁰⁵ Afghanistan acceded to the ICESCR on 24 January 1983.

³⁰⁶ Afghanistan ratified CAT on 1 April 1987.

³⁰⁷ Afghanistan ratified the CRC on 28 March 1994.

³⁰⁸ Afghanistan ratified the Geneva Conventions of 1949 on 26 September 1956.

³⁰⁹ Afghanistan acceded to the Rome Statute on 10 February 2003.

³¹⁰ Unofficial English translation accessed from website of the Ministry of Foreign Affairs of Afghanistan: <http://www.afghanistan-mfa.net/draft_co.pdf>. A non-English official text of the Constitution is available from the website of the Constitutional Commission of Afghanistan: <<http://www.constitution-afg.com/>>

The Constitution does not refer to customary international law and the national courts do not recognise customary international law as a source of law to be complied with.

The Constitution protects rights in relation to detention (Article 27), extradition (Article 28), access to counsel (Article 31), and forced labour (Article 49). There is a right of complaint to the AIHRC in Article 58. Article 51 of the Constitution states that “any person suffering undue harm by government action is entitled to compensation”. This provision is not yet fully implemented.

Government Policies and Practices

Afghanistan’s police departments are currently being restructured under the National Police Scheme. While the protection of human rights is incorporated into police training programs, the police and disciplinary forces do not have set minimum standards of interrogation which they are required to follow. The Ministry of Justice regularly monitors police custody cells, detention facilities and prisons.

The AIHRC considers that the government is not able to control effectively events that occur in remote areas of the country. The existence of local armed commanders and an inadequate law enforcement presence means that persons who have been forcibly returned to Afghanistan may experience intimidation and considerable personal risk.

Activities of the Afghanistan Independent Human Rights Commission

In 2004 the AIHRC received 45 complaints of torture and other forms of ill-treatment by the police. Following investigation of these complaints, the AIHRC held discussions with judicial authorities. However, the authorities have not taken the complaints seriously.

The AIHRC has conducted training of police officers and police trainees based on the Amnesty International training manual, *Ten Principle Measures of Protecting Human Rights*

for Law Enforcement Staff.³¹¹ The manual has been translated into Pashtu and Dari and has been distributed to police officers, prison staff and prosecutors.

Many of the complaints received by the AIHRC relate to the abuse of women. Forced marriages are one of the major causes of violence against women in Afghanistan. The tribal practice of 'BAD', the exchange of women and girls to resolve disputes relating to murder, robberies and rape, continues throughout the country. The AIHRC has tried to resolve some of these cases through mediation and conciliation. It has intervened to support and protect women subject to domestic violence and women subject to discrimination for speaking out in support of women's rights.

From July 2003 to May 2004 the AIHRC made more than 134 monitoring visits to prisons and detention centres. During the visits, the AIHRC examined detention and prison facilities and interviewed prisoners about the status of their cases and their treatment. The AIHRC assesses whether incarceration is arbitrary, and whether or not prisoners have experienced torture during their detention.

In its *2003-2004 Annual Report* the AIHRC highlighted a number of concerning issues with respect to detention and imprisonment, including torture and other forms of ill-treatment, poor living conditions, lack of access to legal assistance and judicial and administrative corruption:

Torture continues to take place as a routine part of police procedures. AIHRC has found torture to particularly take place at the investigation stage in order to extort confessions from detainees. Forced confessions are clearly in violation of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Torture was found to be especially prevalent in the investigation process in Herat Province.³¹²

The AIHRC has concerns about the role of the judiciary in the detention of people in Afghanistan:

³¹¹ AI Index POL30/04/98.

³¹² Afghanistan Independent Human Rights Commission, *Annual Report 2003-2004* at 18-19 located at <<http://www.aihrc.org.af/>>

Individuals are often arrested and detained without cause by district attorney offices. In Panjshir, the district attorney held four people in prison for 45 days with no evidence. AIHRC intervened and won the release of all four prisoners. Prisoners are sometimes held for a year or more before courts issue rulings.

Disposition of cases often is decided by bribes. Those who pay the bribes are released; those who do not remain in prison. The commission has documented cases where murderers are released because they paid money. People with no money, power, or favouritism are still in prison.³¹³

The AIHRC's Child Protection Unit visits detention centres for children in six cities on a monthly basis. These visits have assisted in the release of more than 85 children who had been illegally detained or had committed petty offences. In Mazar-e-Sharif and Kandahar the AIHRC has successfully secured the separation of child detainees from adult offenders. It has also conducted education and training programs for police, with the objective of preventing the illegal detention and torture of children.

In 2003 the AIHRC monitored the trial of Mr Abdullah Shah who was charged with murder and persecution. Mr Shah complained during the trial that he had been subject to torture (beatings and electric shocks) by the police. His claims were not considered by the court. The AIHRC submitted a report on the case to the President of Afghanistan, but the report was not considered. Mr Shah was sentenced to death.

The AIHRC Chairperson, Dr Sima Samar has formally requested access to the detention facilities operated by the United States military forces in Bagram and Kandahar. The AIHRC has not yet been permitted to monitor these facilities.

³¹³ Afghanistan Independent Human Rights Commission, *Annual Report 2003-2004* at 20 located at <<http://www.aihrc.org.af/>>

Australia

ACJ Recommendations

The ACJ recommends that the Human Rights and Equal Opportunity Commission (HREOC) urges its Government to address the following issues:

- the necessity to sign and ratify OPCAT;
- the restrictions placed on persons who have been detained under the ASIO Amendment Act, including in relation to accessing a lawyer, the communication between a lawyer and their client, the requirement that a detainee answer all questions asked of him or her and the rights of a detained person to communicate with their family;
- the practice of detaining children in immigration detention, including for prolonged periods;
- the conditions in immigration detention facilities;
- the necessity to monitor the safety of those deported after not being recognised as refugees;
- the need to have proper procedural safeguards in immigration matters to ensure Australia's non-refoulement obligation is fulfilled; and
- the need to monitor prison facilities regularly.

International Law

Australia is a party to the ICCPR,³¹⁴ First Optional Protocol,³¹⁵ ICESCR,³¹⁶ CAT,³¹⁷ CRC,³¹⁸ and the Refugee Convention.³¹⁹ Australia is not a party to OPCAT. Australia is a party to the

³¹⁴ Australia ratified the ICCPR on 13 August 1980.

³¹⁵ Australia acceded to the First Optional Protocol on 25 December 1991.

³¹⁶ Australia ratified ICESCR on 10 December 1975.

³¹⁷ Australia ratified CAT on 8 August 1989.

³¹⁸ Australia ratified the CROC on 17 December 1990.

³¹⁹ Australia acceded to the Refugee Convention on 22 January 1954.

Geneva Conventions of 12 August 1949³²⁰ and their Protocols.³²¹ Australia is also a party to the Rome Statute.³²²

Australian courts demonstrate an increasing willingness to refer to international instruments in the interpretation of domestic law and the development of the common law.³²³

National Law

The Australian Constitution does not contain comprehensive human rights provisions and is silent on torture. It expressly guarantees only a limited number of individual rights.³²⁴ However, section 51 of the Constitution does give the Federal Government the general power to implement Australia's international treaty obligations.

Legislation

The Crimes Act 1914 (Cth) imposes requirements in relation to the period of detention of accused persons before they are charged;³²⁵ treatment of accused persons while in detention; cautioning of accused persons upon apprehension and during interrogation;³²⁶ communications with a "friend", relative or legal practitioner while detained;³²⁷ access to a legal practitioner and, if appropriate, an interpreter during questioning;³²⁸ special protections for Aboriginal and Torres Strait Islanders and persons under 18 years old;³²⁹ and tape-recording of interviews.³³⁰

Section 23Q of the Crimes Act states:

³²⁰ Australia ratified the Geneva Conventions I-IV on 14 October 1958.

³²¹ Australia ratified Additional Protocols I and II on 21 June 1991.

³²² Australia ratified the Rome Statute on 1 July 2002.

³²³ H Charlesworth, M Chiam, D Hovell, G Williams, 'Deep Anxieties: Australia and the International Order', (2003) 25 *Sydney Law Review* 423.

³²⁴ Protection against acquisition of property on unjust terms (s 51(xxxi)); the right to a trial by jury (s 80); and freedom of religion (s 116).

³²⁵ Crimes Act 1914 (Cth), ss 23C, 23CA, 23CB, 23D, 23D, 23DA and 23E.

³²⁶ Crimes Act 1914 (Cth), s 23F.

³²⁷ Crimes Act 1914 (Cth), s 23G.

³²⁸ Crimes Act 1914 (Cth), s 23N.

³²⁹ Crimes Act 1914 (Cth), s 23H.

A person who is under arrest or a protected suspect must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.³³¹

Under the Human Rights and Equal Opportunity Commission Act 1986 (HREOC Act), the President of HREOC can inquire into and attempt to conciliate complaints regarding alleged breaches of ‘human rights’ by, or on behalf of, the Commonwealth of Australia.³³² ‘Human rights’ is defined in the HREOC Act as rights and freedoms contained in any relevant instrument which is scheduled to or declared under the HREOC Act.³³³ They are the ICCPR, CRC, the Declaration on the Rights of Mentally Retarded Persons; the Declaration on the Rights of Disabled Persons; and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.

HREOC does not have jurisdiction to scrutinise directly the activities of state or territory governments which are responsible for the administration of Australia’s prisons in which both state and federal prisoners are kept. However, it can inquire into the detention of federal prisoners on the basis that they are detained “on behalf of the Commonwealth”.³³⁴ Further, HREOC does not have jurisdiction to investigate an act or practice of an Australian intelligence agency. Any complaints about intelligence agencies must be referred to the Inspector-General of Intelligence and Security.³³⁵

CAT is *not* scheduled to the HREOC Act. Although Australia has ratified CAT, HREOC has no direct jurisdiction to ensure the protection and promotion of the rights under CAT. However, to the extent that the prohibition on torture is included in Article 7 of the ICCPR and Article 37(a) of the CRC, HREOC does have the authority pursuant to those two instruments to examine the acts and practices of the Commonwealth and its agents in relation to the

³³⁰ Crimes Act 1914 (Cth), ss 23U, 23V.

³³¹ Crimes Act 1914 (Cth), s 23Q.

³³² HREOC Act, section 11(1)(f).

³³³ HREOC Act, ss 3 (‘Covenant’, ‘Declarations’ and ‘human rights’) & 47.

³³⁴ HREOC Act, s 3(10).

³³⁵ HREOC Act, s 11(3).

prohibition of torture, cruel, inhuman and degrading treatment. HREOC has carried out a number of investigations into those subject to detention.

Legislation on torture

In accordance with the War Crimes Act 1945, a person may be tried in Australia for war crimes committed outside Australia.³³⁶ A person may also be specifically liable for acts of torture committed extraterritorially under the Criminal Code 1995 (Cth) (the Criminal Code) and the Crimes (Torture) Act 1988 (Cth) (the Torture Act).

The Torture Act provides that a person may be held liable for an ‘act of torture’ committed outside Australia in certain circumstances.³³⁷ The term ‘act of torture’ is defined as an act or omission by which severe mental or physical pain or suffering is intentionally inflicted on a person for such purposes as: obtaining from that person or some other person information or a confession; punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; intimidating or coercing that person or some other person; or for any reason based on discrimination of any kind. The definition does not include any act or omission arising only from, or inherent in, or incidental to, any lawful sanctions that are not inconsistent with the ICCPR.³³⁸

The Torture Act gives the court jurisdiction in relation to acts of torture committed by Australian citizens or ‘persons present in Australia’.³³⁹ A territorial nexus between Australia and conduct of the accused is not required to enliven the court’s jurisdiction under the Act. A prosecution can only be brought under the Torture Act with the consent of the Attorney-General. It is not a defence to a prosecution under the Torture Act that the act constituting the defence was done out of necessity arising from the existence of a state of war, a threat of war,

³³⁶ *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

³³⁷ If the person committed the act in his or her capacity as a public official or while acting in an official capacity; or the person committed the act at the instigation, or with the consent or acquiescence of a public official or person acting in an official capacity; and at the time it was committed, it would have been an offence under Australian law - Crimes (Torture) Act 1988 (Cth), s 6.

³³⁸ Crimes (Torture) Act 1988 (Cth), s 3(1).

³³⁹ Crimes (Torture) Act 1988 (Cth), s 7.

internal political instability, a public emergency or any other exceptional circumstance;³⁴⁰ or that in doing the act the accused was acting under orders or a superior officer or public authority.³⁴¹ There have been no prosecutions brought under the Crimes (Torture) Act 1988.

The Criminal Code 1995 prohibits torture committed as a War Crime³⁴² or a Crime Against Humanity,³⁴³ whether such crimes are committed within or outside Australia.³⁴⁴ Prosecutions under the War Crimes and Crimes Against Humanity provisions in the Code require the consent of the Attorney-General. Section 268.116(3) of the Criminal Code provides a defence to persons alleged to have committed torture as a War Crime. That provision mirrors Article 33 of the Rome Statute of the International Criminal Court³⁴⁵ and was enacted to meet Australia's obligations under the Rome Statute. Section 268.116(3) could put Australia in breach of its obligation under Article 2(3) of CAT to ensure that in any prosecution for torture, an order from a superior officer or a public authority may not be invoked as a justification of torture.

Section 84 of the Evidence Act 1995 (Cth) provides that evidence of an admission is not admissible unless the admission and the making of the admission were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or a threat of any such conduct. That exclusion only applies if the party against whom evidence of the admission is adduced raises an issue in the proceedings about whether the admission, or the making of the admission, were influenced by violent, oppressive, inhuman or degrading conduct.

³⁴⁰ Crimes (Torture) Act 1988 (Cth), s 11(a).

³⁴¹ Crimes (Torture) Act 1988 (Cth), s 11(b).

³⁴² Criminal Code 1995 (Cth), ss 268.25 (grave breach of Protocol I to the Geneva Conventions) and 268.73 (serious violation of common art 3 to the Geneva Conventions).

³⁴³ Criminal Code 1995 (Cth), s 268.13.

³⁴⁴ Criminal Code 1995 (Cth), ss 268.117 and 15.4. This extended jurisdiction relevantly only applies to Genocide, War Crimes and Crimes against Humanity.

³⁴⁵ That provision provides that, 'it is a defence to a War Crime that:

- (a) the War Crime was committed by a person pursuant to an order of a Government or of a superior, whether military or civilian;
- (b) the person was under a legal obligation to obey the order;
- (c) the person did not know the order was unlawful; and

Remedies

Tortious compensation for wrongful imprisonment and trespass to the person is available at common law throughout Australia. Some States and Territories also operate victims' compensation schemes for victims of crime, including crimes that may amount to torture. HREOC is also aware of initiatives, partially funded by the Commonwealth, to assist in rehabilitation and medical services provided to survivors of torture and other trauma, particularly amongst recognised refugees.

Government Policies and Practices

In the wake of September 11, 2001, the Australian Security and Intelligence Organisation Act 1979 (Cth) (ASIO Act) was amended to permit additional questioning powers by ASIO officers in relation to persons detained for terrorism offences. A person detained pursuant to the ASIO Act has no automatic right to contact family members,³⁴⁶ though they are permitted to contact a lawyer³⁴⁷ and persons under 18 years of age may request the presence of a parent or legal guardian during questioning.³⁴⁸ Furthermore, a person may be detained under the ASIO Act without charge for a continuous period of more than 168 hours.³⁴⁹ Further, the ASIO Act abrogates the right to silence of the person detained under the Act as it requires the detained person to give any information requested by the prescribed authority in accordance with the warrant³⁵⁰ even if doing so will tend to incriminate the person, or make the person liable to a penalty.³⁵¹ A failure to provide such information constitutes an offence under the Act.³⁵²

(d) the order was not manifestly unlawful'.

³⁴⁶ ASIO Act, s 34D(4).

³⁴⁷ ASIO Act, s 34C(3B).

³⁴⁸ ASIO Act, s 34NA(4).

³⁴⁹ ASIO Act, s 34HC.

³⁵⁰ ASIO Act, ss 34G(1) and 34G(6). Though note that these sections do not apply if the defendant can establish that he or she does not have the information or document requested: ss 34G(4) and 34G(7).

³⁵¹ ASIO Act s 34G(8).

³⁵² ASIO Act, ss 34G(3) and 34G(6).

The Australian Government has recently introduced new legislation concerning preventative detention orders, control orders and sedition offences under the Anti-Terrorism Bill (No. 2) 2005. In its submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No. 2) 2005 HREOC raised concerns about the Bill and made a series of recommendations in relation to a wide range of issues including review of orders, humane treatment, solitary confinement, contact with lawyers and family members, provision of legal aid and complaint handling mechanisms.³⁵³

The Australian Government does not monitor the safety of persons who are deported back to their country of origin or some other third country after being denied refugee protection in Australia.

Activities of the Human Rights and Equal Opportunity Commission (HREOC)

In 2002, HREOC conducted a National Inquiry into whether the detention of children asylum seekers and their families contravened Article 37(a) of the CRC.³⁵⁴ The Report found a breach of Article 37(a) of the CRC³⁵⁵:

Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhumane and degrading treatment of those children in detention.³⁵⁶

HREOC made a number of recommendations regarding steps to be taken by the Commonwealth and possible legislative amendment.³⁵⁷ HREOC has also prepared a number of publications dealing with the treatment of persons in Australia's immigration detention

³⁵³ The full text of HREOC's submission to the Committee is available at http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sub158.pdf

³⁵⁴ "A last resort?" The Report of the National Inquiry into Children in Immigration Detention, http://www.humanrights.gov.au/human_rights/children_detention/index.html.

³⁵⁵ "A last resort?" was tabled in the Commonwealth Parliament on 13 May 2004 and is available on HREOC's website at: http://www.humanrights.gov.au/human_rights/children_detention/index.html

³⁵⁶ HREOC, "A last resort?" (April 2004) at 431, 850, 855.

³⁵⁷ HREOC "A last resort?" (April 2004) at 5-6.

centres and torture-related issues in relation to the ICCPR and CRC.³⁵⁸ HREOC conducts factual and legal research in the course of preparing reports on individual complaints and submissions to Government and Parliament.

HREOC's Human Rights Commissioner conducted prison visits between 1995 and 2000. The Social Justice Commissioner has visited prisons as part of a review of deaths in custody between 1991 and 1996. The Social Justice Unit has visited prison facilities. However, there is no regular program of prison visits by HREOC.

The Human Rights Commissioner periodically inspects immigration detention facilities and state prisons holding immigration detainees to evaluate the condition and treatment of detainees. Immigration detention usually raises a variety of human rights concerns ranging from specific issues such as the physical conditions of detention, to more systemic issues such as the deterioration in mental health of detainees due to the prolonged nature of detention. Following prison visits, the Human Rights Commissioner raises particular issues concerning each facility directly with the responsible government department and in some cases corresponds directly with the Minister. The Human Rights Commissioner has transmitted a report on these visits to the Attorney-General for tabling in the Commonwealth Parliament.³⁵⁹

The HREOC Act confers upon HREOC the function of intervening in proceedings before a Court involving 'human rights issues'.³⁶⁰ In 2002, HREOC was granted leave to intervene in the matter of *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*.³⁶¹ In this case, provisions of the Migration Act 1958 (Cth) limited the rights of judicial review of asylum seekers. HREOC submitted that the provisions in question raised issues under Article 7 of the ICCPR because restricting asylum seekers' ability to seek judicial review increased the risk that such persons would be returned to situations of torture. HREOC also submitted that this would violate Australia's non-refoulement obligations under Article 3 of CAT and

³⁵⁸ HREOC website:

http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html# idc_review

³⁵⁹ See http://www.humanrights.gov.au/human_rights/idc/index.html.

³⁶⁰ HREOC Act, s 11(1)(o).

³⁶¹ (2002) 123 FCR 298, available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/391.html>.

Article 33(1) of the Refugee Convention.³⁶² A Full Federal Court upheld the impugned provisions although the operation of the provisions were significantly confined by the High Court in a later decision.³⁶³

In 2003, HREOC was granted leave to intervene in three cases concerning the limits on lawful detention of ‘unlawful non-citizens’ by the Commonwealth under section 196 of the Migration Act 1958 (Cth).³⁶⁴ HREOC contended that in determining those limits, the Court should have regard to relevant international standards including the proscription against torture and cruel, inhuman or degrading treatment (ICCPR, Article 7) and the requirement that people deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person (ICCPR, Article 10).³⁶⁵ A majority of the High Court dismissed the each of the appeals.³⁶⁶

HREOC has made recent public submissions regarding torture and ill-treatment:

- 29 April 2004: submission to the Senate Legal and Constitutional Legislation Committee regarding a proposed amendment to the Migration Act 1958 (Cth). HREOC expressed concern that proposed amendments would weaken the protections under Australian law to prevent refoulement in breach of Article 3 of the CAT.³⁶⁷
- February 2004: submissions to the Joint Standing Committee on Treaties’ Inquiry into the Optional Protocol to the CAT. HREOC urged the Government to ratify and implement the Optional Protocol to CAT.³⁶⁸

³⁶² HREOC’s full submission in NAAV can be found on its website

http://www.humanrights.gov.au/legal/guidelines/submission_naav.html

³⁶³ See *Plaintiff S 157 v Commonwealth of Australia* (2003) 211 CLR 476.

³⁶⁴ *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; *SHDB v Godwin & Ors (Al Kateb v Godwin)* [2004] HCA 37; and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38.

³⁶⁵ No reference was made to CAT. We refer you to the explanation provided in our response to question 1.

³⁶⁶ Copies of HREOC’s submissions and supplementary submissions are available on its website

<http://www.humanrights.gov.au/legal/intervention/khafaji.htm>; and

http://www.humanrights.gov.au/legal/intervention/khafaji_supp.htm

³⁶⁷ The full text of the submission is available on HREOC’s website

http://www.humanrights.gov.au/legal/submissions/migration_amendment.htm

³⁶⁸ The full text of the Commission’s written submission to the Committee can be found at <http://www.humanrights.gov.au/legal/submissions/jscot.html>.

- 21 November 2003: submission to the Migration Litigation Review. HREOC submitted that efficient management of immigration cases should not come at the expense of the fundamental rights of people involved in immigration litigation.³⁶⁹

³⁶⁹ The full text of the submission is available on HREOC's website at <http://www.humanrights.gov.au/legal/submissions/migration.html>

Fiji

ACJ Recommendations

The ACJ recommends that the Fiji Human Rights Commission (FHRC) urges its Government to address the following issues:

- the need for Fiji to become a party to the ICCPR, the ICESCR, the CAT, the First Optional Protocol, the OPCAT and the Protocols to the Geneva Conventions.
- the need to establish minimum standards of interrogation for use by the police and other disciplinary authorities;
- the need to adopt video-recorded interview procedures to corroborate police evidence, to ensure the voluntariness of confessions and to eradicate the use of torture or "softening up" techniques prior to or during interrogations;³⁷⁰
- the need to ensure legal protections to persons forcibly returned to a country in which they may face torture or other forms of ill-treatment;
- the continuing low standards of hygiene, health care, food, housing and other basic services provided in correctional facilities;
- the need to implement the recommendations of the Fiji Law Reform Commission when it has completed its review of prison laws and regulations; and
- the promotion of the *National Security and Human Rights Handbook*.

International Law

Fiji is a party to the CRC³⁷¹ and the Refugee Convention.³⁷² Fiji is not a party to the ICCPR, ICESCR, CAT, First Optional Protocol or OPCAT. Fiji is a party to the Geneva Conventions of 12 August 1949³⁷³ but not their Protocols. Fiji is a party to the Rome Statute.³⁷⁴

³⁷⁰ Tawake Cakacaka v The State Crim Case No. HAC010.04S Ruling 15th February 2005

³⁷¹ Fiji ratified the CRC on 13 August 1993.

³⁷² Fiji succeeded to the Refugee Convention on 12 June 1972.

³⁷³ Fiji succeeded to the Geneva Conventions of 1949 on 9 August 1971.

³⁷⁴ Fiji ratified the Rome Statute on 29 November 1999.

National Law

The Fijian Constitution contains a Bill of Rights in Chapter 4.³⁷⁵ Sections 24(1) and 25(1) of the Bill of Rights prohibit slavery, servitude, forced labour, torture and cruel, inhumane, degrading or disproportionately severe treatment or punishment.

Section 25 of the Bill of Rights specifically prohibits torture:

- (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.
- (2) Every person has the right to freedom from scientific or medical treatment or procedures without his or her informed consent or, if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.

Chapter 14, s 187 prohibits derogation from the right to freedom from torture and other degrading punishment or treatment even when a state of emergency is lawfully declared.

Legislation

The Supreme Court Act incorporates the Judges' Rules, which govern the conduct of investigations and interrogation of criminal suspects and accused persons by police to ensure that the investigation is conducted within the law and that any statement given by the suspects are given freely and voluntarily. The Judges' Rules protect the right to communicate privately with a solicitor and confirm the fundamental rule that evidence must be given voluntarily to be admissible in court. The Judges' Rules provide that non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

The existing prison laws and regulations do not specifically prohibit acts of torture. However, under the Prisons Service Regulations, it is a disciplinary offence for a prison officer to

³⁷⁵ Constitution of the Republic of the Fiji Islands 1997.

perform unwarranted violence on any person in his or her custody. No prison officer may use force in dealing with any prisoner except in self-defence or as necessary to prevent a prisoner escaping or to preserve peace. The Fiji Law Reform Commission is currently reviewing the prison laws and regulations. The objectives of the review is to promote the concept of rehabilitation within prison, and to incorporate a number of international human rights standards which are currently absent from the existing instruments, such as the Standard Minimum Rules.

Remedies

Under the Constitution, a person subjected to torture or cruel, inhumane or degrading treatment may apply to the High Court for redress. An award of exemplary damages may be available. Where the Fiji Human Rights Commission (FHRC) applies to the court, redress includes declarations, restraining orders, and damages.³⁷⁶ An order for damages includes pecuniary loss suffered resulting from breach, expenses incurred in seeking redress, loss of benefit, damages for humiliation, loss of dignity and injury to feelings.³⁷⁷ The FHRC complaint mechanism does not have the power to grant a remedy, but it may analyse a complaint and refer it to the relevant disciplinary authority.

Case Law

Section 43(2) of the Constitution requires the Fijian courts to refer to public international law in interpreting human rights provisions of the Bill of Rights, even if the relevant international instruments have not been ratified by Fiji. The courts have on occasion referred to and applied to customary international law in their decisions. Several decisions refer to public international law and its relevance when interpreting the Bill of Rights.³⁷⁸

³⁷⁶ Human Rights Commission Act 1999, s 38(2).

³⁷⁷ Human Rights Commission Act 1999, s 39(1).

³⁷⁸ *Taito Rarasea v the State*, Cr. Appeal No. HAA0027 of 2000, in which the High Court applied the Standard Minimum Rules and the ICCPR. This decision was applied in the case of *Sailasa Naba v the State*, HAC 0012/00L.

Government Policies and Practices

The Extradition Act 2003 allows some discretion in the extradition of offenders if the person to be extradited would face the death penalty or has been subject to torture in the receiving country.³⁷⁹ The statutory context suggests that the discretion may allow the Court to look to the potential for torture, not just if the person to be extradited has been subjected to torture in the past.³⁸⁰ A Judge must not refuse an extradition request on the basis that the person may be subjected to torture or ill-treatment if the requesting country and the Fiji Islands have ratified the CAT or the ICCPR.³⁸¹

Activities of the Fiji Human Rights Commission

In its Annual Report of 2003, the FHRC reported:

The Commission received 51 complaints under this section [section 25 of the Constitution relating to cruel and degrading treatment] in 2003. Most of the complaints were about police or prisons brutality, for example, stripping suspects naked in public view, rubbing chillies on private parts of suspects to extract a confession, including of women suspects, students complaining of assault by teachers, police brutality during arrest and, in court, the validity of the death penalty.

In 2004, the Commission received a total of 62 complaints against the Disciplinary Services (Police, Prisons and Military); 37 were against the Police Force, 21 against the Prisons Services and 4 against the Military Forces. The FHRC has not received any complaints specific to torture. However, complaints have been received about cruel and degrading treatment committed by authorities during arrests and while suspects and convicted persons are held in custody. The complaints are analysed from a human rights perspective and forwarded to the disciplinary committee of the respective Disciplinary Service for

³⁷⁹ Extradition Act 2003, ss18(2), 63(2)(c).

³⁸⁰ Later in section 18 the phrasing “may be subjected to torture or cruel, inhuman or degrading treatment or punishment” is used.

³⁸¹ Extradition Act 2003, s18(4).

investigation. The Director of Public Prosecution then decides whether to prosecute the relevant officer.

The FHRC has not conducted any specific education campaigns on torture. It has conducted training for members of the military, police and prison agencies on the provisions of the Bill of Rights, including coverage of issues of torture and cruel, inhuman and degrading treatment. This training covers general principles of public international law not contained in the Bill of Rights, and is designed for senior officers.

In September 2004 the FHRC and the Disciplinary Services launched the *National Security and Human Rights Handbook*.³⁸² The Handbook provides guidance to the Disciplinary Services on protection of human rights in the course of their duties.

In 2004 the FHRC secured funding from the British High Commission for the design of a new medical reporting template for the documentation of incidents of torture committed by police, military and prison officers. It is intended that the template replace the current police medical reporting form that medical officers are required to complete when an offence of assault or bodily harm is committed. The purpose of the new reporting system is to ensure comprehensive and accurate documentation of alleged incidents of torture. It will also serve to protect officers from false accusations of torture.

The FHRC conducts detention visits only in response to specific complaints. It does not conduct general monitoring visits. In 2004 the High Court requested that the FHRC and three judges of the Criminal Division of the High Court make an on-site visit to Suva Prison. The visit was organised pursuant to two separate bail applications by two remand prisoners on the grounds that the general condition of the prison amounted to cruel, inhuman and degrading punishment or treatment. The purpose of the visit was to compare the conditions in prisons with the guidelines set out in the Standard Minimum Rules. The conditions of both the main

³⁸² A copy of the handbook is available on the website of the Fiji Human Rights Commission: http://www.humanrights.org.fj/pdf/inside_pages_changes.pdf

prison and the remand centre were found to be far short of the minimum standards set out in the Standard Minimum Rules.

The FHRC prepared a report on prison conditions, examining conditions with respect to accommodation, sanitation, personal hygiene, space and lighting. These reports were subsequently submitted to the court during argument of the cases of *Tawake Cakacaka v The State*³⁸³ and *Kelemedi Dreu v The State*,³⁸⁴ resulting in the granting of bail to both accused. The reports were also referred to in subsequent and similar applications of *Jason Zhong v The State* and *Senijieli Boila v The State*.³⁸⁵ Since its establishment in 1999, the FHRC has appeared as amicus curiae in five cases involving applications for bail due to the poor conditions existing at the prison remand centre or prison detention cells.³⁸⁶

One of the 2005 objectives of the FHRC's Policy Analysis Unit is the drafting of FHRC policies on torture and other cruel, inhumane and degrading treatment. These policies will form the basis for a submission to the government to introduce legislative and policy measures to prohibit torture in Fiji, particularly targeting the disciplinary services.

³⁸³ *Tawake Cakacaka v The State*, Crim Case No. HAM 045/04.

³⁸⁴ *Kelemedi Dreu v The State*, Crim Case No HAC 023/04.

³⁸⁵ *Jason Zhong v The State*, Crim. Misc. Case No. HAM 68/04.

³⁸⁶ *Sailasa Naba & others v The State* HAC 0012/00L; *Tawake Cakacaka v The State* Crim. Case No. HAM 045/04; *Kelemedi Dreu v The State* Crim. Case No. HAC 023/04; *Senijieli Boila and Pita Nainoka v The State* Crim. Case No. HAC 032/04; *Jason Zhong v The State* Crim. Misc. Case No. HAM 68/04.

India

ACJ Recommendations

The ACJ recommends that the National Human Rights Commission of India (NHRCI) urges its Government to address the following issues:

- the need for India to sign and/or ratify the First Optional Protocol, CAT, the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions and the Rome Statute;
- the provision of the Prevention of Terrorism Act which prevents the legal practitioner of a detainee to remain present through the period of interrogation;
- section 376(B) of the Indian Penal Code which seems on its face to apply only in the case of public servants who are male and who have sexual intercourse with a woman in custody but not in the case of female public servants who have sexual intercourse with a male in custody;
- the promotion of the NHRCI handbook on human rights for judicial officers;
- the continuation of human rights training for the police, the paramilitary, the armed forces and public servants;
- strengthening the role of human rights cells in State police headquarters; and
- ensuring the guidelines set by the Supreme Court on arrest and detention are met.

International Law

India is a party to the ICCPR,³⁸⁷ ICESCR,³⁸⁸ and CRC.³⁸⁹ India is not a party to the First Optional Protocol, OPCAT or the Refugee Convention. It has signed, but not ratified, the CAT.³⁹⁰ India is a party to the Geneva Conventions of 12 August 1949³⁹¹ but not their Protocols. India is not a party to the Rome Statute.

³⁸⁷ India acceded to the ICCPR on 10 April 1979.

³⁸⁸ India acceded to the ICESCR on 10 April 1979.

³⁸⁹ India acceded to the CRC on 11 December 1992.

³⁹⁰ India became a signatory to the CAT on 14 October 1997.

National Law

The Constitution of India 1950 provides for several rights and freedoms including protection of life and personal liberty (article 21); and rights relation to arrest and detention (article 22). There are limited procedural safeguards in the Constitution, including equality before the law,³⁹² and a prohibition on retrospective lawmaking.³⁹³ Article 51(c) provides that “the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another.”

Legislation

Offences under the Penal Code 1860 include:

- causing hurt for extorting a confession of any information which may lead to the detection of an offence (s 330);
- causing grievous hurt for the purpose of extorting or compelling restoration of property (s 331);
- rape committed in police custody (s 376(2)); and
- sexual intercourse between a public servant and a woman in his custody (s 376(B)).

The Evidence Act 1872 provides that no confession made to a police officer shall be proved as against a person accused of any offence³⁹⁴ and that no confession made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such a person.³⁹⁵

³⁹¹ India ratified the Geneva Conventions of 1949 on 9 November 1950.

³⁹² Constitution of India 1950, art 14.

³⁹³ Constitution of India 1950, art 20.

³⁹⁴ Evidence Act 1872, s 25.

³⁹⁵ Evidence Act 1872, s 26

The Code of Criminal Procedure 1973 sets out the requirements that must be met before a police officer can make an arrest. The Code states that a person arrested and held in custody shall not be subjected to more restraint than is necessary to prevent their escape. The Code sets out the rights of arrested persons, including the right to be taken before a Magistrate without delay; the right not to be detained for more than 24 hours without judicial scrutiny; and the right to be examined by a medical practitioner upon request.

Remedies

The National Human Rights Commission of India (NHRCI) advises that victims of torture can bring complaints to senior police officers, courts of law, and the NHRCI. Victims of torture can also invoke the writ of jurisdiction of the High Court and Supreme Court to make complaints and to seek redress, compensation, and medical rehabilitation.

The Supreme Court has outlined the ethical obligations of law enforcement agencies with respect to the issue of torture. The Supreme Court laid down the following guidelines:³⁹⁶

1. On request by the detainee, a friend, relative or anyone else who may care about the detainee's welfare, must be informed for their detention.
2. The police officer must inform the detainee of this right as soon as they are brought to the police station.
3. The name of the person informed of the detention must be made in the Station Diary.
4. It is the duty of the magistrate, before whom an arrested person is produced, to satisfy him or herself that these requirements have been complied with.

The Supreme Court issued the following guidelines in cases of arrest or detention:³⁹⁷

1. The police personnel carrying out the arrest and handling the interrogation should bear accurate, visible, and clear identification and name tags with their designations. The particulars of all such police personnel, who handle interrogation of the arrestee, must be recorded in a register.
2. The police officer executing the arrest must prepare a memo at the time of arrest and it must be attested by at least one witness. It must contain the time and date of arrest.
3. A person who has been arrested or detained, and is being held in custody in a police station or interrogation centre or lock-up, is entitled to inform a friend, relative or

³⁹⁶ *Joginder Kumar vs. State of Uttar Pradesh*, the Supreme Court (1994) 4 SC 260.

³⁹⁷ *Ashok Kumar Johri*, brought by writ on July 29, 1987.

anyone else who may care about the detainee's welfare of their detention and the place of detention.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police when the next friend or relative of the arrestee lives outside the district or town, through the legal aid organisation in the district, and the police station of the area concerned, telegraphically within eight to twelve hours after the arrest.
5. The person arrested must be made aware of this right as soon as they are put under arrest or detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person, which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. On request, the arrestee should be examined by a medical practitioner at the time of arrest and major and minor injuries, if any, must be recorded at that time. The inspection memo must be signed both by the arrestee and the police officer effecting the arrest, and a copy provided to the arrestee.
8. The arrestee should be medically examination every 48 hours by a doctor on the panel of approved doctors appointed by the Director of Health Services of the State concerned or the Union Territory.
9. Copies of all the documents including the memo of arrest should be sent to the Magistrate for his record.
10. The detainee may be permitted to meet their lawyers during interrogation, though the lawyers need not be present throughout the interrogation.
11. A police control room should be provided at all district and State headquarters. There, information regarding the arrest and the place of custody of the detainee must be communicated by the officer executing the arrest within 12 hours of the arrest. Such information should be displayed on a conspicuous notice board in the Control Room.

The national courts in India recognise customary international law to the extent that it is not in conflict with statutory law.³⁹⁸ The NHRCI reports that the national courts are not competent to exercise jurisdiction with respect to extra-territorial cases.

Government Policies and Practices

The Code of Criminal Procedure 1973 establishes minimum standards of interrogation. During induction training and other courses, police and disciplinary forces undergo specific training about minimum standards of interrogation and interrogation methods. Both the Indian Penal

³⁹⁸ See *Gramophone Company Ltd. v Pandey* (1948) SC.

Code and the Code of Criminal Procedure 1973 protect against torture and other forms of ill-treatment committed by non-state actors.

Activities of the National Human Rights Commission of India

Since its establishment in 1993 until January 2005, the NHRCI has received 3333 complaints relating to torture. Section 12(g) of the Protection of Human Rights Act 1993 requires the NHRCI to undertake and promote research in the field of human rights. The NHRCI has two ongoing studies which address torture, among other issues.

Action Aid India is conducting one study: *Poor People in Custody: Experience of Biases in the Criminal Justice System*. The objectives of the study are to ascertain the experiences of poor people during judicial or police custody; to determine whether courts decisions are being complied with; to explore the functioning of the legal aid system in select courts; to find out about visitation of the district judge to the prison; and to ascertain the functioning and benefits of fast track courts in prisons. The National Institute of Criminology and Forensic Science is researching for a report entitled *Rights of Women Prisoners in Indian Jails – A Sociological Study*. Its objectives are to ascertain the socio-economic background of women prisoners; examine the nature, type and extent of vocational training facilities available to them; the rights enjoyed by them in prisons and the role of prison officers in protecting those rights.

The NHRCI has introduced education modules on torture in its human rights training course for the police, paramilitary forces, Army and public servants. The NHRCI has organised training programs and workshops for judicial officers resulting in the publication of a handbook on human rights for judicial officers. The NHRCI has also developed training programs for the police and prison officials. Human Rights Cells have been established within the police headquarters of each State.

The NHRCI's Chairperson, Members and Special Rapporteurs visit prisons throughout India on a regular basis. Mr Chaman Lal, Special Rapporteur of the Commission and Chief Coordinator, Custodial Justice Cell, conducts frequent and detailed inspections of prisons at the district and central level. In addition to making a broad assessment of the living conditions,

state of sanitation, extent of medical cover, production in court, overcrowding of prisons, wage claims and the availability of recreational facilities, the Special Rapporteur has also dealt with specific problems of convicts and under-trials. The special needs of women prisoners and children have also been reviewed.

The Government has approached the NHRCI to contribute to the periodic reports under ICCPR and CRC. The NHRCI decided not to contribute in order to maintain its autonomy and independence. Nor has the NHRCI presented any shadow reports. In 1994-1995 the NHRCI raised the need for India to accede to CAT. A comprehensive memorandum prepared by the NHRCI and presented to the Prime Minister in April 1997 contributed to India's signing of CAT in 1997. The government has not yet ratified CAT. The NHRC recently developed a joint project with the British Council on *Human Rights Investigation and Interviewing Skills and Strengthening the Role of Human Rights Cells in State Police Headquarters to improve Custody Management*.

The NHRCI recommended s114(b) be included in the Indian Evidence Act 1872 so that injuries sustained by a person in police custody may be presumed to have been caused by a police officer. The NHRCI supported the recommendation of the Indian Law Commission that s197 of the Criminal Procedure Code be amended to remove the requirement of governmental sanction for the prosecution of a police officer when a prima facie case is established. The NHRCI also made recommendations in relation to the Prevention of Terrorism Act as they refer to the rights of detainees.

Indonesia

ACJ Recommendations

The ACJ recommends that the Indonesian National Commission on Human Rights (Komnas HAM) urges its Government to address the following issues:

- the need to sign and ratify the ICCPR, the ICESCR, the First Optional Protocol, the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions and the Rome Statute.
- the necessity for the definition of ‘torture’ in Article 1(4) of Legislation No. 39 of 1999 ‘Concerning Human Rights’ to be fully consistent with the definition in article 1(1) of CAT;
- the comprehensive recommendations made by the Committee against Torture in relation to Indonesia, including the establishment of a reliable independent complaints system, the proper investigation of allegations of torture, reducing the length of pre-trial detention, police reform, measures, human rights training of public officials and the rehabilitation of torture victims;
- reports of systematic torture by Indonesian military against detainees suspected of supporting the armed separatist Free Aceh Movement; and
- the comprehensive recommendations made by Human Rights Watch in relation to torture and also the position of domestic workers in Indonesia.

International Law

Indonesia is a party to the CAT³⁹⁹ and the CRC.⁴⁰⁰ Indonesia is not a party to the ICCPR, ICESCR, First Optional Protocol, OPCAT or the Refugee Convention. Indonesia is a party to

³⁹⁹ Indonesia ratified CAT on 28 October 1998.

⁴⁰⁰ Indonesia ratified the CRC on 5 September 1990.

the Geneva Conventions of 12 August 1949⁴⁰¹ but not their Protocols. Indonesia is not a party to the Rome Statute.

National Law

The Indonesian Constitution provides a non-derogable prohibition against torture:

Everyone has the right to be free from torture or inhuman or degrading treatment and has the right to seek asylum in another country.⁴⁰²

Legislation

Legislation No. 39 Concerning Human Rights has a number of provisions relevant to torture and other forms of ill-treatment. Article 1(4) defines torture:

All deliberate acts that cause deep pain and suffering, both physical or emotional, inflicted on an individual person to obtain information or knowledge from that person or from a third party, by punishing an individual for an act carried out or suspected to have been carried out by an individual or third party, or by threatening or coercing an individual or third party, or for reasons based on discriminative considerations, should this pain or suffering arise as a result of provocation by, with the approval of, or with the knowledge of any person or public official whatsoever.

The Act also provides:

The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever (Article 4)...

Everyone has the right to freedom from torture, or cruel, inhuman and degrading punishment or treatment (Article 33(1))...

⁴⁰¹ Indonesia acceded to the Geneva Conventions of 1949 on 30 September 1958.

⁴⁰² Constitution of Indonesia 1945, Article 28(g).

No one shall be subject to arbitrary arrest, detention, torture or exile (Article 34).

By statute, human rights treaties which have been ratified by Indonesia are legally binding domestically.⁴⁰³

The Penal Code of Indonesia contains a number of provisions relevant to considerations of torture and other forms of ill-treatment including: one which sets a four year penalty for any state official who in a criminal case “uses coercion, whether to force somebody to confess, or to persuade someone in order to give information”.⁴⁰⁴

Government Regulation No. 30 of 1980 on Discipline of Public Servants states that public servants shall not perform any activities that might be considered as or related to torture.

Article 50 of the Law of Criminal Procedure states that a suspect or an accused in detention should be investigated immediately, and aims to prevent authorities from committing torture during the investigation of a criminal suspect.⁴⁰⁵

Government Policies and Practices

In its initial report to the Committee against Torture, Indonesia commented on the responsibility of government agencies in relation to the prevention of torture:

The authorities competent to handle issues contained in the Convention are the Department of Justice and Human Rights, the Indonesian National Police, the Attorney-General, and the Department of Defence. However according to the Penal Code (KUHP) and the Law of Criminal Procedure (KUHAP), the most competent institutions are the Indonesian National Police, the Attorney-General, and the Department of Justice and Human Rights. Torture committed by the Indonesian Army (TNI) is handled by the Military Police, military

⁴⁰³ Article 7(2) of the Legislation No. 39 of 1999.

⁴⁰⁴ Article 422, Penal Code of Indonesia.

⁴⁰⁵ CAT/C/47/Add.3 (16 July 2001) at [70].

prosecutors and military judges in accordance with Law No. 31 of 1997 on the Military Court.⁴⁰⁶

In its observations on Indonesia's initial report, the Committee against Torture made a number of recommendations,⁴⁰⁷ including:

- Amend the penal legislation so that torture and other cruel, inhuman or degrading treatment or punishment are offences strictly prohibited under criminal law, in terms fully consistent with the definition contained in article 1 of the Convention. Adequate penalties, reflecting the seriousness of the crime, should be adopted.
- Establish an effective, reliable and independent complaint system to undertake prompt, impartial and effective investigations into allegations of ill treatment and torture by police and other officials and, where the findings so warrant, to prosecute and punish perpetrators, including senior officials.
- Take immediate measures to strengthen the independence, objectivity, effectiveness and public accountability of the National Commission on Human Rights (Komnas-HAM), and ensure that its reports to the Attorney General are published in a timely fashion.
- Ensure that crimes under international law such as torture and crimes against humanity committed in the past may be investigated and, where appropriate, prosecuted in Indonesian courts.
- Continue measures of police reform to strengthen the independence of the police from the military, as an independent civilian law enforcement agency.
- Reduce the length of pre-trial detention, ensure adequate protection for witnesses and victims of torture and exclude any statement made under torture from consideration in any proceedings, except against the torturer.
- Ensure that no person can be expelled, returned, or extradited to another State where there are substantial grounds for believing that that person would be in danger of being subjected to torture, in accordance with article 3 of CAT.

⁴⁰⁶ CAT/C/47/Add.3 (16 July 2001) at [56].

⁴⁰⁷ CAT/C/XXVII/Concl.3. Conclusions and Recommendations of the Committee against Torture: Indonesia, 22/11/2001 at [10].

- Ensure that human rights defenders are protected from harassments, threats, and other attacks.
- Reinforce human rights education to provide guidelines and training regarding, in particular, the prohibition of torture, for law-enforcement officials, judges, and medical personnel.
- Take immediate steps to address the urgent need for rehabilitation of the large number of victims of torture and ill-treatment in the country.
- Make the declarations provided for in articles 21 and 22 of CAT.
- Include, in its next periodic report, statistical data regarding torture and other forms of cruel, inhuman or degrading treatment or punishment, disaggregated by, *inter alia*, gender, ethnic group, geographical region, and type and location of detention. In addition, information should be provided regarding complaints and cases heard by domestic bodies, including the results of investigations made and the consequence for the victims in terms of redress and compensation.

Indonesia did not submit its second periodic report to the Committee against Torture.

Activities of the Komnas-HAM and NGOs

In May 2003, the Indonesian National Commission on Human Rights (Komnas HAM) released its *Cooperation Plan 2003-2008*, which is expected to strengthen its capacity to address the issue of torture and other forms of ill-treatment within Indonesia. Komnas HAM and the National Police signed an agreement on 10 June as to the handling of human rights abuse cases.⁴⁰⁸ The National Police Chief General Da'i Bachtiar said the agreement would keep police officers from committing abuse when undertaking their duties. Komnas HAM has provided training for the police regarding human rights cases.

In September 2004, Human Rights Watch (HRW) reported the systematic practice of torture by the Indonesian military against detainees suspected of supporting the armed separatist Free

⁴⁰⁸ Jakarta Post, 14 June 2005.

Aceh Movement.⁴⁰⁹ The report made a number of recommendations to Komnas HAM as well as the Indonesian Government with respect to treatment in detention, arbitrary arrest and detention, the right to a fair trial and accountability, including:⁴¹⁰

- permit unfettered access to independent monitors and the placement inside detention facilities of NGOs or Komnas HAM;
- communicate information of persons taken into custody promptly to relatives and legal counsel; and
- permit and encourage visits to detainees by legal counsel, medical personnel, and appropriately supervised family members.
- ensure that all arrests except those in *flagrante delicto* are carried out with properly issued warrants.
- Permit prompt access to defense attorneys. Permit them adequate time and facilities to prepare a defense.
- Prohibit prosecutors from seeking to admit evidence obtained through torture or other cruel, inhuman, or degrading treatment.
- Instruct prosecutors not to seek to admit into any legal proceeding evidence obtained through torture or other cruel, inhuman, or degrading treatment.
- Courts must enforce the requirement that two forms of evidence are necessary for a conviction; confessions alone should never be the basis for convictions.
- Put into place an effective legal aid system providing free and competent legal assistance to those who cannot afford legal representation.
- Invite the United Nations Special Rapporteur on Torture and the Special Rapporteur on the Independence of Judges and Lawyers to investigate and report on these allegations and make relevant recommendations.

⁴⁰⁹ Human Rights Watch, *Aceh at War: Torture, Ill-Treatment and Unfair Trials*, September 2004, Vol. 16, No. 11(C). Located at <<http://hrw.org/reports/2004/indonesia0904/>>

⁴¹⁰ Human Rights Watch, *Aceh at War: Torture, Ill-Treatment and Unfair Trials*, September 2004, Vol. 16, No. 11(C) at 50-52.

- Military and police officials should launch their own investigations and discipline personnel found to have committed or been complicit in the torture or other mistreatment of detainees.
- Make all findings of official investigations public.

HRW asked the Indonesian judiciary to refuse to accept evidence procured as a result of torture.⁴¹¹ HRW asked the international community: for access to Aceh by independent observers; for pressure on Indonesia to implement the Committee Against Torture and the recommendations of the Special Rapporteur on the Independence of Judges and Lawyer; and for donor assistance for the reform of the criminal justice process.⁴¹²

In June 2005, HRW published a report outlining complaints of abuse by child domestic workers in Indonesia.⁴¹³ HRW reported that domestic workers are extremely vulnerable to sexual assault and abuse; more than half of the girls interviewed for the report suffered some form of sexual, physical, or psychological abuse.⁴¹⁴ The girls work under poor conditions: long hours, inadequate sleeping quarters and insufficient provision of food. The report did not make any recommendations directly to Komnas HAM but did contain recommendations to the Indonesian Government including:⁴¹⁵

- Amend the Ministerial Decree on Types of Work that are Hazardous to the Health, Safety or Moral of Children to prohibit all employers from employing children, aged fifteen to eighteen, overtime, and to prohibit any work which exposes children to physical, psychological or sexual abuse, or where the child works long hours, and is unreasonably

⁴¹¹ Human Rights Watch, *Aceh at War: Torture, Ill-Treatment and Unfair Trials*, September 2004, Vol. 16, No. 11(C) at 50-52.

⁴¹² Human Rights Watch, *Aceh at War: Torture, Ill-Treatment and Unfair Trials*, September 2004, Vol. 16, No. 11(C) at 52.

⁴¹³ Human Rights Watch, *Always on Call: Abuse and Exploitation of Child Domestic Workers in Indonesia*, June 2005, Vol. 17, No. 7(C). Located at <http://hrw.org/reports/2005/indonesia0605/>.

⁴¹⁴ Human Rights Watch, *Always on Call: Abuse and Exploitation of Child Domestic Workers in Indonesia*, June 2005, Vol. 17, No. 7(C) at 36.

⁴¹⁵ Human Rights Watch, *Always on Call: Abuse and Exploitation of Child Domestic Workers in Indonesia*, June 2005, Vol. 17, No. 7(C) at 64 – 72.

confined to the premises of the employer, as hazardous work, and therefore a worst form of child labour.

- Gather and publish data on prosecutions for abuse and exploitation of domestic workers, disaggregated by sex and age of the worker.
- Work to encourage local governments to implement the Domestic Violence law and the Child Protection Act and to use the law to prosecute those who abuse domestic workers and who economically and sexually exploit children, including child domestic workers.
- Enact regulations to monitor labour supplier agencies and workplace conditions.
- Create toll-free telephone hotlines to ensure reporting of abuses and enact regulations to ensure rehabilitation of and provide redress to these workers.
- Implement existing laws to protect children from abuse and exploitation.
- Disseminate information on the rights of domestic workers, and obligations of employers, domestic worker supplier agents, and informal recruiters.

Jordan

ACJ Recommendations

The ACJ recommends that the Jordan National Centre for Human Rights (JNCHR) urges its Government to address the following issues:

- the need for Jordan to become a party to the First Optional Protocol, the OPCAT and the Refugee Convention.
- The need to address the recommendations of the Committee against Torture and the HRC;
- the lack of a definition of torture in Jordanian law;
- the failure to subject all allegations of torture to an independent and impartial investigations;
- the sentencing to death or imprisonment of individuals on the basis of confessions allegedly extracted after torture;
- the continuing application of corporal punishment;
- the expulsion by Jordan of individuals to countries in which they may face torture or other ill-treatment;
- the lack of education and training of police and other disciplinary services in relation to the prohibition on torture and ill-treatment;
- the need to eliminate incommunicado detention; and
- the practice of ‘honour’ crimes

International Law

Jordan is a party to the ICCPR,⁴¹⁶ ICESCR,⁴¹⁷ CAT⁴¹⁸ and the CRC.⁴¹⁹ Jordan is not a party to the First Optional Protocol, OPCAT or the Refugee Convention. Jordan is a party to the

⁴¹⁶ Jordan ratified the ICCPR on 28 May 1975.

⁴¹⁷ Jordan ratified the ICESCR on 28 May 1975.

⁴¹⁸ Jordan acceded to CAT on 13 November 1991.

⁴¹⁹ Jordan ratified the CRC on 24 May 1991.

Geneva Conventions of 12 August 1949⁴²⁰ and their Protocols.⁴²¹ Jordan is a party to the Rome Statute.⁴²²

National Law

Jordan's constitution provides for equality before the law;⁴²³ personal freedom;⁴²⁴ freedom from arbitrary detention;⁴²⁵ and freedom of expression.⁴²⁶

Reports of UN treaty bodies

Jordan submitted its initial report to the Committee against Torture on 3 March 1995.⁴²⁷ The Committee welcomed the lifting of the state of emergency and the abolition of martial law in April 1992, the release of political prisoners and the institution of the right to appeal fully against awards and decisions of the State Security Court in questions of both fact and law. The Committee expressed concern about the following issues, among others:⁴²⁸

- the Jordanian Constitution does not contain specific provisions as to the relationship between international conventions and domestic laws. Accordingly, there is a need to incorporate CAT in the legal system of Jordan to ensure its correct and prompt application;
- the definition of torture is not incorporated into Jordanian legislation. Jordanian criminal law did not cover all cases of torture and ill treatment, as provided for in the CAT;
- a number of allegations of torture have been made since Jordan acceded to the CAT. The allegations were rarely subjected to independent and impartial investigations. The Committee was further concerned that during 1993 and 1994 political detainees were

⁴²⁰ Jordan acceded to the Geneva Conventions of 1949 on 29 May 1951.

⁴²¹ Jordan ratified the Additional Protocols on 1 May 1979.

⁴²² Jordan ratified the Rome Statute on 11 April 2002.

⁴²³ Constitution of the Hashemite Kingdom of Jordan, 1 January 1952 (Constitution of Jordan), Article 6.

⁴²⁴ Constitution of Jordan, Article 7.

⁴²⁵ Constitution of Jordan, Article 8.

⁴²⁶ Constitution of Jordan, Article 15.

⁴²⁷ CAT/C/16/Add.5, 3 March 1995

⁴²⁸ A/50/44 at [159]-[182].

sentenced to death or imprisonment in trials before the State Security Court on the basis of confessions allegedly extracted after torture;

- armed forces officers are granted the capacity of public prosecutors, they have the capacity of detaining suspects incommunicado, whether military persons or civilians, until the end of their interrogation for periods of up to six months, and detainees are deprived of access to judges, lawyers or doctors;
- continuing application of corporal punishment, which could constitute in itself a violation in terms of the CAT;
- there are allegations that individuals have been expelled from Jordan to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture;
- there does not seem to be in Jordan any comprehensive programme of education for members of the police and security forces, dealing with Jordan's obligations under the CAT. Similarly, no specific educational programmes for medical personnel appears to be in place. These programmes would be useful, in particular given the fact that so many refugees from other countries are located in Jordan.

Jordan submitted its third periodic report to the HRC on 18 January 1993.⁴²⁹ The HRC made a number of recommendations that reflected the concerns raised by the Committee against Torture.⁴³⁰ However, the HRC also recommended that:

- the Government of Jordan consider becoming a party to the First Optional Protocol to the ICCPR; and
- Jordan envisage measures towards the abolition of the death penalty, including giving consideration to accession to the Second Optional Protocol.

The UN Special Rapporteur on Torture has raised concerns about two specific possible torture cases in Jordan.⁴³¹

⁴²⁹ CCPR/C/76/Add.1, 18 January 1993.

⁴³⁰ CCPR/C/79/Add.35; A/49/40 at [226]-[244], 10 August 1994.

Activities and Observations of NGOs

In *Jordan: An Absence of Safeguards*⁴³² Amnesty International (AI) reported that the Jordanian government had dismantled a system which had allowed large-scale arrest and detention of prisoners of conscience, widespread torture, and unfair trials of political detainees.⁴³³ AI noted continued reports of the use of torture or ill-treatment both of political and of common law suspects. Such torture was facilitated, according to AI, by pre-trial incommunicado detention and a lack of the safeguards which should ensure the thorough and prompt investigation of allegations of torture and compensation for those who have suffered such treatment at the hands of the security forces.⁴³⁴ AI reports on alleged incidents of torture against individuals, prepares reports on legal and political developments and issues urgent actions in relation to the practice of torture.⁴³⁵ In its 2002 report, AI reiterated its concern about incommunicado detention in Jordan.⁴³⁶

HRW also regularly monitors political and legal developments in Jordan which impact on human rights protections, including the practice of torture. HRW recently released a report on the practice of honour killings in Jordan – *Honoring the Killers: Justice Denied for ‘Honor’ Crimes in Jordan*.⁴³⁷ HRW emphasised the discriminatory assumptions and societal beliefs that underpin the practice of ‘honour’ crimes. HRW believes that police rarely investigate ‘honour’ crimes, do not act to deter such crimes, and the perpetrators are typically considered vindicated men. Police routinely force women to undergo painful and humiliating virginity examinations at the request of their families in order to determine whether they have had sexual relations with a man. HRW reports that, although there is no legislation recognising this

⁴³¹ *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur, Theo van Boven*, E/CN.4/2004/56/Add.1, 23 March 2004.

⁴³² *Jordan: An Absence of Safeguards*, 1998, AI Index: MSW 16/11/98. Available at <http://web.amnesty.org/library/eng-jor/reports>

⁴³³ *Jordan: An Absence of Safeguards*, AI Index: MSW 16/11/98 at 1.

⁴³⁴ *Jordan: An Absence of Safeguards*, AI Index: MDE 16/011/1998 at 2.

⁴³⁵ Please refer to the Amnesty International website at < <http://web.amnesty.org/library/eng-jor/index>>

⁴³⁶ *Jordan: Security measures violate human rights*, AI Index: MDE 16/001/2002. Available at <http://web.amnesty.org/library/eng-jor/reports>

⁴³⁷ Human Rights Watch, *Honoring the Killers: Justice Denied for ‘Honor’ Crimes in Jordan*, April 2004, Vol 16, No. 1 (E). Available at < <http://www.hrw.org/reports/2004/jordan0404/>>

cultural practice, it is not dealt with as severely by authorities, particularly the police, as other crimes.

Malaysia

ACJ Recommendations

The ACJ recommends that the Human Rights Commission of Malaysia (SUHAKAM) urge its Government to address the following issues:

- the need to become a party to the ICCPR, the First Optional Protocol, the ICESCR, the CAT, the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions, and the Rome Statute.
- the circumstances in which derogations to fundamental rights are permitted by the Constitution extend well beyond a situation of public emergency which threatens the life of the nation as required by article 4 of the ICCPR;
- the provisions of the Internal Security Act extend the period of police investigation for 60 days, denying the detainee the right to be released on bail and permitting a Ministerial order for detention at any time after arrest without any possibility of judicial review and merely on suspicion that a person may commit an offence;
- the provisions of the Internal Security Act extend the period during which a person may be detained to two years;
- the Internal Security (Detained Persons) Rules 1960 restrict a person's rights to be visited by and communicate with family;
- the apparent failure to provide a legislative definition of torture;
- the reluctance of Malaysian courts to recognise customary international law;
- reports of human rights violations by law enforcement officers and the abuse of powers by government agencies;
- the continued practice of caning in schools; and
- the need to ensure the implementation of the recommendations of the Royal Commission on the Malaysian police.

International Law

Malaysia is a party to the CRC.⁴³⁸ Malaysia is not a party to the ICCPR, First Optional Protocol, ICESCR, CAT, OPCAT or the Refugee Convention. Malaysia is a party to the Geneva Conventions of 12 August 1949,⁴³⁹ but not to their Protocols. Malaysia is not a party to the Rome Statute.

The ACJ notes with concern that, although SUHAKAM in its very first annual report for the year 1999 and thereafter in every subsequent report HAS recommended that Malaysia sign these International Conventions, these Conventions remain unsigned. Governmental omission to focus on the need to uphold international norms inevitably results in a deterioration of domestic standards. The ACJ is gratified that Malaysia set up a Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police and hopes that all relevant Malaysian authorities take serious note of the Report of the Royal Commission ("the Report"). To take one example, at paragraph 1.3 at page 302 of the Report it is recorded that from 2001 to 2004 only 6 inquests were held into the 80 custodial deaths which occurred in the same period. Full details of these deaths are contained in Appendix 3C of the Report at page 72. Deaths in custody are a matter of mandatory statutory record. Injuries which have been inflicted during custody, however, may not be recorded with the same diligence by persons in authority and at page 127 the Royal Commissioners stated that, "the sheer numbers of complaints does warrant concern."

As a general observation it would be fair to say that torture during official or police custody usually occurs with a view to extorting information or a confession which could be used as evidence in support of a prosecution or to justify further detention of a suspect.

Whilst three or four years Governmental consideration on whether it should ratify a particular Convention may not be unusual, in this case the ACJ agrees with the comments made at page 237 of the Report that the amendment of Section 113 of the Criminal Procedure Code should

⁴³⁸ Malaysia acceded to the CRC on 17 February 1995.

result in an immediate removal of the incentive to torture suspects in order to obtain "evidence". Since a draft amendment is supplied in Appendix 8B at page 250 of the Report, this recommendation can be implemented immediately.

The ACJ also wishes to place emphasis on Article 53 of the Vienna Convention on the Law of Treaties which covers peremptory norms or *jus cogens* which arise when a norm is accepted and recognised by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Customary international law and peremptory norms/*jus cogens* are binding on all States regardless of whether they have ratified any of the relevant treaties, including the Conventions we have listed above.

National Law

The Malaysian Constitution provides for the right to life and personal liberty;⁴⁴⁰ freedom from slavery;⁴⁴¹ prohibition of forced labour;⁴⁴² freedom of speech and expression;⁴⁴³ and the right to assemble peaceably and without arms.⁴⁴⁴ These rights are subject to derogation provisions.⁴⁴⁵

Article 150 states that a Proclamation of Emergency may be issued if the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened.⁴⁴⁶ Any ordinance or law promulgated in accordance with this Article shall not be invalid on the ground of inconsistency with the Constitution.⁴⁴⁷

⁴³⁹ Malaysia acceded to the Geneva Conventions of 1949 on 24 August 1962.

⁴⁴⁰ Constitution of Malaysia 1957, art 5.

⁴⁴¹ Constitution of Malaysia 1957, art 6(1).

⁴⁴² Constitution of Malaysia 1957, art 6(2).

⁴⁴³ Constitution of Malaysia 1957, art 10(1).

⁴⁴⁴ Constitution of Malaysia 1957, art 10(1)(b).

⁴⁴⁵ Constitution of Malaysia 1957, art 10(2) and Part XI.

⁴⁴⁶ Constitution of Malaysia 1957, art 150(1).

⁴⁴⁷ Constitution of Malaysia 1957, art 150(6). The Constitution also imposes particular procedural requirements in the case of a law or ordinance which provides for preventive detention (see art 151).

Legislation

Section 73 of the Internal Security Act 1960 (the ISA) provides police with a power to detain suspected persons. Section 8 of the ISA empowers the Minister for Home Affairs to detain a person for up to two years if this is necessary to prevent him from acting in any manner prejudicial to the security of Malaysia or to the maintenance of essential services therein or the economic life therein. This detention can be extended for an indefinite number of further periods of up to two years at a time.⁴⁴⁸

Rules 71 and 72 of the Internal Security (Detained Persons) Rules 1960 state that detained persons can be confined to a ‘punishment cell’ and deprived of certain privileges for both aggravated (up to seven days) and minor offences (up to five days). Rule 86 provides for the detention of persons in a ‘special detention camp:

- to secure the safe custody of such person;
- for the maintenance of good order or discipline in a place of detention;
- where such person has repeatedly offended whilst in detention; and
- where it is deemed undesirable that such person should continue to associate with other persons held in places of detention other than special detention camps.

Section 28 of the Criminal Procedure Code (Revised 1999) states that a person arrested without a warrant shall be brought before the Magistrate’s Court without unnecessary delay and shall only be detained for a reasonable period. Section 42 states that a person arrested pursuant to a warrant shall be brought before a Court without unnecessary delay. Section 112 imposes requirements in relation to the police questioning of witnesses:

- Statements of persons examined by the police are to be reduced to writing;
- A person examined by the police must answer all questions that relate to the particular case, but may refuse to answer self-incriminating questions;

⁴⁴⁸ Internal Security Act 1960, s 8B.

- A statement made by a person will be signed or affixed with the thumb print of that person, after the statement has been read to that person in the appropriate language;

The Code prohibits the admission into evidence of any statement of a person charged that “appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority”.⁴⁴⁹ A statement made by a person *after* having been arrested will be inadmissible in the absence of a satisfactory ‘right to silence’ caution by police.⁴⁵⁰ Although the Penal Code does not contain a specific torture provision offence, it does contain provisions criminalising voluntarily causing grievous hurt.⁴⁵¹

Case Law

There is a general trend of non-recognition of obligations arising from United Nations Declarations and Resolutions. In *Merdeka University Berhad v Government of Malaysia*,⁴⁵² in the High Court of Malaysia, Justice Eusoffe Abdoolcader said that the UDHR:

...is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.⁴⁵³

This decision remained largely unchallenged until the introduction of the Human Rights Commission of Malaysia Act 1999. In *Mohamed Ezam Mohamed Noor v Ketua Polis Negara & Ors*,⁴⁵⁴ Siti Norma Yaakob FCJ considered the applicability of the UDHR, the UN Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment. Relying on *Merdeka University*, Siti Norma Yaakob FCJ rejected the suggestion of any binding obligations upon Malaysia arising from the UDHR, notwithstanding the fact that the Act specifically calls for “regard to

⁴⁴⁹ Criminal Procedure Code (Revised 1999), s 113(1)(a)(i).

⁴⁵⁰ Criminal Procedure Code (Revised 1999), s 113(1)(a)(ii).

⁴⁵¹ See Penal Code, ss 322, 326, 329 and 331.

⁴⁵² [1981] 1 C.L.H. 175.

⁴⁵³ [1981] 1 C.L.H. 175 at 209.

be had to the Universal Declaration of Human Rights” to the extent of compatibility with the Federal Constitution.⁴⁵⁵

These decisions appear to have been made without taking into account Malaysia's obligations to implement the *jus cogens*. When this issue is reconsidered it is hoped that the Malaysia court will address its mind to the full import of section 4(4) of the Human Rights Commission of Malaysia Act 1999. Amongst the Royal Commissioners, the Chairman Tun Dzaidin, and Tun Salleh Abbas were former Chief Justices of Malaysia and one other member Datin Paduka Zaleha bte Zahari is currently a distinguished Judge on the Malaysian Court of Appeal. At page 121 of the Report the Royal Commissioners said this:-

"Besides the Federal Constitution, policing in Malaysia should have regard for the provisions of international human rights instruments and mechanisms relevant to law enforcement to the extent they are not inconsistent with the Federal Constitution. These instruments and mechanisms include the following:-"

- The Report then went on to list inter alia the following instruments and mechanisms- the Universal Declaration of Human Rights 1948;
- The International Covenant of Civil and Political Rights 1966; the International Covenant for Economic Social and Cultural Rights 1966;
- The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment 1988; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985; the United Nations Standard Minimum Rules for the Treatment of Prisoners and the recommendations of the United Nations Special Rapporteur on Torture.

⁴⁵⁴ [2002] 4 C.L.J 309.

⁴⁵⁵ *Human Rights Commission of Malaysia Act 1999* (Act 597), s 4(4).

It would not look well on any Malaysian authority to contend that these instruments and mechanisms were "merely a statement of principles devoid of any obligatory character and is not part of our municipal law".

Section 4 of the Malaysian Penal Code provides for extra-territorial jurisdiction in respect of offences against the State. In *Public Prosecutor v Rajappan Chinna Kounder*,⁴⁵⁶ Lord President of the Supreme Court, Salleh Abas, explained the ambit of extra-territorial jurisdiction within the Malaysian context:

Our Penal Code does not make all offences under the Code to be extra-territorial. It only makes offences against the State to be extraterritorial; nor does our CPC provide for the venue of the trial of persons who have committed acts abroad which would have been offences, if committed in Malaysia.⁴⁵⁷

In addition, s 3 of the Geneva Conventions Act 1962 (revised 1993) provides for universal jurisdiction in respect of grave breaches of the 1949 Geneva Conventions.

Government Policies and Practices

As indicated above, in 2004 the Malaysian Government established a Royal Commission on the Malaysian Police. The Commission inquired into various allegations against the police, including allegations of torture and ill-treatment of detainees. The Royal Commission recently released a detailed report with 125 recommendations and, in response, the Prime Minister announced the appointment of a task force to implement these recommendations.

Activities of the Human Rights Commission of Malaysia and NGOs

The Human Rights Commission of Malaysia (SUHAKAM) reports that in 2004 the majority of complaints it received and investigated related to human rights violations committed by law enforcement officers, abuse of powers by government agencies, and matters relating to land

⁴⁵⁶ [1986] CLJ (Rep) 217.

⁴⁵⁷ [1986] CLJ (Rep) 217 at 222-223.

disputes. SUHAKAM's Complaints and Inquiries Working Group (CIWG) is responsible for complaint handling and investigations. CIWG's activities include contacting parties against whom a complaint has been made; holding meetings with law enforcement agencies and related bodies in relation to particular issues and incidents; visiting detention centres; issuing press statements and holding workshops and forums.

SUHAKAM has not conducted any awareness or education campaigns specifically relating to torture. However, it has organised workshops with government departments and law enforcement agencies to highlight particular problems relating to their practices and improved awareness of human rights issues while performing their duties.

In the period of 9 March 2004 to 25 August 2004 SUHAKAM made twenty-one visits to immigration detention depots, police lock-ups and prisons throughout Malaysia. The main purpose of these visits is to monitor the conditions of detention and to assess the level of compliance with various rules and regulations. In 2004 SUHAKAM reported that the Malaysian Government introduced administrative reforms designed to streamline the management of detention facilities.

In its 2003 Annual Report, SUHAKAM raised concerns about the excessive number of remand inmates in Malaysian prisons and the extended period of remand for some of these prisoners. SUHAKAM identified a number of reasons for the prolonged detention of prison inmates.⁴⁵⁸ In some cases, detainees were unable to obtain release from prison due to bail being set by the courts at too high a level for families of inmates. There is delay in the disposal of cases, sometimes caused by unavailability of judges and requests for postponement of trials by prosecution and defence lawyers, and delay in decision-making by the Pardons Board about cases involving the death penalty.

⁴⁵⁸ Human Rights Commission of Malaysia, Annual Report 2003 at 44-45.

SUHAKAM published a comprehensive review of the ISA in 2003.⁴⁵⁹ Its report recommended repealing the ISA and replacing it with national security legislation which conforms with human rights principles.⁴⁶⁰ SUHAKAM also made a number of interim recommendations, including:

- Reductions in and increased restrictions upon periods of detention;⁴⁶¹
- Improvements in judicial review of detention and other formal mechanisms of oversight,⁴⁶² including disposing of *habeas corpus* applications more expeditiously and providing for the presence of detainees before the Court during *habeas corpus* proceedings.
- The power to arrest and detain under ss 8 and 73 to be exercised with utmost care and in good faith, and with respect to s 8, to be used as a last resort;⁴⁶³
- Persons arrested for offences falling under normal criminal law to be detained in accordance with the Criminal Procedure Code rather than the ISA;⁴⁶⁴
- Improved notification of families of a family-member's detention and improved access to detainees by family members;⁴⁶⁵
- Allow SUHAKAM to make surprise visits to detention centres holding detainees under s 73;⁴⁶⁶
- Detainees arrested under s 73 to be produced before a magistrate within 24 hours of arrest in accordance with Article 5 of the Constitution and to be provided access to counsel;⁴⁶⁷

⁴⁵⁹ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003).

⁴⁶⁰ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003), pX.

⁴⁶¹ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) ppXII-XV, see para 5.2.1(a)(ii), (iii), (vii) and (b)(i), (vii).

⁴⁶² Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XII-XIX, see [5.2.1(a)(iv)], [5.2.1(a)(vi)], [5.2.1(a)(ix)] and [5.2.2 (c)].

⁴⁶³ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XV, see [5.2.2(a)(i)] and XVII, [5.2.2(b)(i)] and XVI [5.2.2(a)(iii)].

⁴⁶⁴ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XVII, [5.2.2(b)(ii)].

⁴⁶⁵ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XVIII, [5.2.2(b)(viii)] and XVI [5.2.2(a)(v)].

⁴⁶⁶ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XVIII, [5.2.2(b)(vii)].

⁴⁶⁷ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XVIII, [5.2.2(b)(ix)].

- Training and education for law enforcement personnel to improve awareness of their obligations to refrain from exercising any form of torture or cruel, inhuman or degrading treatment or punishment of detainees;⁴⁶⁸

SUHAKAM is currently reviewing the Dangerous Drugs (Special Preventive Measures) Act 1985 (the DSPMA) and the Prevention of Crime Act 1959 (the PCA) to ascertain their compatibility with international human rights standards and practices. Under the DSPMA, the Minister may detain a person without trial if that person has been or is associated with the trafficking of dangerous drugs and the detention is necessary in the interest of public order. Under the PCA, a police officer can arrest without warrant any person if he has reason to believe that grounds exist which would justify the holding of an inquiry into the case of the person under the Act.

SUARAM is a non-governmental organisation, active in documenting the practice of torture and other forms of ill-treatment in Malaysia. SUARAM's monitoring and documentation work and its advocacy has focussed on the ISA. It has also conducted campaigns against police brutality.⁴⁶⁹ Internationally, both the HRW and Amnesty International have highlighted the occurrence of torture and other forms of ill-treatment.

⁴⁶⁸ Human Rights Commission of Malaysia, *Review of the Internal Security Act 1960* (2003) XIX, [5.2.2(b)(xii)] and [5.2.2(b)(xiii)].

⁴⁶⁹ Further information is available from SUARAM's website: <<http://www.suaram.net>>

Mongolia

ACJ Recommendations

The ACJ recommends that the National Human Rights Commission of Mongolia (NHRCM) urges its Government to address the following issues:

- the need for Mongolia to become a party to the OPCAT and the Refugee Convention;
- the 14 day detention period under the *Criminal Procedure Codes* for a suspect;
- the need to legislate the inadmissibility of confessions obtained through torture;
- the need to ensure domestic legislation conforms with international standards with regard to torture and detention;
- the need to continue the training programmes instituted by the Mongolian NHRI;
- the abuses recorded by the NHRI of Mongolia in relation to interrogation and detention;
- the failure to provide adequate conditions of detention in detention centres and prisons; and
- the need to implement the recommendations which will arise from the current public inquiry on torture.

International Law

Mongolia is a party to the ICCPR,⁴⁷⁰ First Optional Protocol,⁴⁷¹ ICESCR,⁴⁷² CAT⁴⁷³ and CRC.⁴⁷⁴ Mongolia is not a party to OPCAT or the Refugee Convention. Mongolia is a party to the Geneva Conventions of 12 August 1949⁴⁷⁵ and their Protocols.⁴⁷⁶ Mongolia is also a party to the Rome Statute.⁴⁷⁷

⁴⁷⁰ Mongolia ratified the ICCPR on 18 November 1974.

⁴⁷¹ Mongolia acceded to the First Optional Protocol on 16 July 1991.

⁴⁷² Mongolia ratified the ICESCR on 3 January 1976.

⁴⁷³ Mongolia acceded to CAT on 24 January 2002.

⁴⁷⁴ Mongolia ratified the CRC on 6 July 1990.

⁴⁷⁵ Mongolia acceded to the Geneva Conventions of 1949 on 20 December 1958.

⁴⁷⁶ Mongolia ratified Additional Protocols I and II of 8 June 1977 on 6 December 1995.

⁴⁷⁷ Mongolia ratified the Rome Statute on 11 April 2002.

National Law

Article 10 of the Constitution of Mongolia 1992 states:

- (1) Mongolia adheres to the universally recognized norms and principles of international law and pursues a peaceful foreign policy.
- (2) Mongolia fulfils in good faith its obligations under international treaties to which it is a Party.
- (3) The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.
- (4) Mongolia may not abide by any international treaty or other instruments incompatible with its Constitution.

Article 16(13) of the Constitution states:

No one may be searched, arrested, detained, persecuted, or restricted of liberty save in accordance with procedures and on grounds determined by law. No one may be subjected to torture, inhuman, cruel, or degrading treatment. Where a person is arrested his or her family and counsel shall be notified within a period of time established by law of the reasons for the arrest. Privacy of citizens, their families, correspondence, and homes are protected by law.

Article 19(2) of the Constitution states:

In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws shall be subject to limitation only by a law. Such a law shall not affect the right to life, the freedom of thought, conscience and religion, as well as the right not to be subjected to torture, inhuman and cruel treatment.

Legislation

Article 96 of the Criminal Code of Mongolia 2002 prohibits the intentional infliction of a severe bodily injury:

- (1) Intentional infliction of a severe injury that is, of a life-threatening injury or one which has entailed the loss of sight, hearing or any organ, or the loss by an organ of its functions, a

mental illness or another detriment to health which has entailed or which has been expressed in irreversible disfiguration of the face or interruption of pregnancy, or which has caused a permanent loss of the working ability shall be punishable by imprisonment for a period of more than 5 to 7 years.

Article 96(2) of the Code states that the same crime committed by order, in an especially brutal way, by humiliating or battering the victim, or in connection with the performance by the victim of his/her official or public duties, shall be punishable by imprisonment for a term of more than seven to ten years.

Article 98 of the Code relates to the intentional infliction of a less severe bodily injury:

- (1) Intentional infliction of a less severe bodily injury which has caused a long-term detriment of health or a loss of the working ability for not less than one third shall be punishable by 251 to 450 hours of forced labour or imprisonment for a term of up to 3 years.
- (2) The same crime committed repeatedly, in a group, by battering the victim or by a recidivist shall be punishable by incarceration for a period of more than 3 to 6 months, or imprisonment for a term of more than 3 to 5 years.

Article 100 of the Code states the following in relation to torment:

- (1) Systematic battery or other actions having the nature of torment if they have not entailed the consequences specified in Articles 96 and 98 of this Code shall be punishable by incarceration for a period of more than 3 to 6 months or by imprisonment for a term of up to 2 years.

Remedies

Article 46 of the Code provides for a range of remedies including fines, deprivation of the right to hold specified positions and engage in specified business, confiscation of property, forced labour, incarceration, imprisonment, and the death penalty.

Government Policies and Practices

Article 251 of the Code provides:

251.1 Forcing of testimony by an inquirer or investigator by threat, violence, torture, humiliation, deception or other illegal methods shall be punishable by imprisonment for a term of up to 5 years with or without deprivation of the right to hold specified positions or engage in specified business for a term of up to 3 years.

251.2 The same crime if it has entailed a less serious or severe bodily injury or has caused damage in a large amount shall be punishable by imprisonment for a term of more than 5 to 10 years with or without deprivation of the right to hold specified positions or engage in specified business for a term of up to 5 years.

In its 2004 Annual Report, however, the National Human Rights Commission of Mongolia (the NHRC) criticised this provision:

in the disposition of article 251 (forcing affidavit) the concept of ‘torture’ is not encompassed at all. Furthermore the lawmakers had failed to include in the Criminal Code the concept of the article 4 of CAT declaring corrupted prosecution as a crime of extraordinary violence and the responsibility for such crime is left out in article 251 of the Criminal Code.⁴⁷⁸

Article 10(4) of the Criminal Procedure Law of Mongolia 2002 prohibits forced confessions. However, the legislation does not proscribe the use of evidence obtained by torture or other forms of ill-treatment.⁴⁷⁹ The NHRC has observed:

In the process of criminal investigation and prosecution, human rights abuse is permanent and it is the most general practice so far. Violating of human rights commencing at the very start of the case compiling and all through the prosecution process is never abandoned. Suppressing mentally, exercising physical and psychological suffering from the part of officials, then putting the suspect with prisoners for the latter to force out the necessary confessing, changing the cells for everyone to abuse the suspect is the classic routine.⁴⁸⁰

⁴⁷⁸ National Human Rights Commission of Mongolia, *Annual Report 2004* at [3.1.1.1].

⁴⁷⁹ National Human Rights Commission of Mongolia, *Annual Report 2004* at [3.1.1.1].

⁴⁸⁰ National Human Rights Commission of Mongolia, *Annual Report 2004* at [3.1.1.1].

Activities of the National Human Rights Commission of Mongolia

Since it commenced operations in early 2001 the NHRC has investigated approximately ten cases which have included complaints of torture. The NHRC investigated a complaint relating to the Court Decision Enforcement Office of Mongolia (CDEOM)'s 0429-detention centre's tuberculosis hospital. The complainant claimed that prisoners were oppressed, insulted, beaten and tortured by the officers and servants of that detention centre. At the conclusion of the investigation a 'results meeting' was held. The NHRC adopted the following measures:

- reported to related individuals about the use of torture in the detention centre;
- informed the relevant parties of the prisoners' opinions and comments; and
- sent a recommendation letter to the CDEOM demanding the management to separate inmates suffering from TB from the other detainees.

The NHRC and the General Department of Police have conducted several awareness and education campaigns which address the issue of torture. These campaigns have included:

- Training for the officers of the Police Academy (50 people);
- Training for district investigation officers, incident registrars and senior inspectors on public order (200 people);
- Training for the police and other legislative institutions' officers in 10 provinces (with duplicate records) during "Human Rights Open Days" (200); and
- Training for the capital, district, and province's judges who issue permission for detention (45 people).

The NHRC reports that it has conducted two investigations to monitor and assess the conditions of detention centres. Generally, the NHRC has found that detention premises are in an unacceptable condition. There has been no attempt to improve conditions.

The NHRC has not been approached by the Mongolian Government to contribute to its periodic reports to the relevant treaty body committees. Though the founding legislation does not specify how the NHRC should participate in the treaty reporting process, the NHRC reports that the present Commissioners have a firm position that the institution should only comment on the periodic report prepared by the Government.

The NHRC reports that the Criminal Procedure Law of Mongolia specifies circumstances that may constitute torture. However, internal laws and policies are inferior in comparison to international standards prohibiting torture. The NHRC has submitted proposals for amendment of the Criminal Procedure Law that include: revision of time limits for detention, inclusion of the term 'torture' in the legislation, changes in criminal sanctions on specific types of crime and the reintroduction of the parole system. In 2005 the NHRC launched a public inquiry on 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in order to bring about policy change relating to the prevention and combating of torture. One of the expected outcomes of the inquiry is the development and submission of amendments to existing criminal legislation.

Nepal*

ACJ Recommendations

The ACJ recommends that the National Human Rights Commission of Nepal (NHRCP) urges its Government to address the following issues:

- the need to become a party to the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions and the Rome Statute.
- the narrow definition of torture in both the Constitution and the Torture Compensation Act, including the failure to define torture as a criminal offence;
- the absence of any provision for the rehabilitation of victims of torture;
- the absence of any witness protection provisions;
- inadequate accountability provisions and ineffective punishment provisions;
- the absence of any capacity to conduct impartial and independent investigation of cases of torture;
- the time-consuming process that must be undertaken in order for a detainee to receive a medical examination under the Torture Compensation Act.

International Law

Nepal is a party to the ICCPR,⁴⁸¹ First Optional Protocol,⁴⁸² CAT,⁴⁸³ and the CRC.⁴⁸⁴ Nepal is not a party to the OPCAT or the Refugee Convention. Nepal is a party to the Geneva

* The National Human Rights Commission of Nepal provided some information for this report. However it did not submit a response to the questionnaire on torture prepared by the Secretariat. The information contained in this section is derived from UN and NGO documentation and previous Background Papers.

⁴⁸¹ Nepal acceded to the ICCPR on 14 May 1991.

⁴⁸² Nepal acceded to the First Optional Protocol on 14 August 1991.

⁴⁸³ Nepal acceded to the CAT on 14 May 1991.

⁴⁸⁴ Nepal ratified the CRC on 14 September 1990.

Conventions of 12 August 1949⁴⁸⁵ but not their Protocols. Nepal is not a party to the Rome Statute.

National Law

The Constitution of Nepal 1990 provides for equality before the law;⁴⁸⁶ the right not to be deprived of personal liberty save in accordance with law;⁴⁸⁷ freedom of opinion and expression;⁴⁸⁸ and freedom to assemble peaceably and without arms.⁴⁸⁹

Article 14 of the Constitution relates to the administration of justice. Subsection (4) relevantly provides that:

No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law.

Article 15 states the following in relation to preventive detention:

- (1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal.
- (2) Any person held under preventive detention shall, if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law.

Article 115(1) of the Constitution allows the King to declare a state of emergency:

If a grave crisis arises in regard to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray...

⁴⁸⁵ Nepal acceded to the Geneva Conventions of 1949 on 7 February 1964.

⁴⁸⁶ Constitution of Nepal 1990, art 11(1).

⁴⁸⁷ Constitution of Nepal 1990, art 12(1).

⁴⁸⁸ Constitution of Nepal 1990, art 12(2)(a).

⁴⁸⁹ Constitution of Nepal 1990, art 12(2)(b).

Article 115(8) of the Constitution provides for derogation from certain rights during a time of emergency, including: freedom of opinion and expression; freedom to assemble peaceably and without arms; freedom to move throughout the Kingdom and reside in any part thereof; freedom to practise any profession, or to carry on any occupation, industry, or trade; freedom from censorship; the right against preventive detention; the right to information; the right to property; the right to privacy; and the right to constitutional remedy (except *habeas corpus* which survives during a state of emergency).

*Legislation*⁴⁹⁰

Section 3 of the Public Security Act 2046 (1989) establishes broad detention powers:

3.1. In case there exists adequate and appropriate grounds to prevent any person from doing anything that may immediately undermine the sovereignty, integrity or public tranquillity and order of the Kingdom of Nepal, the local authority may issue an order to detain such person in any specified place for a specified period.

3.2. In case there exist adequate and appropriate grounds to prevent any person from doing anything that may undermine the interests of the common people or amicable relations among different castes, communities, or religions, the local authority may issue any of the following orders in the name of such person for internment or externment:

3.2.1. To direct him not to stay at any specified place in the Kingdom of Nepal.

3.2.2. To direct him not to enter into any specified place in the Kingdom of Nepal

3.2.3. To direct him to stay only at a specified place in the Kingdom of Nepal.

Detention orders are valid for an initial period of up to 90 days and can be extended to six months and further extended to twelve months, subject to approval by the relevant authorities.⁴⁹¹ Internment orders are valid for an initial period of up to 30 days and may be

⁴⁹⁰ The legislation referred to in this report is based on unofficial English translations of legislation made available by the National Human Rights Commission of Nepal or alternatively, obtained from the International Commission of Jurists at <http://www.icj.org/news.php3?id_article=2952&lang=en>

⁴⁹¹ *Public Security Act* 1989, ss 5.1, 5.2.1 and 5.2.2.

extended to 90 days subject to the relevant approval.⁴⁹² Although s 11 provides that no order under the Act may be questioned in any court, a detainee may file a complaint alleging that he or she has been detained in contravention of the law or in a malafide manner.⁴⁹³ The District Court may award appropriate compensation if the complainant's claims are substantiated.⁴⁹⁴

The Children's Act 2048 (1992) states:

7. Prohibition on torture or cruel treatment:

No Child shall be subjected to torture or cruel treatment.

Provided that, the act of scolding and minor beating to the Child by his father, mother, member of the family, Guardian or teacher for the interests of the Child himself shall not be deemed to violate the provisions of this Section.

15. Prohibition on imposing rigorous punishment:

Not with-standing anything contained in the existing laws, no Child shall be subjected to handcuffs and fetters, solitary confinement or live together in prison with a prisoner who has attained maturity in case a Child is convicted for any offence.

Section 42 of the Military Act states:

If any person under the Jurisdiction of this Act is convicted of any of the following offence he/she shall be imprisoned with up to two years or shall be liable with the less punishment as mentioned in this Act.

- (a) If a case is not tried without reason after arresting or detaining any person, or if his/her case is not submitted to the competent authority for investigation, or
- (b) If an official giving order to keep any person in the military detention fails, except any reasonable ground, to submit the duly signed accusation against the detainee to the

⁴⁹² *Public Security Act* 1989, s 6.

⁴⁹³ *Public Security Act* 1989, s12A.1.

⁴⁹⁴ *Public Security Act* 1989, s12A.2.

authority detaining the accused at the time of detention or at the earliest possible or at any cost within forty eight hours from the date of detention.

Section 9 of the Evidence Act 1974 provides that the court may admit evidence if it finds that the accused was not compelled or tortured.

Remedies

The Compensation Relating to Torture Act 1996 provides that if any Government employee has inflicted torture on any person, the victim shall be provided compensation.⁴⁹⁵ Torture is defined as “physical or mental torture inflicted on a person who is in detention for investigation or awaiting trial or for any other reason, and this term includes cruel, inhuman or degrading treatment that person is subjected to.”⁴⁹⁶ However, any suffering inherently caused by detention pursuant to the existing law shall not be regarded as an act of torture for the purposes of the Act.⁴⁹⁷ The Act provides for the procedural requirements for obtaining compensation.⁴⁹⁸ In the event of suspicion of acts of torture, a victim’s family or legal representative may petition the District Court, upon receipt of which the Court may order the detainee’s physical or mental examination within three days.⁴⁹⁹

Section 7 requires departmental action to be taken against the governmental employee who committed the act of torture. Under s 6, a District Court may impose a maximum fine of 100,000 rupees on the Government of Nepal. Relevant considerations as to the level of compensation include the gravity of physical or mental pain or suffering; depreciation in income earning capability of the victim; the estimated expenses required for treatment; the victims age and his responsibility to the family (in the case of untreatable damage); and, in case of death, the number of family members dependent upon the victim’s income and the

⁴⁹⁵ *Compensation Relating to Torture Act 1996*, s4. However, the Special Rapporteur on Torture has reported that compensation has been actually paid out in only one case to date, despite several decisions by the courts to award compensation: see ACHR Review “Torture in Nepal: A Case for Investigation by CAT” available at <http://www.achrweb.org/Review/2005/97-05.htm>.

⁴⁹⁶ *Compensation Relating to Torture Act 1996*, s2(a).

⁴⁹⁷ *Compensation Relating to Torture Act 1996*, s 11.

⁴⁹⁸ *Compensation Relating to Torture Act 1996*, s5(1) and (2).

minimum expenses needed for their livelihood.⁵⁰⁰ A victim who brings an action under this Act is not barred from commencing a separate action under existing law.⁵⁰¹

A person who commits an offence against ss 7-15 of the Children's Act shall be punished with a fine or with a term of imprisonment of up to one year, or both. In case of torture and cruel treatment, he shall pay a reasonable amount of compensation to the child.⁵⁰²

Government Policies and Practices

The Royal Nepalese Army (RNA) has introduced a number of structural and policy developments as a means of strengthening its compliance with human rights standards.⁵⁰³ These developments include the establishment of a Human Rights Cell within the RNA. The major responsibilities of the Human Rights Cell include monitoring the RNA's compliance with international humanitarian law and human rights law; conducting training on international humanitarian law and human rights law; and working with national and international humanitarian agencies and foreign diplomatic missions.⁵⁰⁴

The RNA's *Instructions and Directives on Human Rights*,⁵⁰⁵ the *Chief of the Army Staff's Human Rights Directive*,⁵⁰⁶ and the Soldier's Code of Conduct⁵⁰⁷ provide instructions relevant to the prevention of torture and other forms of ill-treatment.

⁴⁹⁹ *Compensation Relating to Torture Act* 1996, s5(3).

⁵⁰⁰ *Compensation Relating to Torture Act* 1996, s8.

⁵⁰¹ *Compensation Relating to Torture Act* 1996, s11

⁵⁰² Children's Act 1048 (1992), s 53(3).

⁵⁰³ Royal Nepalese Army, *Effort Made by the Royal Nepalese Army to Protect and Promote Human Rights*. This document was provided to the APF Secretariat by the National Human Rights Commission of Nepal.

⁵⁰⁴ Royal Nepalese Army, *Effort Made by the Royal Nepalese Army to Protect and Promote Human Rights* at 7-8.

⁵⁰⁵ Royal Nepalese Army, *Effort Made by the Royal Nepalese Army to Protect and Promote Human Rights* at 18-23.

⁵⁰⁶ Royal Nepalese Army, *Effort Made by the Royal Nepalese Army to Protect and Promote Human Rights* at 24-26.

⁵⁰⁷ Royal Nepalese Army, *Effort Made by the Royal Nepalese Army to Protect and Promote Human Rights* at 28.

Activities of the National Human Rights Commission of Nepal

The National Human Rights Commission of Nepal (NHRC) has published a number of reports on the extent and nature of the practice of torture in Nepal.⁵⁰⁸ *Human Rights in Nepal: A Status Report 2003* includes a chapter on torture in Nepal between 1996 and 2003.⁵⁰⁹

The NHRC notes that the current legislation relevant to torture, criminal procedure and detention do not contain adequate provisions for the ‘competent and impartial investigation of the cases of torture.’⁵¹⁰ The NHRC is critical of a number of aspects of the Compensation Relating to Torture Act, including:

- The narrow definition of torture, including failing to define it as a criminal offence;
- The absence of any provision for the rehabilitation of victims of torture;
- The absence of any witness protection provisions;
- Inadequate accountability provisions and ineffective punishment provisions; and
- The absence of any capacity to conduct impartial and independent investigation of cases of torture.⁵¹¹

The NHRC has conducted a number of training programs and seminars designed to improve the standard of compliance with the CAT at all levels of the Government of Nepal. The programs inform on treaty body reporting requirements and provide training for security agencies regarding obligations under human rights and humanitarian law.⁵¹² The NHRC has conducted public education and awareness campaigns, including the discussion programs with NGOs to recognise United Nations Day Against Torture.⁵¹³

⁵⁰⁸ See *Human Rights in Nepal: A Status Report 2003; Annual Report 2002-2003; Emergency and Human Rights: Human Rights Monitoring Report 2059* (June 2003).

⁵⁰⁹ National Human Rights Commission of Nepal, *Human Rights in Nepal: A Status Report 2003* at 34-39.

⁵¹⁰ National Human Rights Commission of Nepal, *Human Rights in Nepal: A Status Report 2003* at 38.

⁵¹¹ National Human Rights Commission of Nepal, *Human Rights in Nepal: A Status Report 2003* at 38.

⁵¹² National Human Rights Commission of Nepal, *Annual Report 2002-2003* at 10-11.

⁵¹³ National Human Rights Commission of Nepal, *Annual Report 2002-2003* at 10.

The Commission regularly visits prisons to monitor the condition of facilities and to check on the situation of detainees.⁵¹⁴ The Commission reports that a majority of individuals detained by the Royal Nepalese Army have been subject to torture.⁵¹⁵

Activities and Observations of Non Government Organisations

Within Nepal, the Centre for Victims of Torture and INSEC have been actively involved in the monitoring, investigation and reporting of torture and other forms of ill-treatment. Internationally, Amnesty International and Human Rights Watch have conducted similar activities⁵¹⁶.

⁵¹⁴ National Human Rights Commission of Nepal, *Annual Report 2002-2003* at 8-9.

⁵¹⁵ Information provided to APF Secretariat by National Human Rights Commission of Nepal, 15 June 2005.

⁵¹⁶ See also ACHR Review “Torture in Nepal: A Case for Investigation by CAT” available at <http://www.achrweb.org/Review/2005/97-05.htm>.

New Zealand

ACJ Recommendations

The ACJ recommends that the New Zealand Human Rights Commission (NZHRC) urges its Government to address the following issues:

- The need to complete the process needed in order to ratify the OPCAT;
- the need for the Police to complete its current review of interviewing procedure, and incorporate the appropriate torture standards and protections in any resulting policies;
- the conclusions of the NZHRC made in its report titled *Human Rights in New Zealand Today* including: concerns about the use of non-voluntary segregation, the excessive periods of lock-down and the need for independent review of practice in these areas; issues of staff-to-prisoner ratios; the lack of human rights training; the continued mixing of youth and adult offenders and New Zealand' continued reservation to the CRC on this point;
- the recommendations made by the Committee against Torture in relation to the periodic report of New Zealand, including the need to legislate the non-refoulement obligation.

International Law

New Zealand is a party to the ICCPR,⁵¹⁷ First Optional Protocol,⁵¹⁸ Second Optional Protocol,⁵¹⁹ ICESCR,⁵²⁰ CAT,⁵²¹ CRC⁵²², the Rome Statute,⁵²³ the Refugee Convention,⁵²⁴ as well as the Geneva Conventions of 12 August 1949⁵²⁵ and their Protocols.⁵²⁶ It is also a signatory to the OPCAT, and is currently taking steps towards ratification.⁵²⁷

⁵¹⁷ New Zealand ratified the ICCPR on 28 December 1978.

⁵¹⁸ New Zealand acceded to the First Optional Protocol on 26 August 1989.

⁵¹⁹ New Zealand ratified the Second Optional Protocol on 11 July 1991.

⁵²⁰ New Zealand ratified the ICESCR on 28 December 1978.

⁵²¹ New Zealand ratified the CAT on 10 December 1989.

⁵²² New Zealand ratified the CRC on 6 April 1993.

⁵²³ New Zealand ratified the Rome Statute on 7 September 2000.

⁵²⁴ New Zealand acceded to the Refugee Convention on 30 June 1960 and to the Refugees Protocol on 6 August 1973.

⁵²⁵ New Zealand ratified the Geneva Conventions of 1949 on 2 May 1959.

Domestic Legislation

Domestically, substantive human rights protections are found in the New Zealand Bill of Rights Act 1990 (BORA). The BORA applies to acts done by the legislative, executive, or judicial branches of the government of New Zealand or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Section 9 of BORA provides that “[e]veryone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.” While this provision is arguably subject to the “reasonable limitation” provision of BORA,⁵²⁸ expert academic opinion has suggested that “as a practical matter some rights [in BORA] must be understood as absolute and s 9 is one of them.”⁵²⁹ Furthermore, it was recently confirmed by the Supreme Court of New Zealand that the rights in BORA, and the provisions of domestic statutes, are to be interpreted in accordance with international law, both customary and treaty based.⁵³⁰

Acts of torture which occur in New Zealand, or occurred outside New Zealand but were carried out by New Zealand citizens or by persons physically present in New Zealand, are proscribed by the Crimes of Torture Act 1989. “Acts of torture” are defined for this purpose as acts or omissions by which severe mental or physical pain or suffering is intentionally inflicted on a person for such purposes as: obtaining from that person or some other person information or a confession; punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; intimidating or coercing that person or some other person; or for any reason based on discrimination of any kind. There is a

⁵²⁶ New Zealand ratified Additional Protocols I and II of 8 June 1977 on 8 February 1988.

⁵²⁷ New Zealand signed the OPCAT on 23 September 2003, the New Zealand Government is currently taking steps to establish its Human Rights Commission as the central national preventive mechanism under the protocol, so that the OPCAT can then be ratified.

⁵²⁸ New Zealand Bill of Rights Act 1990, s 5.

⁵²⁹ Rishworth, P., G. Huscroft, S. Optican, R Mahoney, *The New Zealand Bill of Rights*, Oxford University Press (2003) at 249.

⁵³⁰ *Attorney-General v Zaoui and Anor* [2005] NZSC 38, para [90].

proviso to this stating the definition does not include any act or omission arising only from, or inherent in, or incidental to, any lawful sanctions that are not inconsistent with the ICCPR.

The regime for punishing acts of torture is set out in the rest of the Act. A maximum penalty of 14 years' imprisonment is provided for anybody⁵³¹ who commits an act of torture, or aids, abets, incites, counsels or procures someone to commit an act of torture. Lesser penalties are provided for those who attempt or conspire to commit acts of torture, or are accessories after the fact to such acts. There are also provisions relating to the extradition of offenders charged with committing acts of torture. The Act also permits the Attorney General to consider whether compensation should be paid to persons subjected to torture.

Capital punishment was abolished altogether in 1989,⁵³² and prior to this the death penalty was only available for crimes of treason and treachery in the armed services.⁵³³ There are no provisions in New Zealand law permitting corporal punishment, other than the use of reasonable force by parents against children by way of correction.⁵³⁴ This exception is currently under review.⁵³⁵

Further, the general criminal law proscribes various forms of violent conduct, which would also encompass acts that amount to torture.⁵³⁶

Treatment of those subject to Detention

The treatment of those subject to detention in New Zealand has been a matter of concern domestically⁵³⁷ and internationally⁵³⁸ for some time. However a range of reforms to the New

⁵³¹ “being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand”.

⁵³² Abolition of the Death Penalty Act 1989.

⁵³³ The death penalty was removed for all other offences by the Crimes Act 1961.

⁵³⁴ Crimes Act 1961, s59.

⁵³⁵ The Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, currently before a Parliamentary Select Committee, would repeal the s 59 exception.

⁵³⁶ Crimes Act 1961, Part 8.

⁵³⁷ See New Zealand Human Rights Commission, “Chapter 11: The rights of people who are detained. Nga tika o nga tangata mauhere”, *Human Rights in New Zealand Today* (2003). Located at <<http://www.hrc.co.nz/report/chapters/chapter11/detention01.html>> (Date of access: 15 August 2005).

Zealand corrections regime introduced in the last year seek to remedy some of these concerns.⁵³⁹

The protections in BORA (as outlined above) apply in respect of those in detention. In addition to these, the Department of Corrections' Code of Conduct provides that it is unacceptable for Corrections staff to subject "colleagues, offenders, stakeholders or members of the public... to physical or verbal violence, abuse, intimidation, or threats".⁵⁴⁰ The Corrections Regulations 2005 provide that no penalties may be imposed on a prisoner unless a disciplinary hearing has been held and the prisoner pleads guilty to or is found guilty of the offence.⁵⁴¹ The Department of Corrections' Policy and Procedure Manual contains a detailed set of procedures for the handling of hearings, including rights of information, legal representation, and to adequate time to prepare a defence. Appeals are also provided for. Additionally, the Manual provides that:⁵⁴²

- No officer may take disciplinary action against a prisoner if that action is retaliatory in nature or inconsistent with acceptable standards of treatment of a prisoner in similar circumstances;
- The disciplining of each prisoner must have regard for their cultural values, gender and any disability they may have.

The Corrections Act, regulations and policy manual also provide for prisoners' minimum entitlements. These include entitlements to open air exercise, sufficient bedding, wholesome

⁵³⁸ See *Concluding observations of the Committee against Torture : New Zealand* 5 August 1998, A/53/44 at [175].

⁵³⁹ Section 5(1)(b) of the Corrections Act 2004 provides that "The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society" by (among other things) "providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners".

⁵⁴⁰ Department of Corrections *Code of Conduct*

<http://www.corrections.govt.nz/public/policyandlegislation/codeofconduct/> (Last Accessed 16 August 2005).

⁵⁴¹ Corrections Regulations 2005, Sch 7, cl 47.

⁵⁴² Department of Corrections *Policy and Procedure Manual A.07*

<http://www.corrections.govt.nz/public/policyandlegislation/ppm/sectiona/a07/> (Last Accessed 16 August 2005).

and nutritious food, visitors (including legal advisors), phone calls, medical treatment, information and education.⁵⁴³

These processes should reduce the incidence of problems, and also remedy many of the concerns noted by the NZHRC in its 2003 report, *Human Rights in New Zealand Today*.⁵⁴⁴

However, this does not address all of the NZHRC's areas of concern. In the preparation of *Human Rights in New Zealand Today*, a detailed analysis was undertaken of the situation in New Zealand with regards to a wide range of people held in detention including prisoners, military detainees, people detained under mental health legislation, people with disabilities, people held in police cells and children and young people. With regard to the issue of torture and other forms of ill-treatment, the report came to a number of conclusions:

- Control and sanctions: Concerns have been expressed about the use of non-voluntary segregation, the excessive periods of lock-down, and the *Taunoa* case in particular emphasises that independent review of practice in these areas is essential.⁵⁴⁵
- Workforce development: New Zealand does not rate well against international comparisons for staff-to-prisoner ratios. Human rights training has not been mainstreamed into staff training.⁵⁴⁶
- There is strong criticism of the continued mixing of youth and adult offenders and strong support for the withdrawal of New Zealand's reservation to UNCROC [CRC] on this point.⁵⁴⁷

⁵⁴³ Corrections Regulations 2005, Regs 63, 85-86, 98; Corrections Act 2004, ss 6, 58-60, 69, 70-74, 77-78; Department of Corrections *Policy and Procedure Manual A.10* <http://www.corrections.govt.nz/public/policyandlegislation/ppm/sectiona/a10/> (Last Accessed 16 August 2005).

⁵⁴⁴ New Zealand Human Rights Commission, "Chapter 11: The rights of people who are detained. Nga tika o nga tangata mauhere", *Human Rights in New Zealand Today* (2003). Located at <<http://www.hrc.co.nz/report/chapters/chapter11/detention01.html>> (Date of access: 20 March 2005).

⁵⁴⁵ New Zealand Human Rights Commission *Human Rights in New Zealand Today* (2003) at 39.

⁵⁴⁶ New Zealand Human Rights Commission *Human Rights in New Zealand Today* (2003) at 40.

⁵⁴⁷ New Zealand Human Rights Commission *Human Rights in New Zealand Today* (2003) at 3.

Remedies

The issue of how to provide redress for serving prisoners who have suffered violations of their rights has recently come to the fore in New Zealand. In one case involving allegations by prisoners of abuse amounting to torture both under the CAT and s 9 of BORA, the High Court found that the prisoners' treatment did not amount to torture, but was a breach of the BORA obligation to treat those in detention with humanity and respect for the inherent dignity.⁵⁴⁸ The complainants were awarded compensation of between \$2000 and \$55,000 each. Following this case the New Zealand Parliament passed the Prisoners' and Victims' Claims Act 2005, which restricts the availability of public law damages to offenders. The Act applies retrospectively and limits the payment of damages to exceptional cases where all avenues of complaint to remedy the breach have been exhausted.

The New Zealand Human Rights Commission (NZHRC) noted in its submission to the Parliamentary committee which considered the legislation that it could have serious implications in terms of New Zealand's international commitments, specifically with respect to the endorsement of the treaty body Committees of the need for monetary compensation as a remedy. The NZHRC noted that it remains arguable whether the legislation would limit remedies in particularly egregious situations such as allegations of torture, as the level of the state's culpability would need to be taken into account, together with the consequences of the action and the nature of the right that is breached.

The more restrictive provisions in the Act, such as guidelines to judges on the availability of compensation, are subject to a sunset clause and, unless re-enacted, will expire at the end of June 2007.

⁵⁴⁸ *Taunoa & Ors v Attorney-General & Ors* HC, WN, CIV-2002-485-000742, 2 September 2004. This decision was upheld by the Court of Appeal in *Attorney-General v Taunoa* CA82/04, 8 December 2005. In addition, in relation to one inmate, a declaration was made that there was a breach of 9 of BORA on the basis that, although the inmate's treatment did not amount to torture and was not cruel or degrading, it was disproportionately severe.

A parallel development is the recent reform of corrections laws in New Zealand.⁵⁴⁹ Under the new Corrections Act, a complaint, investigation and inspection system is set up to monitor prisons.⁵⁵⁰ Prisons are now required to have a formal internal complaints system, which must be advertised to prisoners.⁵⁵¹ Prisoners must be provided with assistance to make a complaint, should they require it.⁵⁵² The Act also sets up the office of “inspector of corrections”. Inspectors may receive complaints, and investigate them in any way they think fit. These inspectors are given wide investigative powers, including rights of access to places, documents and people.⁵⁵³ Prisoners, or former prisoners, may at any time seek assistance from an inspector for the purpose of making a complaint. At the conclusion of an investigation, an inspector may issue recommendations or make directions. If directions are made, these may be revoked only by the Chief Executive of the Department of Corrections, who must provide reasons for this to the Chief Ombudsman. Notices advising the visit of inspectors or of ombudsmen must be prominently displayed within each unit in a prison.

Interrogation

It is a disciplinary offence for a sworn Police Officer to treat any person or prisoner cruelly, harshly, or with unnecessary force or violence.⁵⁵⁴ In addition, prosecutions under the general criminal law can occur where officers are alleged to have used excessive force.⁵⁵⁵

The Police Manual of Best Practice states that “[s]upervisors must ensure that interviews are conducted fairly, legally, ethically and to the highest practical standard. The desire to obtain a result must not lead them to place interviewees under unreasonable pressure. This could result

⁵⁴⁹ The 50-year-old Penal Institutions Act 1954 was replaced with the Corrections Act 2004, which came into force on 1 June 2005.

⁵⁵⁰ Under the former legislation, complaints could be made to the Office of the Ombudsman, or to the Police if the allegation was of a criminal nature. The ability to make a complaint to the Police remains.

⁵⁵¹ Corrections Act 2004, s153. The complaints system must comply with the objectives as set out in the Act, including ensuring that complaints are investigated in a fair, timely, and effective manner.

⁵⁵² Corrections Act 2004, s154.

⁵⁵³ Corrections Act 2004, s156-158.

⁵⁵⁴ Police Regulations 1992, cl 9(5).

⁵⁵⁵ See, for example, “Policeman faces new inquiry” *The New Zealand Herald* 8 April 2005, which details the conviction of a Senior Sergeant for assaulting a 17 year old outside a Police station.

in unfair, illegal or unethical behaviour.”⁵⁵⁶ Further, the Manual prohibits the use of “force, violence, compulsion or unfair methods such as trickery” during the conduct of interviews.⁵⁵⁷ Internal police guidelines require that all interviews with persons suspected of having committed an indictable crime be videotaped. There are specific provisions dealing with interviewing children and young people.⁵⁵⁸ The New Zealand Police are currently conducting a detailed review of their interviewing practices.

There is an expectation that police will abide by the Standard Minimum Rules for the Treatment of Prisoners and the Principles for Persons under Detention. The relevant provisions of BORA are also applicable.⁵⁵⁹ Any confession obtained as a result of violence will be inadmissible.⁵⁶⁰

An independent body, the Police Complaints Authority (PCA), is competent to receive and investigate complaints of Police misconduct and to investigate Police practices, policies and procedures.⁵⁶¹ The PCA may, following an investigation, make recommendations to the Commissioner of Police. The Commissioner must then inform the PCA of what actions (if any) are proposed in respect of the recommendations, and give reasons for any departure from the recommendations. If the PCA is unsatisfied with the Commissioner’s response, the PCA may refer the matter to the Attorney-General and the Minister of Police.

An independent review of the PCA was carried out in 2000.⁵⁶² This recommended a number of changes, including enhancing the PCA’s investigative capacity and increasing its independence from the Police. The Government responded by introducing the Independent Police Complaints Authority Bill, which is currently before Parliament.⁵⁶³ This Bill does not action all of the recommendations in the Review, but will change the name of the PCA to the

⁵⁵⁶ New Zealand Police *Manual of Best Practice* (1997) at 371.

⁵⁵⁷ New Zealand Police *Manual of Best Practice* (1997) at 375.

⁵⁵⁸ Children, Young Persons, and Their Families Act 1989, Part 4.

⁵⁵⁹ See *Archbold v Attorney-General* [2003] NZAR 563, where damages were awarded to a man who was the victim of excessive force while being arrested.

⁵⁶⁰ *R v Nanisani* [1971] NZLR 269, 271 (CA).

⁵⁶¹ Police Complaints Authority Act 1988.

⁵⁶² Hon Sir Rodney Gallen *Review of the Police Complaints Authority* (Wellington, 2000).

⁵⁶³ The Bill received its second reading on the 5th of May 2005.

“Independent Police Complaints Authority” and increase the membership of the PCA from one to three persons, increasing its investigative capacity.

Non-Refoulement

The Supreme Court of New Zealand recently considered the scope of the non-refoulement obligation in situations where there is a risk of torture in the receiving country.⁵⁶⁴ The Court was considering the case of Mr Ahmed Zaoui, an Algerian refugee facing expulsion from New Zealand under national security provisions in the Immigration Act 1999. This matter is currently pending a determination on a review of Mr Zaoui’s security risk certificate. If this review upholds the certificate by finding he presents a genuine security risk, the Minister of Immigration, and later Cabinet, will have to decide whether or not to act on the certificate and deport him. The Supreme Court ruled that, were the certificate upheld, the Minister of Immigration (and other Ministers as members of the Executive Council) were not to take steps towards deportation if they were satisfied that there were substantial grounds for believing that Mr Zaoui (or others in his position) would be in danger of being arbitrarily deprived of life, or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁵⁶⁵

We note our recommendation in our 2004 *Reference on the Rule of Law in Combating Terrorism* that the New Zealand Government carry out its promised review of the security risk provisions in the Immigration Act 1999, including the human rights implications of this legislation, once the Zaoui case is concluded.⁵⁶⁶

⁵⁶⁴ *Attorney-General v Zaoui and Anor* [2005] NZSC 38.

⁵⁶⁵ *Attorney-General v Zaoui and Anor* [2005] NZSC 38; the New Zealand Government accepted throughout the proceeding that Mr Zaoui could not be deported to a country where he may (directly or indirectly) face torture.

⁵⁶⁶ Asia Pacific Forum of National Human Rights Institutions Advisory Council of Jurists *Reference on the Rule of Law in Combating Terrorism* (Nepal, May 2004) at 118.

With regard to extradition, sections 30(3) and 48(1)(b)(i) of the Extradition Act 1999 confer a power to refuse extraditions when offenders may face the death penalty or torture. In fact, it has been argued that BORA requires the use of that power in every case.⁵⁶⁷

Treaty Body Reports

New Zealand has submitted four periodic reports to the Committee against Torture pursuant to the requirements under the CAT. The NZHRC has contributed to New Zealand's periodic reports by providing comment to the draft reports prepared by the responsible government agencies. The NZHRC has not provided shadow or parallel reports. A prominent NGO however, the Human Rights Foundation of New Zealand, did present a shadow report at the Committee's most recent sitting. The Committee against Torture recommended that New Zealand:⁵⁶⁸

- (a) Incorporate in the immigration legislation the non-refoulement obligation contained in article 3, and consider establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed by the examination of other possible grounds for the grant of complementary forms of protection, in particular under article 3 of the Convention against Torture;
- (b) Ensure at all times that the fight against terrorism does not lead to a breach of the Convention and undue hardship imposed on asylum seekers, and establish a time limit beyond which detention and restrictions on asylum seekers may not be continued;
- (c) Take immediate steps to review the legislation relating to the security risk certificate, in order to ensure the effectiveness of the appeal made against the decision to detain, remove or deport a person, extend the time frame given to the Minister of Immigration to adopt a decision,⁵⁶⁹ and ensure full respect of article 3 of the Convention;

⁵⁶⁷ Rishworth, P., G. Huscroft, S. Optican, R Mahoney, *The New Zealand Bill of Rights*, Oxford University Press (2003) at 217.

⁵⁶⁸ Committee Against Torture, *Concluding Observations: New Zealand*, CAT/C/CR/32/4, 11 June 2004.

⁵⁶⁹ To some extent this concern has been mitigated by the recent decision of the Supreme Court. Section 114K of the Immigration Act 1987 empowers the Minister of Immigration to decide within three working days whether or not to rely on the confirmed certificate. However, the Supreme Court in *Attorney-General v Zaoui and Anor* [2005] NZSC 38 held at [92] that, when making the final decision whether or not to report the person named in a

- (d) Reduce the time and improve the conditions of non-voluntary segregation (solitary confinement) that can be imposed on asylum seekers, prisoners and other detainees;
- (e) Implement the recommendations already made by the Committee on the Rights of the Child in paragraphs 30 and 50 (CRC/C/15/Add.216);⁵⁷⁰
- (f) Report on the results of the development strategy aimed at ensuring that minors are not subjected to unreasonable searches;
- (g) Carry out an inquiry into the events that led to the decision of the High Court in the *Taunoa et al.* Case;⁵⁷¹
- (h) Inform the Committee about the results of the action taken in response to the concern expressed by the Ombudsman regarding investigations of staff assaults on inmates.

certificate, “there is no pressing prescriptive time requirement: those charged with responsibility... should have adequate time to address the issues of fact and judgment involved”.

⁵⁷⁰ The recommendations at [30] were to amend legislation to prohibit corporal punishment in the home; strengthen public education campaigns and activities aimed at promoting positive, non-violent forms of discipline and respect for children’s right to human dignity and physical integrity, while raising awareness about the negative consequences of corporal punishment. The recommendations at [50] were to ensure the full implementation of juvenile justice standards, in particular Articles 37, 39 and 40 of UNCROC as well the Beijing Rules and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), and in the light of the Committee’s discussion day on the administration of juvenile justice in 1995 (CRC/C/69); to ensure the availability of sufficient youth facilities so that all juveniles in conflict with the law are held separately from adults in pre- and post-trial detention; and to undertake a systematic evaluation of the use of family group conferencing in juvenile justice.

⁵⁷¹ *Taunoa & Ors v Attorney-General & Ors* HC, WN, CIV-2002-485-000742, 2 September 2004.

Palestinian Territories

ACJ Recommendations

The ACJ recommends that the Palestinian Independent Commission for Citizens' Rights (PICCR) urges the Palestinian Territories to address the following issues:

- the application by Israel of international human rights law, including human rights treaties, to Palestine;
- the apparent failure to provide a legislative definition of torture;
- the hearing of cases against civilians in military courts;
- reports of torture by militant groups of persons suspected of being 'collaborators';
- the failure to investigate and prosecute individuals following allegations of torture;
- the recommendations made by the PICCR in its report titled *Ill-treatment of Detainees in Police Holding facilities in the Northern West Bank*;
- reports of mistreatment by officials of detainees in detention centres and prisons.

International Law

The Palestinian National Authority has committed to ratifying all international human rights instruments upon receiving statehood. Article 10(2) of the Basic Law states:

The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights.

In 2003 the PICCR coordinated the drafting of a parallel report to Israel's periodic report to the HRC. The Palestinian Independent Commission for Citizen's Rights (PICCR) criticised Israel's performance of its responsibilities under international law as an occupying power. Israel has argued that under international law it is not required to apply international human rights law to areas that are not part of its sovereign territory, that is the Occupied Territories. The PICCR argues that it is a basic principle of human rights law that the ICCPR and other

human rights treaties are applicable in all areas in which states parties exercise effective control, regardless of whether they exercise sovereignty in that area or not.

National Law

The constitutional document governing the Palestinian Territories is the Palestinian Basic Law 2003. Article 13(1) of the Basic Law states:

No person shall be subject to any duress or torture. All persons deprived of their freedom shall receive proper treatment.

Article 13(2) of the Basic Law states:

All statements or confessions obtained through violations of paragraph one of this article shall be considered null and void.

Legislation

Legislation relevant to the consideration of torture and other forms of ill-treatment are the Criminal Procedures Law No. 3 of 2001 and the Reform and Rehabilitation Centers Law No. 6 of 1998. For a confession of a crime to be admissible in court, article 214 of the Criminal Procedures Law No. 3 of 2001 requires:

It shall be offered voluntarily and by choice, without pressure, material or psychological coercion, promise, or threat.

Article 37(2) of the Reform and Rehabilitation Centers Law No. 6 of 1998 states that “[t]orture or abuse of the prisoner is prohibited”.

Remedies

The PICCR reports that, while the Basic Law provides some remedies, there is currently no system in place to enforce these remedies. The PICCR has found that complaints or claims for remedy are often ignored or denied.

Case Law

The PICCR reports that, in practice, judges often reject evidence arising from police investigations, suspecting that confessions have been made or statements taken under duress. The PICCR noted that, as well as the Palestinian civil and criminal courts, citizens are tried in Israeli military courts which lack legal protections used in civil courts. The only exception to this is appealing to the High Court over the administrative actions of the military regarding use of weapons, military practices, and checkpoints.⁵⁷²

Procedures and safeguards protecting against torture by non-state actors

The PICCR reports that it is aware that militant groups torture suspected collaborators. While the same legal safeguards should protect victims of torture by militant groups, in practice such cases do not surface, as people are fearful of being seen as collaborators.

Government Policies and Practices

The PICCR reports that a set of minimum standards on the use of interrogation by the police and other disciplinary forces was developed in 1998 by the Palestinian Police in cooperation with the OHCHR. Training on interrogation techniques is reportedly conducted by the police authorities on an ad hoc basis.

⁵⁷² Palestinian Independent Commission for Citizen's Rights, "Excerpt from Parallel Report to the Human Rights Committee", *PICCR response to APF Questionnaire on Advisory Council of Jurists Reference on Torture* (2005) at 17-23

Israeli intelligence services, military and police practice torture against Palestinian civilians according to the PICCR. The 1999 decision of the Israeli High Court of Justice banned the use of four methods of torture which had previously been sanctioned by a 1997 Israeli Government Commission of Inquiry (the Landau Commission). That decision of nine judges overruled the regulations permitting use of such methods of torture during interrogation as severe shaking, position abuse, sleep deprivation, hooding and shackling the detainee and the use of extremely loud music. However, the PICCR says the evidence suggests the continued use of those methods of torture. The Israeli High Court decision permitted the use of “moderate pressure” in “ticking bomb” cases. These definitions have not been further refined by the Court, and the practice of torture continues.⁵⁷³

Activities of the Palestinian Independent Commission for Citizen’s Rights

In 2004 the PICCR received 84 complaints of torture by police. The PICCR wrote to the relevant authorities, requesting an investigation. According to the PICCR, the response was either a denial of the complaint or no response at all.

In October 2004 the PICCR published *Ill-treatment of Detainees in Police Holding Facilities in the Northern West Bank*,⁵⁷⁴ a report documenting cases of torture and making recommendations. Most complaints relate to ill-treatment by police after the accused had confessed to the original charges, to pressure the accused to confess to additional charges. There is no response or intervention by any Palestinian official organisation. The report recommended:

1. Independent, objective investigative committees should be formed to investigate the cases of mistreatment.

⁵⁷³ Palestinian Independent Commission for Citizen’s Rights, “Excerpt from Parallel Report to the Human Rights Committee”, *PICCR response to APF Questionnaire on Advisory Council of Jurists Reference on Torture* (2005) at 18-19

⁵⁷⁴ Palestinian Independent Commission for Citizen’s Rights, *Ill-treatment of Detainees in Police Holding Facilities in the Northern West Bank*, (October 2004), available from <http://www.piccr.org/publications/special.html>

2. Prompt, effective measures should be formulated to stop the mistreatment of detainees at security agency holding facilities during arrest, custody, and interrogation. There must be administrative and judicial procedures initiated against those who violate these measures.
3. Illegal detention centres belonging to the security agencies must be closed. There should be legislation regulating the security agencies' operations, jurisdictions and powers.
4. The Civil Office of the Attorney General and the judiciary should periodically search prisons and detention centres to confirm that no detainee mistreatment is taking place there.
5. The Cabinet and the National Security Council should be responsible for dealing with cases of mistreatment and ensuring that they are not repeated. The National Security Council must set down clear, unequivocal directives for security agencies, prohibiting torture practices by members of security agencies and the police criminal investigation department.
6. The Legislative Council must question the directors of the relevant security agencies and the Attorney General about the circumstances surrounding detainee mistreatment in security agency prisons and detention centers.
7. The leadership of the various security agencies must comply with international standards and agreements, which require respect for prisoner and detainee rights. They must also respect Palestinian laws, which prohibit the torture and mistreatment of detainees.
8. There must be more work toward spreading a culture of human rights among law enforcement personnel, especially as regarding detainee treatment.

The PICCR's public education program provides human rights training courses for police, prison and security officers, with a specific focus on the humane treatment of detainees during arrest, detention and interrogation. Training courses for journalists, teachers, students and lawyers include a component on torture. The PICCR's regular town hall meetings and specialised television broadcasts raise awareness within the broader the community about the issue of torture.

The PICCR visits detention centres throughout the Palestinian Territories. Field workers collect complaints from inmates and draft reports about the general condition of detention. The

PICCR meets with prison authorities to discuss these complaints and the conditions of the detention centres. In its 2003 Annual Report the PICCR identified the main problems as including: space allocated to inmates; recreational time; ventilation; cleanliness; nutrition; medical services; and mistreatment.⁵⁷⁵

The PICCR works with non-government organisations by sharing information and attending workshops and seminars on the issue of torture and other forms of ill-treatment. The PICCR believes that there is capacity for future cooperation with the private sector, multilateral donors, and with the Office of the High Commissioner for Human Rights. The PICCR proposed special anti-torture legislation but this was rejected as it was thought that both the Basic Law and Criminal Procedures Law were sufficient in addressing the issue. The PICCR reports that there is no official policy on torture.

The Treatment and Rehabilitation Centre for Victims of Torture (TRC) is a Palestinian NGO that provides psychosocial services to survivors of politically-motivated torture and violence, to their families and to their communities.

⁵⁷⁵ 2003 Annual Report in PICCR response to the APF Questionnaire on the ACJ Terms of Reference on Torture at 13.

Philippines

ACJ Recommendations

The ACJ recommends that the Philippines Commission on Human Rights (PCHR) urges its government to address the following issues:

- the need for the Philippines to become a party to the OPCAT and the Protocols to the Geneva Conventions.
- the lack of definition of torture in Philippines law;
- the inadequate remedies available to victims of torture;
- reports of persistent and widespread torture;
- the burden of proof on victims to prove that a confession was made as a result of torture;
- persistent reports of ill-treatment and abuse of children;
- the detention of children together with adults in conditions that may amount to cruel, inhuman and degrading treatment;
- the tolerance by prison wardens of the practice of ‘basagan’;
- impunity in the investigation and prosecuting of perpetrators of torture’
- the need to address the 2003 recommendations of the HRC; and
- the need to address the overcrowding and poor conditions in detention facilities.

International Law

The Philippines is a party to the ICCPR,⁵⁷⁶ First Optional Protocol,⁵⁷⁷ ICESCR,⁵⁷⁸ CAT,⁵⁷⁹ CRC⁵⁸⁰ and the Refugee Convention.⁵⁸¹ The Philippines is not a party to the OPCAT. The

⁵⁷⁶ The Philippines ratified the ICCPR on 23 January 1987.

⁵⁷⁷ The Philippines acceded to the First Optional Protocol on 22 November 1989.

⁵⁷⁸ The Philippines ratified the ICESCR on 3 January 1976.

⁵⁷⁹ The Philippines acceded to CAT on 27 June 1987.

⁵⁸⁰ The Philippines ratified the CRC on 20 September 1990.

⁵⁸¹ The Philippines acceded to the Refugee Convention on 22 July 1981.

Philippines is a party to the Geneva Conventions of 12 August 1949⁵⁸² but not their Protocols. The Philippines is a signatory to the Rome Statute.⁵⁸³

National Law

Section 12 of the Constitution of the Philippines 1987 prohibits torture:

- (1) Any person under investigation for the commission of an offence shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.
- (2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.
- (3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.
- (4) The law shall provide for penal and civil sanctions for violations of this section as well as compensation to and rehabilitation of victims of torture or similar practices, and their families.

In addition, Section 19 of the Constitution states:

- (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.
- (2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.

⁵⁸² The Philippines ratified the Geneva Conventions of 1949 on 6 October 1952. (The First Geneva Convention was ratified by the Philippines on 7 March 1951).

Legislation

The Republic Act 7438 (1992) defines the rights of persons who are arrested, detained or under custodial investigation as well as the duties of the arresting, detaining and investigating officers. The Act provides:

- Any person arrested, detained or under custodial investigation shall at all times be assisted by competent and independent counsel, preferably of their own choice;
- A person must be informed of their right to competent and independent counsel in a language they understand;
- A custodial investigation report will be produced, read and explained to the individual and signed by both the custodial officer and individual;
- Any extrajudicial confession made by a person arrested, detained or under custodial investigation must be in writing and signed by that person in the presence of a witness designated by the legislation;
- Any person arrested or detained or under custodial investigation must be allowed visits by any member of their immediate family, medical doctor, priest or religious minister, national NGO duly accredited by the Commission on Human Rights or any international non-governmental organisation duly accredited by the Office of the President.

Failure to comply with the requirement to inform the detainee of their rights by a public officer may result in either fines or imprisonment, or both.

Other Acts relevant to, although not referring specifically to, torture are:

- Republic Act No. 7309. An Act Creating a Board of Claims Under the Department of Justice for Victims of Unjust Imprisonment or Detention and Victims of Violent Crimes and for Other Purposes.

⁵⁸³ The Philippines signed the Rome Statute on 28 December 2000.

- Republic Act No.7610. An Act Providing For Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, Providing Penalties For Its Violation, and For Other Purposes.
- Republic Act No. 7659. Death Penalty Law. An Act to Impose The Death Penalty On Certain Heinous Crimes, Amending For That Purpose The Revised Penal Code, As Amended, Other Special Penal Laws, and For Other Purposes.
- Republic Act No. 8049. Anti-Hazing Law
- Republic Act. No. 9262. Anti-Violence Against Women and Their Children Act of 2004. An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and For Other Purposes.

Remedies

The Philippines Commission on Human Rights (PCHR) reports that remedies and compensation for victims of torture are inadequate. The only remedies offered by the government are financial relief programs for temporary alleviation of social and economic dislocation.⁵⁸⁴

The PCHR reports that a witness protection program is operated by the Department of Justice with the objective of encouraging victims of torture to complain against perpetrators. The witness protection programme is established pursuant to Republic Act No. 6981.

Other legislation and documents relevant to remedies include the CHR Resolution No. A96-060 – Guidelines for Compensation to Victims of Human Rights Violations, and PHRC’s Operations Manual on Investigation and Case Management Process.

⁵⁸⁴ Philippines Commission on Human Rights, *Comments on the Draft Terms of Reference on Torture* at 2.

Case Law

In December 2004, Commissioner Quintin B. Cueto III addressed the *Regional Workshop on the Recognition, Documentation and Reporting Cases of Torture*, held in Zamaboanga City in the Philippines. At this workshop, Commissioner Cueto said:

Torture is illegal. Our Courts have been consistent in its rulings that evidence gained by torture, violates fundamental fairness and the due process standard. About 70 years ago, the Supreme Court stopped the use of evidence produced by third-degree tactics largely on the theory that it was highly unreliable. Subsequently, high court rulings were based on revulsion at the unfairness and brutality of it and later on the idea that confessions ought to be free and uncompelled.⁵⁸⁵

Two landmark Supreme Court decisions hold that customary international law may exist contemporaneously with treaty law and that treaty law may embody long-held norms and principles of customary international law.⁵⁸⁶ In *Borovsky v. Commissioner of Immigration and Director of Prisons*, for example, the Supreme Court cited the UDHR as a basis for its decision that prolonged detention of an alien pending deportation was unlawful.

Article II, section 2 of the Philippines Constitution of 1987 provides for the adoption of generally accepted principles of international law as part of the law of the land. However:

In making such principles of international law “part of the law of the land”, no primacy is implied. Thus, a later law would prevail over a generally accepted principle of international law insofar as the national or domestic court is concerned. ... [In addition] the Supreme Court may declare a treaty unconstitutional if it is in conflict with the constitution.⁵⁸⁷

⁵⁸⁵ Commissioner Quintin B. Cueto III, Address to the *Regional Workshop on the Recognition, Documentation and Reporting Cases of Torture*, Zamaboanga City, Philippines, 7 December 2004. Located at <http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/speeches/qbc_speech01.htm>

⁵⁸⁶ *Yamashita v. Styer* 75 Phil. 563 [1945] and *Kuroda v. Jalandoni* 83 Phil. 171 [1949].

⁵⁸⁷ Public International Law, 5th Edition by Salonga & Yap at 10-14.

Government Policies and Practices

In its second periodic report to the HRC submitted in 2002, the Philippines made a number of observations with respect to its commitments under Article 7 of the ICCPR:⁵⁸⁸

- There is a declining trend in reported incidents of torture from 1988 to 1997, based on data collated by the PCHR, Armed Forces of the Philippines and the Philippines National Police.⁵⁸⁹ The report said that between 1989 and 1997, the PCHR received a total of 67 cases of torture.
- There are legislative, administrative and other measures aimed at the prevention of torture, including:
 - Introduction of the Republic Act 7438;⁵⁹⁰
 - Relevant jurisprudence;⁵⁹¹
 - Improved access to detainees by medical personnel;⁵⁹²
 - Development of rules of engagement by the Armed Forces and the National Police;⁵⁹³
 - Reforms in criminal investigation methods;⁵⁹⁴
 - Human rights education training for the military and police;⁵⁹⁵
 - Compensation measures for victims of torture.⁵⁹⁶
- Pointed to the implementation of recommendations of the UN Special Rapporteur on Torture.⁵⁹⁷

⁵⁸⁸ CCPR/C/PHL/2002/2 at [590]-[632].

⁵⁸⁹ CCPR/C/PHL/2002/2 at [592].

⁵⁹⁰ CCPR/C/PHL/2002/2 at [595].

⁵⁹¹ CCPR/C/PHL/2002/2 at [605].

⁵⁹² CCPR/C/PHL/2002/2 at [609].

⁵⁹³ CCPR/C/PHL/2002/2 at [612].

⁵⁹⁴ CCPR/C/PHL/2002/2 at [617].

⁵⁹⁵ CCPR/C/PHL/2002/2 at [619].

⁵⁹⁶ CCPR/C/PHL/2002/2 at [620].

⁵⁹⁷ CCPR/C/PHL/2002/2 at [525].

In response, the HRC made a number of observations and recommendations:

The Committee is concerned about the reports of persistent and widespread use of torture and cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and the lack of legislation specifically prohibiting torture in accordance with articles 7 and 10 of the Covenant. The Committee notes that evidence is not admissible if it is shown to have been obtained by improper means, but remains concerned that the victim bears the burden of proof in this event.

The State party should institute an effective system of monitoring treatment of all detainees, to ensure that their rights under articles 7 and 10 of the Covenant are fully protected. The State party should ensure that all allegations of torture are effectively and promptly investigated by an independent authority, that those found responsible are prosecuted, and that victims are given adequate compensation. Free access to legal counsel and a doctor should be guaranteed in practice, immediately after arrest and during all stages of detention. All allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim.⁵⁹⁸

The Committee is concerned that the measures of protection of children are inadequate and the situation of large numbers of children, particularly the most vulnerable, is deplorable. While recognizing that certain legislation has been adopted in this respect, many problems remain in practice, such as:

- b) Persistent reports of ill-treatment and abuse, including sexual abuse, in situations of detention and children being detained together with adults where conditions of detention may amount to cruel, inhuman and degrading treatment (art. 7);⁵⁹⁹

Activities of the Philippines Commission on Human Rights

The PCHR has conducted investigations into incidents of torture and other forms of ill-treatment by the police and military authorities. The PCHR has conducted basic orientation and advanced courses for police and other uniformed personnel, including substantial training

⁵⁹⁸ CCPR/CO/79/PHL, 1 December 2003 at [12].

on the CAT. The *National Workshop on the Role of Medical Officers and Jail Personnel in the Recognition, Documentation and Reporting Cases of Torture* was held because of the continuing use of torture by agents of the state in their work against criminality and revolutionary forces. One of the objectives of the workshop was specifically to train non-governmental organisations (NGOs) and Department of Health medical field officers, to add to their understanding of torture and to train them in the techniques of interviewing and documenting torture. The training was also used as an opportunity to form an agreement between concerned government agencies and NGOs in combating torture.

The PCHR has contributed to the consideration of human rights issues and the preparation of documents about the Philippines by other organisations:

- Anti-Torture Act No. 2302;
- Handbook and Manual on the Universal Declaration of Principles for Victims of Crime and Abuse of Power;
- Draft Philippine Government Response to the UNWGEID re: Disappearances in the Philippines;
- Human Rights Situation on Torture and Death Penalty in the Philippines;
- Philippine Report in Customary Rules of International Humanitarian Law;
- An overview on UN matters re: International Standards and Convention on Death Penalty and Documented Information on the Alleged Cases of Enforced and Involuntary Disappearance in the Philippines.

In its Accomplishment Report 2004, the PCHR reported on its visits to 512 detention facilities and police stations. The report stated that detention facilities are generally in deplorable conditions, often suffering from overpopulation. This condition is aggravated by the lack of adequate ventilation and lighting facilities. Detainees complain of inadequate food allowance and lack of basic utilities like water and bedding. Some prisons have no toilets while others

⁵⁹⁹ CCPR/CO/79/PHL, 1 December 2003 at [17].

have no separate detention cells for women, men and youth offenders. Abuse of inmates by prison guards and fellow inmates is also prevalent.

Some PHRC regional offices have reported positive findings. In some cases, detainees are afforded privileges including the ability to participate in religious fellowship studies and other recreations. Others are provided with legal assistance by prison authorities. Minors are separated from adult prisoners and girl detainees are offered handicraft work.

In March 2004 the PCHR urged the Bureau of Jail Management and Penology to stop the practice of ‘basagan’ (the smashing of the heads of inmates by fellow inmates) as a form of disciplinary action against errant inmates. The PCHR recommended the implementation of alternative disciplinary procedures such as temporary separation and isolation. The PCHR presented research into the conditions of the Quezon City Jail at the *Roundtable Discussion on Freedom and Death Inside Jail*, hosted by the Supreme Court of the Philippines, 29 March 2004.⁶⁰⁰

The PCHR has intervened in court proceedings involving torture and has also provided legal advice to and represented victims in court. The PCHR has provided comments on Philippine’s second periodic report to the Committee on the Rights of the Child and made contributions to the HRC and the Committee on Economic, Social and Cultural Rights.

Prior to the 13th Congress in July 2004, the PCHR consulted with NGOs on priority bills that should be pushed for enactment into laws. After a series of workshops and hearings with the Task Force Detainees of the Philippines (TFDP) and Philippine Alliance of Human Rights Advocates, the PCHR submitted a Human Rights Legislative Agenda to the House of Representatives Committee on Human Rights. The Agenda referred to the H.B.4583 Bill – An Act Declaring Torture a Crime, Prescribing Penalties for Commission of Acts of torture and For Other Purposes and the H.B. 3223 Bill – An Act Criminalizing Enforced or Involuntary Disappearance and for Other Purposes.

⁶⁰⁰ Philippines Commission on Human Rights, *No to ‘basagan’ in jail*;

The PCHR worked with NGOs to produce a Human Rights Executive Agenda. One of the issues on the agenda was the adoption of Amnesty International's Twelve Point Program for the Prevention of Torture.

An active NGO in the Philippines is the TFDP, a non-profit, national human rights organisation concerned with documenting human rights violations, assisting the victims and their families in their material and legal needs, and conducting human rights education work. In a 2003 report, *Human Rights Under the Arroyo Government*, the TFDP documented cases of torture occurring between January and December 2003.⁶⁰¹ The TFDP emphasised the need for an enabling law against torture.⁶⁰² The TFDP is working with the PCHR and NGOs, including Medical Action Group, Families of Victims of Involuntary Disappearance, Balay Rehabilitation Center,⁶⁰³ and Amnesty International to lobby for the introduction of an anti-torture bill.⁶⁰⁴

<http://www.chr.gov.ph/main%20pages/news/nat_intl_news05.htm#basagan>

⁶⁰¹ Task Force Detainees of the Philippines, *Human Rights Under the Arroyo Government: January – December 2003*. Located at < <http://www.tfdp.org/>>

⁶⁰² Task Force Detainees of the Philippines, *Human Rights Under the Arroyo Government: January – December 2003* at [12].

⁶⁰³ The experience of detainees subject to torture in 'safehouses' in the Philippines is documented in the book, *In Search of Balms – A Walk Forward to Healing* (2005), published by the Balay Rehabilitation Centre. See also, *The Safehouse is an Instrument of Torture*, Statement of Sedfrey A. Ordonez, Member, Advisory Council of Jurists, Ulaanbaatar, Mongolia, 25 August 2005.

⁶⁰⁴ Task Force Detainees of the Philippines, *Human Rights Under the Arroyo Government: January – December 2003* at 19.

Republic of Korea

ACJ Recommendations

The ACJ recommends that the National Human Rights Commission of the Republic of Korea (NHRCK) urges its government to address the following issues:

- the need for the Republic of Korea to sign and ratify the OPCAT;
- Ensuring compliance with the Code of Interrogation for Human Rights Protection 2003;
- the 10 day detention period under the *Criminal Procedure Act* for detained persons;
- the constitutional limitation on the prohibition on torture to ‘citizens’;
- the apparent failure to provide a legislative definition of torture;
- persistent allegations of ill-treatment perpetrated by law enforcement officials;
- the need to ensure the continued upgrading of conditions in detention facilities
- ensuring training on and compliance with the NHRC’s handbooks for the Police, the Prosecutors’ Office and Correctional Institutions;
- the need to support and strengthen the Police’s Centre for Human Rights and the Army’s Human Rights Committee; and
- implementing the National Action Plan on human rights when it is completed.

International Law

The Republic of Korea (Korea) is a party to the ICCPR,⁶⁰⁵ First Optional Protocol,⁶⁰⁶ ICESCR,⁶⁰⁷ CAT,⁶⁰⁸ CRC⁶⁰⁹ and the Refugee Convention.⁶¹⁰ Korea is not a party to OPCAT. Korea is a party to the Geneva Conventions of 12 August 1949⁶¹¹ and their Protocols.⁶¹² Korea is also a party to the Rome Statute.⁶¹³

⁶⁰⁵ The Republic of Korea acceded to the ICCPR on 10 July 1990.

⁶⁰⁶ The Republic of Korea acceded to the First Optional Protocol on 10 July 1990.

⁶⁰⁷ The Republic of Korea acceded to the ICESCR on 10 July 1990.

⁶⁰⁸ The Republic of Korea acceded to CAT on 8 February 1995.

⁶⁰⁹ The Republic of Korea ratified the CRC on 20 December 1991.

⁶¹⁰ The Republic of Korea acceded to the Refugee Convention on 3 December 1992.

⁶¹¹ The Republic of Korea acceded to the Geneva Conventions of 1949 on 16 August 1966.

⁶¹² The Republic of Korea ratified Additional Protocols I and II of 8 June 1977 on 15 January 1982.

⁶¹³ The Republic of Korea ratified the Rome Statute on 13 November 2002.

National Law

Article 6 of the Constitution of Republic of Korea 1948 states:

- (1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea.

Article 12 of the Constitution relates to the rights to personal liberty and personal integrity.

In particular, Article 12(2) states:

No citizens shall be tortured or be compelled to testify against himself in criminal cases.

Article 12(7) states:

In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

Article 37 of the Constitution states:

- (1) Freedoms and rights of citizens may not be neglected on the grounds that they are not enumerated in the Constitution.
- (2) The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Legislation

Article 309 of the Criminal Procedure Code states:

Confession of a defendant extracted by torture, violence, threat or after prolonged arrest or detention, or which is suspected to have been made involuntarily by means of fraud or other methods, shall not be admitted as evidence of guilt.

The Code of Interrogation for Human Rights Protection came into effect in 2003. The Code sets out the requirements for the protection of the rights of those under investigation. The Code provides:

- The public prosecutor shall respect to the greatest extent the rights of those related to the investigation including suspects and accusers (Article 3).
- The public prosecutor shall, for the protection of the rights of the suspect, ensure the communication with one's legal counsel and the participation of legal counsel in the interrogation process (Article 4).
- All law enforcement officials in the interrogation process shall respect the dignity of those being interrogated and shall not perform any ill-treatment including acts of torture. The public prosecutor shall not use evidence suspected to be extracted from torture (Articles 5(1), 15(2)).
- The public prosecutor shall take necessary measures including interviewing the suspect him or herself once he or she deems that there have been human rights violations or that a confession was not made voluntarily when reviewing the warrant submitted by a judicial police official (Articles 5(1), 15(2)).
- The public prosecutor shall obtain sufficient evidence before interrogating the suspect and refrain from seeking confession through excessive measures. The public prosecutor shall verify the confession against the process it was obtained when the confession of the suspect appears inconsistent (Articles 5(1), 15(2)).
- The public prosecutor shall complete the interrogation before midnight. However, the prosecutor may proceed when: (1) the overnight interrogation is agreed by the suspect and his/her legal counsel; (2) limitation period is about to expire; (3) reasonable reasons exist including prompt investigation is needed to decide whether to take the suspect in custody (Article 17).
- A human rights officer shall be appointed at every police agency to protect the rights of those under investigation and ensure the due process of law. The human rights officer shall take measures to protect human rights, including inquiries, recommendation of improvement, human rights education, and permission of overnight interrogation and others (Articles 33, 34).

Remedies

The Special Act to Find the Truth on Suspicious Deaths 2000 provides remedies for those killed by torture and other ill-treatment under the previous authoritarian regimes. Families of victims may now file petitions and obtain reparation from the government. The Act for Democratization Movement Activists' Honor - Restoration and Compensation also provides for government reparation. In general, victims of alleged torture or other forms of ill-treatment can request reparation from the government or statutory agencies according to National Reparation Act.

Complaints in relation to torture can also be made through the National Human Rights Commission of Korea. While decisions of the Commission are not enforceable, they have a high compliance rate. The Commission can also request prosecutorial investigation and file an accusation.⁶¹⁴

Case Law

The national courts of Korea have not referred to the rule of customary international law prohibiting torture in any cases. It is expected, however, that if the occasion arises, the courts would refer to Article 6(1) of the Constitution to invoke customary international law in prohibiting torture.

The national courts of Korea have not considered any cases of alleged torture that have taken place outside Korea and which did not involve Korean citizens. However, the Government has drafted a bill which would introduce the relevant provisions of the Rome Statute of the International Criminal Court into municipal law. Before submitting the bill to the National Assembly, the government sought the opinion of the NHRC of Korea and held an open hearing for the public, professors, lawyers and legal experts. If the bill is passed, the Korean courts will be able to exercise universal jurisdiction in relation to genocide, crimes against humanity and war crimes.⁶¹⁵

⁶¹⁴ National Human Rights Commission of Korea, Response to APF Questionnaire on ACJ Reference on Torture at 10.

Government Policies and Practices

The Prosecutor's Office Code of Interrogation for Human Rights Protection 2003 was developed after a suspect died during prosecutorial interrogation in 2001. The NHRC of Korea investigated the case ex officio. The Code provides that interrogators should respect the dignity of those being interrogated and should not engage in any ill-treatment including acts of torture (Article 5(1)). It also prevents public prosecutors from using evidence suspected to be extracted by torture (Article 5(2)).

The Prosecutor's Office is also guided by the Code of Ethics for Public Prosecutors, which concerns human rights protection and the due process of law. Article 6 of the Code provides that prosecutors shall ensure the human rights of suspects, accused, victims and others under investigation and upholds the procedure set forth by the Constitution and laws. The Police have published a guide for complaint filing with the NHRC of Korea and made it available to persons held in police custody.

Activities of the National Human Rights Commission of Korea

Between November 2001 and May 2005, the NHRC received a total of 14,905 complaints, among which about 700 cases concerned ill-treatment and violence by law enforcement officials. In one case, a witness had been assaulted with a baseball bat during the police investigation of a bank robbery. The NHRC filed an accusation with a public prosecutor which resulted in a public prosecution instituted on 23 February 2004. In another case, a suspect was assaulted by the police in relation to the investigation into the death of a police officer. The NHRC requested the Prosecutors' Office to investigate (15 September 2003). The NHRC also lodged accusations and recommended disciplinary action regarding 20 cases relating to ill-treatment by law enforcement officials.

The NHRC has not conducted research specifically on torture. However, it has conducted a number of inquiries in relation to human rights violations within the armed forces and in prisons as well as studies on the impact of national security, criminal procedure and juvenile justice legislation.

⁶¹⁵ National Human Rights Commission of Korea, Response to APF Questionnaire on ACJ Reference on

The NHRC's education activities have included education campaigns for law enforcement officials and the publication and use in training seminars of materials containing information about the prevention of torture. These publications have included the *Human Rights Guidebook for the Police*, the *Human Rights Guidebook for the Prosecutors' Office* and the *Human Rights Guidebook for the Correctional Institutions*.

The NHRC has provided advice to institutions responsible for the education and training of law enforcement officials, including the Ministry of Justice and the National Police Agency. As a result, the National Police Agency established the Centre for Human Rights in February 2005. The Army also established a Human Rights Committee in March 2005.

The NHRC investigators visit detention centres, receive complaints regarding conditions of detention and treatment from prisoners and detainees and attempt to identify appropriate remedies. The NHRC reports that its monitoring work has resulted in significant improvement in the detention environment and treatment of prisoners.⁶¹⁶ These improvements include the repeal of continuous punishment detention within prison; improvement on the use of restraints; enhancement of toilet facilities; dimming of the light during the night time; and the extension of medical services.

Article 21 of the National Human Rights Commission Act states:

If a related state organ prepares a governmental report under the provisions of any international treaty on human rights, it shall hear opinions of the Commission.

Since its establishment in November 2001, the NHRC has reviewed and submitted opinions on the governmental reports to HRC, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination Against Women, and Committee Against Torture. The Commission does not submit shadow reports. The Commission attended the Committee on the Rights of the Child in January 2003 and the Committee on the Elimination of Racial Discrimination in August 2003.

Torture at 11.

The NHRC organises seminars and public hearings and also commissions NGOs to undertake research on human rights issues. The Commission pursues international cooperation through the UN Commission on Human Rights and other treaty monitoring bodies.

The NHRC is in the process of developing the National Action Plan on Human Rights, which will strengthen and advance the country's human rights protection system. The Plan will include the national policy principle that all individuals should be treated equally, receive due process of law and be free from ill-treatment particularly during interrogation. Specifically, it will also recommend some protective measures such as establishing interrogation rooms with transparent windows, preventing overnight interrogation, and inviting lawyers to interrogation sessions.

⁶¹⁶ National Human Rights Commission of Korea, Response to APF Questionnaire on ACJ Reference on Torture at 4.

Sri Lanka

ACJ Recommendations

The ACJ recommends that the Human Rights Commission of Sri Lanka (HRCSL) urges its government to address the following issues:

- the need for Sri Lanka to become a party to the OPCAT, the Refugee convention, the Protocols to the Geneva Conventions, and the Rome Statute.
- the lack of consistency of the definition of torture in the Torture Act with that in Article 1(1) of CAT;
- section 17 of the Prevention of Terrorism Act overriding the provisions of the Evidence Ordinance which render confessions extracted by torture or while a person is in custody inadmissible;
- delays experienced in the handing down decisions of the Supreme Court of Sri Lanka in cases of torture;
- the increase in complaints of torture made to the Human Rights Commission of Sri Lanka;
- reports of instances of torture in the context of the Prevention of Terrorism Act and in police stations following arrests made on private complaints as well as general reports that torture by the police is ‘endemic’;
- the need for the authorities to prevent acts of torture
- the need to institute proper witness protection programmes;
- the conclusions made in the report of the Asia Legal Resource Centre titled *Article 2 – Special report: Torture Committed by the Police in Sri Lanka*.

International Law

Sri Lanka is a party to the ICCPR,⁶¹⁷ First Optional Protocol,⁶¹⁸ ICESCR,⁶¹⁹ CAT⁶²⁰ and the CRC.⁶²¹ Sri Lanka is not a party to the OPCAT or the Refugee Convention. Sri Lanka

⁶¹⁷ Sri Lanka acceded to the ICCPR on 11 September 1980.

⁶¹⁸ Sri Lanka acceded to the First Optional Protocol on 3 January 1998.

⁶¹⁹ Sri Lanka acceded to the ICESCR on 11 September 1980.

⁶²⁰ Sri Lanka acceded to CAT on 2 February 1994.

is a party to the Geneva Conventions of 12 August 1949⁶²² but not their Protocols. Sri Lanka is not a party to the Rome Statute.

National Law

Article 9 of the Constitution of Sri Lanka 1978 provides:

- (1) A person shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- (2) Any restriction shall not be placed on the rights declared and recognized by this Article.

Article 10 of the Constitution sets out the conditions under which a person can be arrested, imprisoned, detained and brought to trial.

Legislation

Article 12 of the Torture Act defines torture as follows:

- “torture” with its grammatical variations and cognate expressions means any act which causes severe pain, whether physical or mental, to any other person, being an act which is –
- (a) done for any of the following purposes that is to say –
 - (i) obtaining from such other person or a third person, any information or confession; or
 - (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
 - (iii) intimidating or coercing such other person or a third person;
- or done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

Article 2 provides:

- (4) A person guilty of an offence under this Act shall on conviction after trial by the High Court be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees.

⁶²¹ Sri Lanka ratified the CRC on 11 August 1991.

⁶²² Sri Lanka ratified the Geneva Conventions of 1949 on 28 February 1959.

- (5) An offence under this Act shall be a cognizable offence and a non-bailable offence, within the meaning, and for the purposes, of the Code of Criminal Procedure Act, No.15 of 1979.

Article 3 states:

For the avoidance of doubts it is hereby declared that the fact that any act constituting an offence under this Act was committed –

- (a) at a time when there was a state of war, threat of war, internal political instability or any public emergency;
- (b) on an order of a superior officer or a public authority, shall not be a defence to such offence.

Article 4 states that the High Court of Sri Lanka shall have the jurisdiction to hear and try an offence under this Act committed in any place outside the territory of Sri Lanka by any person.

Amnesty International has observed that the Torture Act does not fully comply with the CAT, noting that a more restrictive definition of torture is used in the legislation.⁶²³

Under the Extradition Law, No. 8 of 1977, extradition arrangements in force between Sri Lanka and other States are deemed to include provision for extradition in respect of the offence of torture as defined in the CAT.⁶²⁴ Where there is no extradition arrangement in force between Sri Lanka and another State, an order may be made by the Minister that the CAT be treated as an extradition arrangement and with the provision for extradition in respect of the offence of torture as defined in the CAT.⁶²⁵

The Evidence Ordinance contains a number of provisions which prevent the extraction of confessions made under torture. Under Section 24 a confession made by an accused person and which is caused by an inducement, threat or promise is inadmissible. Sections 25 and 26 prohibit the admission of any confession made by a person whilst in custody.⁶²⁶

⁶²³ Amnesty International, *Sri Lanka: Torture in Custody*, ASA 37/010/1999, 1 June 1999 available at <<http://www.amnesty.org>>

⁶²⁴ Article 9(1).

⁶²⁵ Article 9(2).

⁶²⁶ Amnesty International says: “This means that confessions made to another detainee, a doctor or a visitor would also be inadmissible. The only exception made by the Ordinance is where the confession is made in the immediate presence of a magistrate.” Amnesty International, *Sri Lanka – Torture in Custody*, ASA 37/010/1999; <<http://web.amnesty.org/library/Index/ENGASA370101999?open&of=ENG-LKA>>

Section 17 of the Prevention of Terrorism Act directly overrides the above provisions of the Evidence Ordinance:

Notwithstanding anything to the contrary in any other law, the provisions of sections 25, 26 and 30 of the Evidence Ordinance shall have no application in any proceedings under this Act.

Remedies

Under Article 171 of the Constitution, applications may be made to the Supreme Court of Sri Lanka for determination of a violation of fundamental rights contained within the Constitution. Applications are required to be filed within one month of the alleged violation. However, it has been reported that extended delays occur in the final determination of these applications.⁶²⁷

The Attorney General's Department, which is responsible for the commencement of criminal proceedings under the Torture Act, has established two units for the prosecution of state officers. The Disappearances Investigation Unit and the Prosecution of Torture Perpetrators Unit conduct investigations at the direction of the Attorney General's Department. The Asian Legal Resource Centre reports that these units do not have the power to initiate investigations independently, upon receipt of complaints from the public.⁶²⁸

The Human Rights Commission of Sri Lanka (HRCSL) reports:

Remedies available and provided in practice, to victims of torture and other forms of ill-treatment include complaint systems and compensation mechanisms. In a recent judgment the Supreme Court expand[ed] the aspect of medical rehabilitation by recognising a victim's right to choose between [a] government hospital and private hospital.⁶²⁹

⁶²⁷ Asia Legal Resource Centre, *Article 2 – Second Special Report: Endemic Torture and the Collapse of Policing in Sri Lanka*, February 2004, Vol. 3, No. 1, pp20-21 (*Second Special Report*).

⁶²⁸ Asia Legal Resource Centre, *Article 2 – Second Special Report: Endemic Torture and the Collapse of Policing in Sri Lanka*, February 2004, Vol. 3, No. 1, pp20-21 (*Second Special Report*) at 13.

⁶²⁹ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q5

Case Law

The HRCSL reports that the national courts of Sri Lanka recognise customary international law as a relevant source of law that must be complied with. The Commission cited *Shriyani Perera v Attorney General* as a ‘salient judgment’.⁶³⁰

The HRCSL reports that the national courts have jurisdiction to hear extra-territorial cases. However, it was not able to provide any further details or information.⁶³¹ The HRCSL reports that the courts have not extended their jurisdiction to international intervention forces.⁶³²

Government Policies and Practices

The HRCSL reports:

The Police and other Disciplinary forces follow the set minimum standards in interrogation to most extent. Constitutional provisions and general laws are being applied as minimum standards. There are complaints made against disciplinary forces by groups and individuals. However consequent to these complaints State authorities overtake further action.⁶³³

With regards to the protection available to persons facing extradition, the HRCSL says that any complaints it receives are forwarded to relevant agencies including the Foreign Employment Bureau, the Labour Commission, the Ministry of Foreign Affairs and the Ministry of Labour.⁶³⁴

With regards to the nature and extent of procedures and safeguards to protect against torture by non-state actors, the HRCSL reports:

⁶³⁰ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q2

⁶³¹ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q7

⁶³² Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q8

⁶³³ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q6

⁶³⁴ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q6

First and foremost the aggrieved party can resort to civil and criminal action. Legal Aid, awareness programs and campaigns [are] being conducted in this regard.⁶³⁵

Activities of the Human Rights Commission of Sri Lanka

The HRCSL has highlighted the prevention of torture and other forms of ill-treatment as a key activity in its *2003-2006 Strategic Plan*. This includes the development of specific programs of monitoring and follow-up,⁶³⁶ provision of policy advice to the relevant authorities (backed-up by research support)⁶³⁷ and the development of training programs for the police, the armed forces and other government officials.⁶³⁸ The Strategic Plan also indicates that the Commission intends to hold discussions with the Police Commission and the Parliamentary Select Committee about the introduction of human rights considerations as factors in the promotion, transfer and removal of police officers.⁶³⁹

In its Annual Report 2003 the HRCSL reported an upward trend in the number of complaints relating to torture and other forms of ill-treatment that it had received since 2001. The number of cases of torture and harassment had increased from 728 in 2001 to 850 in 2002. The complaints classified as torture had more than doubled from 294 to 607 cases. In the first quarter of 2003 a total of 220 cases of torture and 158 of harassment were reported.⁶⁴⁰

Since 1 January 2004, the HRCSL has received 897 complaints regarding torture from both individuals and groups. The HRCSL has cited the Bulasthsinghela and the Kandapola cases as two of the most significant cases in which it conducted investigations and inquiries. The HRCSL reports that it cooperates with law enforcement agencies in the conduct of its investigations.⁶⁴¹

⁶³⁵ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 2, Q9

⁶³⁶ Human Rights Commission of Sri Lanka, *Strategic Plan (2003-2006)* at 6. Available at <<http://www.hrc-srilanka.org/>>

⁶³⁷ Human Rights Commission of Sri Lanka, *Strategic Plan (2003-2006)* at 8 and 14.

⁶³⁸ Human Rights Commission of Sri Lanka, *Strategic Plan (2003-2006)* at 11.

⁶³⁹ Human Rights Commission of Sri Lanka, *Strategic Plan (2003-2006)* at 11.

⁶⁴⁰ Human Rights Commission of Sri Lanka, *Annual Report 2003*, p8. Available at <<http://www.hrc-srilanka.org/>>

⁶⁴¹ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 1, Q1.

The HRCSL conducted a project in 2002 and 2003 aimed at monitoring and raising awareness of issues relating to torture and other forms of ill-treatment. In its most recent Annual Report the HRCSL noted:

The Commission gave high priority to this project as it continued to receive a high number of complaints of torture from all parts of the island. The pattern of complaints indicated that quite apart from the many complaints of torture that were reported in connection with the arrests under the ER [Emergency Regulations] and the PTA [*Prevention of Terrorism Act*] as part of the ethnic conflict, cases of torture did occur in other circumstances as well, when suspects were taken into custody under the normal law. The causes contributing to torture were numerous. Lack of skill in the methods of interrogation were singled out as a major cause. The public also appeared to condone torture in certain circumstances. Victims themselves were often reluctant to pursue their complaints and were ready to settle for some compensation.⁶⁴²

The HRCSL's monitoring and awareness-raising project was conducted in three stages. The first stage involved frequent and unannounced visits to police stations in the selected regions of Ampara, Vavuniya and Matara to monitor the practice of arrest and detention. The purpose of these visits was to obtain information about incidents of torture and other forms of ill-treatment and to use this information in the development of the project's second and third stages. The second stage of the project was the development of a system of regular monitoring by the HRCSL of police stations and other locations designed to reduce and eliminate torture and other forms of ill-treatment. The third stage of the project involved the HRCSL conducting public education and training programs specifically targeted at public officials, victims of torture and members of the public. The HRCSL has conducted education programs for teachers and selected members of the community in Matara, Vavuniya and Ampara.⁶⁴³

The HRCSL has intervened in two separate court proceedings in which torture has been an issue. However, it has not provided any details about the cases.⁶⁴⁴ The HRCSL reports that the Government has a practice of consulting with it about the preparation of its treaty body reports. The HRCSL does not produce shadow reports.⁶⁴⁵

⁶⁴² Human Rights Commission of Sri Lanka, *Annual Report 2003* at 18.

⁶⁴³ Human Rights Commission of Sri Lanka, *Annual Report 2003* at 18-19

⁶⁴⁴ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 1, Q5

⁶⁴⁵ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 1, Q7

The HRCSL collaborates with UN agencies, multi-lateral donors and government agencies, particularly in the organisation of workshops on torture prevention. It has also received financial support and other assistance from these organisations.⁶⁴⁶

Non-governmental organisations and civil society have been active in documenting torture and other forms of ill-treatment in Sri Lanka and working towards its elimination. Two of these organisations are Home for Human Rights (HHR) and the Asian Legal Resource Centre (ALRC).⁶⁴⁷

HHR is based in Colombo and provides legal representation and support for victims of torture. The Director of HHR's Legal Program, Mr V.S Ganesalingam has said:

From a study of the cases of torture victims arrested and detained by the police, security forces and para military forces working with the forces, it could be said that it is the Prevention of Terrorism Act that has created an atmosphere conducive for torture to occur in a good number of cases. There are also instances of torture in police stations after arrests on private complaints regarding property-related issues or family disputes, to satisfy influential persons or politicians.⁶⁴⁸

In its monitoring of cases of torture and other forms of ill-treatment, HHR points to the weaknesses of so-called 'built-in mechanisms' contained within the laws and institutions which fail to provide the necessary protection to victims of torture.⁶⁴⁹

The ALRC has produced two reports on the issue since 2002.⁶⁵⁰ In its most recent report, the ALRC noted that despite the increased focus by the international community and pressure on the Sri Lankan Government in relation to torture:

⁶⁴⁶ Human Rights Commission of Sri Lanka, *Response to the APF Questionnaire on Torture*, 6 April 2005, at 1, Q9

⁶⁴⁷ The Advisory Council also notes the recent shadow report published by the Asian Centre for Human Rights, *Torture and Lawless Law Enforcement in Sri Lanka*, 16 November 2005 – available at <http://www.achrweb.org/reports/srilanka/SLK-CAT0305.pdf>

⁶⁴⁸ V.S. Ganesalingam "Case study of custodial torture survivors" in *Beyond the Wall: Home for Human Rights Quarterly Journal on Human Rights News and Views*, Colombo, Sri Lanka, January-March 2005 at 21.

⁶⁴⁹ V.S. Ganesalingam "Case study of custodial torture survivors" in *Beyond the Wall: Home for Human Rights Quarterly Journal on Human Rights News and Views*, Colombo, Sri Lanka, January-March 2005 at 25.

torture by the police continues to be endemic in Sri Lanka. In fact, it has now received such widespread attention and yet continues unabated speaks to an immense crisis of policing in the country. The police force in Sri Lanka as it now exists is in no position to protect the rule of law and citizens' rights; on the contrary, it is a profound threat to the security of both.⁶⁵¹

The ALRC's report addresses a wide range of issues relating to torture and other forms of ill-treatment, including: threats against complainants; inadequate compensation and availability of treatment and rehabilitation facilities for victims of torture; the breakdown of the policing system in Sri Lanka; delays in the determination of fundamental rights applications under Article 126 of the Constitution and prosecutions under the Torture Act; the role of the Attorney General's Department; and complaints about the professionalism of the District Medical Officers and Judicial Medical Officers in conducting medical examinations on victims of torture and in post mortem examinations.

In written correspondence with the APF, the Executive Director of the ALRC, Mr Basil Fernando, commented on the difficulties arising from a situation in which the criminal justice system fails to support anti-torture laws:

In our understanding, the issue of torture is very much related to the nature of the criminal justice system....At the practical level, the principles agreed upon in international forums and the real principles on which the criminal justice system is operated, conflict.

This conflict can have extremely dangerous results to the torture victims who seek redress for torture. The danger comes from the fact that, while the government may provide a remedy against torture, (for example, by creating an offence of torture, as was done in Sri Lanka under Act No 22 of 1994), when the torture victims want to pursue legal action in terms of such a law they come under serious threat, including the threat to life itself.

While, the government may report on the existence of a torture Act in the country in international forums, the actual reality is that such law cannot be effectively implemented

⁶⁵⁰ Asia Legal Resource Centre, *Article 2 - Special Report: Torture Committed by the Police in Sri Lanka*, August 2002, Vol. 1, No. 4 (*Special Report*). Article 2 – Second Special Report: Endemic Torture and the Collapse of Policing in Sri Lanka, February 2004, Vol. 3, No. 1 (*Second Special Report*).

⁶⁵¹ Asian Legal Resource Centre, *Article 2: Second Special Report - Endemic Torture and the Collapse of Policing in Sri Lanka*, February 2004, Vol. 3, No. 1 at 2. (Hereafter, *Second Special Report*).

without other laws such as witness protection. It can be said that there is not a single country in the Asian context where there are effective remedies for torture victims.⁶⁵²

⁶⁵² E-mail correspondence from Mr Basil Fernando, Asian Legal Resource Centre to Mr Stephen Clark, APF Secretariat, 15 December 2004.

Thailand

ACJ Recommendations

The ACJ recommends that the National Human Rights Commission of Thailand (NHRCT) urges its government to address the following issues:

- the need for Thailand to become a party to the First Optional Protocol, CAT, OPCAT, the Refugee Convention, the Protocols to the Geneva Conventions, and the Rome Statute.
- the Constitutional provision allowing for derogation from the rights recognised in the Constitution on the basis of ‘*necessity*’;
- the need to provide a legislative definition of torture;
- the decision of Thai courts not to recognise customary international law except to the extent that it is reflected in domestic laws;
- the limitation on the extra-judicial jurisdiction of Thai courts to offences ‘affecting Thailand’;
- the need to have set minimum standards of interrogation for police and other disciplinary forces except for those provided in the Constitution;
- reports of persons located on the Thai border being forcibly returned to their country of origin;
- reports of overcrowding and sub-standard conditions in Thai prisons;
- the inconsistency of the recent emergency decree with human rights obligations and the Constitution.

International Law

Thailand is a party to the ICCPR,⁶⁵³ ICESCR⁶⁵⁴ and the CRC.⁶⁵⁵ Thailand is not a party to the First Optional Protocol, CAT, OPCAT or the Refugee Convention. Thailand is a party

⁶⁵³ Thailand acceded the ICCPR on 29 January 1997.

⁶⁵⁴ Thailand acceded to the ICESCR on 5 December 1999

⁶⁵⁵ Thailand ratified the CRC on 26 April 1992.

to the Geneva Conventions of 12 August 1949⁶⁵⁶ but not their Protocols. Thailand is a signatory to the Rome Statute.⁶⁵⁷

National Law

Section 31 of the Constitution of Thailand 1997 recognises the right to freedom from “torture, brutal act, or punishment by a cruel and inhumane means”.

Section 31 of the Constitution also provides that “punishment by death penalty as provided by law shall not be deemed the punishment by a cruel or inhumane means under the Section”.

Legislation

Under Section 226 of the Criminal Procedure Code B.E. 2477 (1934) an inducement, promise, threat, deception or other unlawful act used to procure any material, documentary or oral evidence in the trial of an accused is not permitted when such evidence is likely to prove the guilt or the innocence of the accused.

Remedies

Section 28 of the Constitution states:

A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the court.

Section 245 of the Constitution states:

In a criminal case, an injured person has the right to protection, proper treatment and necessary and appropriate remuneration from the State, as provided by law. In the case where any person suffers an injury to life, body or mind on account of the commission of a criminal offence by other person without the injured person participating in such commission and the

⁶⁵⁶ Thailand acceded to the Geneva Conventions of 1949 on 29 December 1954.

⁶⁵⁷ Thailand signed the Rome Statute on 2 October 2000.

injury cannot be remedied by other means, such person or his or her heir has the right to receive an aid from the State, upon the conditions and in the manner provided by law.

Section 246 of the Constitution says:

Any person who has become the accused in a criminal case and has been detained during the trial shall, if it appears from the final judgement of that case that the accused did not commit the offence or the act of the accused does not constitute an offence, be entitled to appropriate compensation, expenses and the recovery of any right lost on account of that incident, upon the conditions and in the manner provided by law.

The Remedies for an Injured Person, Compensation and Expense for a Defendant in Criminal Case Act B.E. 2544 (2001) (the “Remedies Act”) establishes a Committee to consider appropriate remedies and compensation.

Section 3 of the Remedies Act defines an ‘injured person’ as a person who suffers an injury to life, body or mind on account of the commission of a criminal offence by other person without the injured person participating in such commission.

Under section 18 of the Remedies Act available remedies for an injured person include medical expenses, physical and mental rehabilitation, compensation in case of death, compensation for the loss of income due to a disability and other damages which the Committee deems appropriate. Remedies awarded to an injured person are to be commensurate with the injury and should consider any other compensation received.

Under section 22 a request for a remedy must be submitted to the Committee within one year of the date of the commission of the offence as acknowledged by the injured person.

Emergency Decree

In 2005, on the initiative of the Government, an “emergency” decree was issued to replace the Law on Public Administration in Emergency Situations 1952, partly as a response to the ongoing unrest in Southern Thailand. The decree confers broad powers on the Government and has been heavily criticised as inconsistent with human rights and the Thai Constitution. Pursuant to the decree, the executive branch has almost unfettered powers to

take action in emergencies, possibly leading to instances of abuse linked with torture and cruel, inhuman and degrading treatment. There are pitfalls both in the process of adopting the new law as well as its substance.

First, the law should have been processed through parliament by means of a parliamentary statute rather than an executive degree emanating from the Government. Second, various substantive issues have been raised by the analysts, including the following:

- inadequate provisions for judicial supervision of arrests and detentions, thus opening the door to the risk of torture, while allowing the courts to grant permission to the authorities to detain suspects for up to seven days renewable to thirty days, pending trial;
- wide powers for the Prime Minister to “issue a notification not to perform any act or to perform any act to the extent necessary for maintaining the security of the State, the safety of the country or the safety of the people”;
- peculiar provision which permits the authorities to detain suspects not in police stations and detention centres, thus raising the spectre of detention in secret locations;
- excessive constraints on various freedoms such as freedom of expression and assembly;
- prevention of access by the aggrieved to the Administrative Courts system;
- exemption of the authorities from responsibility for mistreatment of others, thus entrenching impunity.

It should be noted that while martial law has been imposed in various provinces in Southern Thailand, the authorities have not abided by the obligation under the ICPR, to which Thailand is party, to inform the other member states accordingly through the UN system. This gives rise to concern in regard to a conflict with Thailand’s international obligations in the human rights field. Thailand’s appearance in 2005 before the Human Rights Committee under the ICPR to submit the country’s first report thereunder was also a key occasion where a number of critiques from many sources, including the Committee, were targeted at these inconsistencies.

Case Law

The NHRC advises that Thailand's national courts will not take customary international law into consideration except where it is translated into domestic law, particularly with respect to criminal offences.

Section 7 of the Penal Code enables the national courts to exercise jurisdiction with respect to extra-territorial offences concerning national security, fraud and robbery in the high seas that affect Thailand.

Section 8 of the Penal Code says that torture related offences committed outside the country may fall under the jurisdiction of the Thai courts if they involve Thai citizens, be they injured persons or offenders.

Government Policies and Practices

The NHRC reports that minimum standards for the conduct of interrogation by the police and other disciplinary forces are controlled by relevant provisions of the Constitution, including section 237 (arrest and detention), section 241 (presence of an advocate during interrogation and making of statement), section 242 (access to representation), section 243 (self-incrimination)

The NHRC reports that despite Constitutional protections, it has received a number of complaints alleging the use of torture and degrading treatment by law enforcement officers during detention and interrogation. Methods of torture in these cases include threatening, beating and stripping detainees and electrocuting sensitive parts of body.

The NHRC reports that the Ministry of Defence is responsible for the regulation of case procedures in the Court Martial. The NHRC has been informed by the Ministry that the regulations prohibit any investigation of criminal charges by officers without the requisite authorisation. The purpose of this procedure is to prevent arbitrary investigation by military officers.

The NHRC reports that the Government of Thailand has a long history of protecting persons from being forcibly returned to a country where they may face torture or other forms of ill-treatment. This protection has come in the form of provision of temporary asylum for the “hundreds of thousands of people who flee armed conflicts from neighbouring countries” and close cooperation with the United Nations High Commissioner for Refugees and other countries and international organisations to provide continued assistance.

The NHRC notes however that Thailand is still not party to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol and suggests that the government has “frequently expressed its concerns over the tremendous financial and administrative burden as well as security problems” that may eventuate as a result of their ratification of these instruments. As the NHRC explains, the Thai authorities fear that the ratification of the Refugee Convention would act as a “pull factor” for people in neighbouring countries. In a number of international conferences, representatives of the Thai government have expressed their concern over the financial burden that results from having to shelter and provide basic needs and welfare to hundreds of thousands of displaced persons who have fled fighting in their home countries over the past two decades. The influx of these people has also affected Thai local villagers in their efforts to control disease and as a result of border skirmishes.

The NHRC also notes the concerns raised by NGOs about groups of persons located along Thailand’s borders being forcibly returned to their country of origin. The NHRC observes that the authorities concerned always reaffirm their policy and practice not to send them back until such time that they can leave for the country with safety and dignity. No security policy guidelines and strategies can be in contradiction with the Constitution provisions.

The NHRC says that upon receiving reports or complaints of refugees and/or displaced persons being forcibly returned to their country, it immediately visits the relevant location to conduct an investigation, it coordinates with the relevant authorities and organisations to address particular concerns and then liaises with the government to prevent, where possible, any forcible return.

State and non-state actors are subject to prosecution for acts of torture or ill-treatment under the Criminal Procedure Code, subject to the limitations of jurisdiction of the national courts.

Activities of the National Human Rights Commission of Thailand

The NHRC of Thailand reports that in the last twelve months it has handled more than ten complaints involving acts of torture. The NHRC's filing system does not categorise cases of torture specifically, but rather under the broader areas such as impact of the Thai Government's policy on drugs suppression and the administration of justice. The NHRC says that if during the course of its investigations, acts of torture are identified, it informs the relevant authorities to take disciplinary measures and legal action against those who are responsible.

The NHRC reports that it does not conduct education or awareness campaigns specifically on torture. It does note, however, that when Commissioners conduct their field investigations, they hold small fora educating people and the local communities on their basic rights and freedoms, which are guaranteed by the Constitution, including the prohibition of torture, brutal acts, or punishment by cruel or inhuman means. Furthermore, through the NHRC's Sub-Commission on Human Rights Education, the police and military academies are encouraged to provide human rights course/training for their cadets.

In this regard, the NHRC reports that the Sub-Commission of Human Rights Education has twice co-operated with the police to organise training courses for their officers. In addition, a teacher in the Police Cadet Academy joined in the human rights training programme which was provided by the NHRC for general teachers. In the Police Cadet Academy there is also an optional subject on human rights. The Sub-Commission on Human Rights Education is also in discussion with various institutions to systematically integrate human rights issues into their curricula.

The NHRC occasionally visits detention facilities when it has been notified that a detainee has died in custody. The NHRC has identified unsatisfactory sanitary conditions in certain police cells and considers that a number of facilities do not meet minimum standards. The NHRC is planning to develop a program of regular visits to police stations in 2005.

The NHRC also regularly visits prisons. A common problem identified in prisons is overcrowding. This is a result of limited space and financial resources. The NHRC reports that there is a need for personnel training for prison officers, although it notes that in the past year there have been a number of number of positive changes. These improvements include better human rights awareness among high-level officials, improved prison conditions and the improvement of prison administration.

The NHRC has also visited detention facilities for children and juveniles in many provinces, where it says the general conditions of most facilities meet minimum standards. However, limited resources, lack of personnel training, occasional misconduct by officers at the operational level remain areas of concern. Positive outcomes from the NHRC's visits to detention facilities for children and juveniles include: collecting first-hand information, monitoring general conditions of places, listening to children's needs and discussing with officers the shortcomings in their work, and providing recommendations to higher authorities for the improvement of the detention facilities. The NHRC recommends the training of all detention centre personnel. It also point to the need to address overcrowding issues, particularly for female inmates with young babies, and the situation of young children accompanying their mothers as inmates in detention.

The NHRC reports that it has been working with various organisations to amend the existing law in order to allow maternal leave for pregnant inmates, and to provide appropriate facilities in detention places for female prisoners accompanied by babies and young children.

The visits were well received by the authorities concerned and showed their willingness to improve conditions of detention places. The recommendations of the NHRC in relation to inmates with children have been adopted by the authorities.

Section 22 of the National Human Rights Commission Act provides:

the Commission shall have the duties to examine and propose remedial measures under this Act for the commission or omission of acts which violate human rights and which is not a matter being litigated in the Court or that upon which the Court has already given final order or judgement.

The NHRC reports that it has not intervened in court proceedings on the issue of torture.

The NHRC reports that Thailand's most recent ICCPR and CRC reports were drafted before its establishment. The NHRC has monitored the implementation of the CRC by inviting authorities concerned to provide information on their activities, particularly with respect to compliance with the CRC Committee's observations.

The NHRC reports that, in its investigation of complaints (including alleged acts of torture), it involves experts from academic institutions and civil society to sit permanently on the NHRC's Sub-Commissions, which have investigation powers. The NHRC notes also that it has received contacts, information and cases concerning alleged acts of torture from the UN special mechanisms and international organisations such as Amnesty International and the Association for the Prevention of Torture.

Under the National Human Rights Act, the NHRC has a duty to propose, to the Parliament and the Government, policies and recommendations with regard to the revision of laws, rules or regulations relevant to human rights. The NHRC reports that it continues to urge the relevant authorities to consider Thailand's accession to the CAT and has also suggested that the government support the adoption of the OPCAT.

Serious concerns have been raised by Amnesty International, including the Secretary General of Amnesty International personally, about the events of 25 October 2004 when 87 protestors are believed to have suffocated to death following their arrest and during their transportation to a police station.⁶⁵⁸ In her open letter to the President of Thailand, Irene Khan raised particular concerns about:

- the independence, impartiality, competence and effectiveness of any investigation into the events of that day;
- excessive force used against demonstrators;
- the torture of detainees;
- the impunity enjoyed by state officials; and

- the need to ensure that security forces, while responding to grave threats of law and order, still uphold human rights in any response to disturbances.

⁶⁵⁸ This letter was copied from the Amnesty International website on 8 May 2005. URL: <<http://web.amnesty.org/library/Index/ENGASA390152004?open&of=ENG-THA>>

APPENDICES

Table 1

Status of Ratifications in Forum States of Principal International Human Rights Treaties Relevant to Torture as of 15 February 2005

Country	ICCPR	IOP	ICESCR	CAT	OPCAT	CRC	OPCRC	Refugees
Afghanistan	x	-	x	X	-	x	x	-
Australia	x	x	x	X	-	x	x	x
Fiji	-	-	-	-	-	x	-	s
India	x	-	x	s	-	x	s	-
Indonesia	-	-	-	x	-	x	s	-
Jordan	x	-	x	x	-	x	s	-
Malaysia	-	-	-	-	-	x	-	-
Mongolia	x	x	x	x	-	x	x	-
Nepal	x	x	x	x	-	x	s	-
New Zealand	x	x	x	x	s	x	s	x
Palestinian Territories	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Philippines	x	x	x	x	-	x	x	x
Republic of Korea	x	x	x	x	-	x	x	x
Sri Lanka	x	x	x	x	-	x	s	-
Thailand	x	-	x	-	-	x	-	-

Notes:

ICCPR: *International Covenant on Civil and Political Rights.*

IOP: *First Optional Protocol to the International Covenant on Civil and Political Rights.*

ICESCR: *International Covenant on Economic, Social and Cultural Rights.*

CAT: *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.*

OPCAT: *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.*

CRC: *Convention on the Rights of the Child.*

OPCRC: *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.*

Refugees: *Convention relating to the Status of Refugees.*

'x' indicates that the State has ratified or acceded to the specified treaty.

's' indicates that the State is a signatory to the specified treaty

Table 2

Status of Ratifications of Forum States of Principal International Humanitarian Treaties Relevant to Torture as of 10 November 2004

Country	Geneva Convention	First Additional Protocol	Second Additional Protocol	Rome Statute
Afghanistan	X	-	-	x
Australia	X	x	x	x
Fiji	X	-	-	x
India	X	-	-	-
Indonesia	X	-	-	-
Jordan	X	x	x	x
Malaysia	X	-	-	-
Mongolia	X	x	x	x
Nepal	X	-	-	-
New Zealand	X	x	x	x
Palestinian Territories	n/a	n/a	n/a	n/a
Philippines	X	-	x	s
Republic of Korea	X	x	x	x
Sri Lanka	X	-	-	-
Thailand	X	-	-	s

Appendix 1

APT POSITION PAPER



The Role of National Human Rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment or punishment

During the last decade, many States established or considered the establishment of national human rights institutions (NHRI) for the promotion and protection of human rights, as a means to strengthen democracies and the rule of law and to reinforce peace processes. NHRI have a pivotal role to play in the prevention of torture and other forms of ill-treatment. In this position paper, the APT proposes six concrete steps that NHRI can take to significantly reduce such violations. These suggestions are not intended to be exhaustive and must be adapted to the particularities of each NHRI and national context.

A. National Human Rights Institutions (NHRI)

NHRI are public organs specifically empowered to promote and protect human rights nationally. In practice, with such broad mandates, each of these institutions operates very differently from others. However, they share common characteristics and fundamental needs that permit them to achieve their purpose in the most effective and independent way. Some of these characteristics are reflected in the “Paris Principles”⁶⁵⁹ that establish their competence, responsibilities, composition and guarantees of independence, pluralism and methods of operation. These principles became the foundation and reference point for the establishment and operation of NHRI throughout the world.

These institutions monitor public administration, prevent abuses committed by public bodies and, in general, promote the respect for human rights. In some cases, NHRI have quasi-judiciary powers, which enable them to hear and consider complaints and petitions concerning individual situations. Their role should be considered as complementary to other established institutions working for the protection and promotion of fundamental rights, such as the judicial and legislative branches, parliamentary commissions, governmental agencies and non-governmental organisations (NGOs).

NHRI can take the form of officially recognised human rights organs with a national mandate, such as national human rights commissions or ombudsmen. Some institutions are geographically or thematically specialised, like local ombudsmen or national institutions whose mandate consists of promoting or protecting rights of particular groups. Although these more specific institutions are not considered by the Paris Principles as NHRI per se, the APT believes that the

⁶⁵⁹ The Paris Principles can be downloaded at <http://www.nhri.net/pdf/ParisPrinciples.english.pdf>

Paris Principles can also be applied to those institutions with a more restricted geographical or thematic mandate.

B. Six concrete steps for NHRI to prevent torture

The following concrete steps can be adopted by NHRI to more effectively combat torture and ill-treatment:

1. Advocating for the application of international and regional standards prohibiting torture

- (a) In coordination with the media and civil society, NHRI should play a proactive role in promoting the **adoption and ratification** of relevant international and regional human rights instruments. This can be accomplished by lobbying and advocating to relevant bodies, particularly within the executive and legislative branches of government. NHRI are ideally placed to promote the ratification, as well as the application, of international and regional norms involving the general protection of human rights, more specific instruments for combating torture and ill-treatment and instruments involving the protection of specific groups such as women, juveniles, migrants and detained persons, among others.
- (b) NHRI can ensure that ratified international and regional norms are fully incorporated into **domestic legislation**.⁶⁶⁰ According to the Paris Principles,⁶⁶¹ NHRI should have the power to submit to the government, parliament and any other competent body, opinions, recommendations and proposals, which they may also decide to publicize. These competencies can be used by NHRI to strongly advocate for national law to be brought into conformity with international human rights norms. NHRI can examine legislation already in force, as well as draft bills and proposals under discussion, recommending possible amendments. They can also promote the adoption of new legislative measures.

An aspect of domestic legislation of tantamount importance is the **criminalisation** of torture. NHRI should verify that torture and ill-treatment are clearly identified as distinct criminal offences under national law. If not, they ought to take all appropriate measures to ensure that torture and ill-treatment are immediately criminalized by law.

- (c) **Effective implementation of existing legislation:** NHRI should also review and monitor the implementation of legislation that is already in force. In order to ensure adequate knowledge and application of international and regional human rights standards by the judiciary, NHRI should follow legal proceedings and observe relevant trials related to cases of human rights violations, particularly of torture and ill-treatment. If a problem is revealed, appropriate steps, such as judicial reform, should then be proposed by NHRI to remedy the problem(s).

⁶⁶⁰ Including local legislation in federal systems.

⁶⁶¹ Principle 3 under *Competence and Responsibilities*.

2. Cooperation with international and regional human rights bodies

- (a) NHRI should be involved in the process of submitting information, cases or reports to relevant international and regional bodies.

The treaty bodies and special procedures with whom NHRI may cooperate in the prevention of torture and ill-treatment include:

- (i) The UN Special Rapporteur on Torture;
- (ii) The UN Committee against Torture;
- (iii) The UN Human Rights Committee;
- (iv) The UN Working Group on Arbitrary Detention;
- (v) For the Americas, the Inter-American Commission on Human Rights;
- (vi) For Europe, the European Committee for the Prevention of Torture; and
- (vii) For Africa, the African Commission on Human and Peoples' Rights.

It is important to keep in mind that other treaty bodies and thematic or regional special procedures can also deal with issues related to cases of torture and ill-treatment. Within the UN system, these include, but are not limited to, the Committee on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of All Forms of Racial Discrimination, the Committee on the Rights of the Child, the Committee on Migrant Workers, the Special Rapporteur on Human Rights Defenders, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, among others.⁶⁶²

- (b) Each NHRI should be particularly aware of the State reports that their government must present periodically to these international and regional bodies, and should participate in the process by providing the international or regional body with relevant information and observations. This can be done either through participating in consultations by the state as part of its process of preparing the official state report, or through independent shadow reports traditionally drafted by NGOs.
- (c) The NHRI can also assist international and regional human rights mechanisms that visit countries to examine the specific human rights situation on the ground: for example, by providing up-to-date information, facilitating contacts and making suggestions to the proposed agenda.
- (d) When international and regional bodies produce relevant reports, particularly those that are country-specific, the NHRI has an irreplaceable role to play in disseminating findings, conclusions and recommendations through the media. They should be of interest to the general public, as well as to concerned civil society actors and relevant

⁶⁶² For more information and contact details of secretariat for Special Procedures at the UN, please refer to <http://www.ohchr.org/english/bodies/chr/special/themes.htm>

governmental bodies, such as parliamentarians, social institutions and specific offices of the executive or judicial branch. Furthermore, NHRI can be decisive in following up to the specific recommendations made by these bodies and ensuring that these are implemented by those responsible.

3. Monitoring places of detention

- (a) NHRI should have established monitoring programmes for places of detention. Such programmes are one of the most powerful tools to prevent torture and ill-treatment. Through regular preventive visits to places of detention, each NHRI should urge the State to fulfil its obligations regarding the absolute prohibition of torture, under any circumstances, as well as adequate detention conditions.
- (b) In order for NHRI to conduct effective monitoring work, they ought to have unrestricted access to all places where people are deprived of their liberty, including police stations, prisons, administrative detention facilities, military detention centres, juvenile detention centres and social care institutions such as psychiatric hospitals. They should have the full complement of powers required to conduct professional monitoring, namely access to all persons, the right to conduct interviews in private with persons of their choice, as well as access to all relevant information.⁶⁶³
- (c) Furthermore, experience shows that such visits are most effective if they are done by pluralist and multi-disciplinary teams including, if possible, doctors and lawyers. Visits to places of detention should be as regular as possible and the monitoring team should be adequately trained.
- (d) These visits should help to establish a constructive dialogue of cooperation with all relevant authorities in order jointly to seek solutions to the problems observed. The NHRI should therefore transmit their conclusions and recommendations to the authorities of the establishment they visited, and to other ministries or government offices responsible for persons deprived of liberty.

NHRI should be sure to monitor places of detention already visited by regional or international bodies, in order to give adequate follow-up to their recommendations related to cases of torture and ill-treatment.

- (e) It is possible for NHRI to be designated as part of the national preventive mechanism foreseen by the Optional Protocol to the UN Convention against Torture. This designation could greatly enhance their monitoring role, but is not a function exclusively reserved to NHRI. To ensure designation of the most effective mechanism, the structure adopted in each state should be the result of a broad public debate.

⁶⁶³ In other words, NHRI should have the same powers as foreseen for national preventive visits in the Optional Protocol to the UN Convention against Torture (Article 20).

4. Investigating alleged cases of torture and ill-treatment to combat impunity

- (a) NHRI should have the capacity and ability to receive complaints of torture and ill-treatment, investigate their validity and details and, if appropriate, ensure that the case is effectively brought to court, following established procedures.
- (b) NHRI should promote the right to reparation, rehabilitation and compensation for survivors of torture and their relatives. NHRI should be supportive of victims, giving legal orientation regarding the procedures in force and/or providing legal assistance for them to bring their cases to court. NHRI should prompt the government to offer adequate support for victims of torture.
- (c) In doing so, NHRI would also send a clear message of a society's solidarity with the survivors rather than acquiescence with the violators, who should be brought to justice.

5. Public education, awareness-raising and training

- (a) NHRI are in an excellent position to initiate public education and awareness-raising programmes regarding the prohibition and prevention of torture in order to promote a culture that respects human rights.

Public education programmes should be conducted in collaboration with other relevant stakeholders, such as local and international human rights NGOs and the media.

For instance, in post-conflict situations or democratic transition processes, NHRI can help recover and preserve society's collective memory of gross human rights violations by collecting information and testimonies and making these accessible to current and future generations. In this way, NHRI can promote a national debate regarding reconciliation and the need to guarantee that such violations never happen again.

- (b) NHRI should ensure that human rights standards are an integral part of the professional training curricula of certain public officials, such as:

- Police
- Prison staff
- Staff of mental health hospital and social care institutions
- Staff of detention centres for juveniles
- Military
- Judges, prosecutors and public defence attorneys
- Forensic doctors
- Parliamentarians

Furthermore, NHRI can provide guidance and jointly organize specific training initiatives on the practicalities of applying relevant human rights standards in order to strengthen the potential role of these professionals in preventing torture and ill-treatment.

- (c) If needed, NHRI can also help some of these groups to draw up codes of conduct that are in conformity with applicable international standards and ensure that these guide their work. Where such a framework already exists, NHRI can assist professional bodies with their adequate implementation.

6. Participating in public policy making

NHRI should also be actively engaged in the process of designing public policies related to the treatment of persons deprived of liberty. Along with other relevant actors, NHRI can participate in designing general strategies and plans of action to respond to concrete issues from a human rights perspective. NHRI should also advocate for adequate financial support to implement such policies: for example, calling for adequate resources for bodies such as the police, penitentiary system and the judiciary.

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Appendix 2

FORENSIC DOCUMENTATION OF ALLEGED ASSAULT IN FIJI

BACKGROUND

Introduction

These guidelines were commissioned by the Fiji Human Rights Commission to help doctors and other clinicians document allegations of torture and other inappropriate uses of force by State Agents (for example officers of the police, the military and the prison service). However, the skills necessary to document such ill-treatment are generally the same as those necessary to document other, more common, forms of criminal assault.

Copies of the relevant form (appendix A) will be held by a number of agencies including the police and the Human Rights Commission. Newly appointed doctors will be given a personal set of forms and these guidelines on commencing work in Fiji, so that they can document allegations made by patients without having to check with other authorities first. The Fiji Medical Officer's Report Form is a legal document and is the property of the relevant Court. Doctors must remember this when completing the forms. There is a declaration on the form to the accuracy of the information entered and in signing the form the doctor is making that declaration. The route by which the Report reaches the Court will depend on how it is commissioned. However, it is an offence (Contempt of Court) to prevent a completed form from reaching the appropriate Court.

These Guidelines are aimed principally at relatively recently qualified doctors with little or no previous forensic experience. It is hoped that these guidelines will also be valuable to more experienced clinicians and other professionals working alongside them, including magistrates, prosecutors and the police. The guidelines are structured to assist a doctor completing the standard Fiji Medical Officer's Report Form, but can be used by any clinician documenting allegations of assault. Some key issues are discussed below, followed by specific references to the Report Form. They are structured so that they can be used as a legal statement. Different courts may have different requirements, and they may change, so it is important always to check if the report is going to an unfamiliar destination.

Doctors writing reports must avoid the use of abbreviations and jargon. Technical terms should be avoided where possible, but if they are essential for clarity they should be explained. A glossary of common technical terms is appended at the end of this document.

The form must be completed as soon as the doctor has seen a victim of assault as delay can have important legal consequences. In Fiji, as in many other jurisdictions based on the British system, the crime with which the accused is charged can depend on the severity of the injury, so the investigating officers need to know this as soon as possible. However, treatment of the patient always takes priority.

There is space on the form for the doctor completing it to recommend that follow-up information is sought, for example about the results of tests, or the progress of the patient's condition. Such further reports can be made on a separate witness form.

Torture

Torture is defined as the deliberate infliction of severe pain, which may be physical, psychological, or (commonly) both. In human rights, the term means that the torture has been committed by a state agent in the course of his or her duties, including where the state agent allows someone else to torture and does nothing. Torture in this context must be done for a purpose. It does not matter what the purpose is, but it is not an act of random violence. Common purposes include the extraction of confessions (whether real or false) and the intimidation of individuals and populations.

Purpose is not the same as motivation. The purpose of torture, in human rights terms, is that of the officials who order or condone the acts. The motivation of the individual perpetrator; whether sadism, lust, misplaced patriotism, or "simply obeying orders" is immaterial.

Torture to extract a confession is wrong. It is for a court to decide guilt, balancing the available evidence from all sources. For an investigating officer to assume guilt and coerce a confession is an abuse of the judicial process. It has been known for more than 2000 years that many guilty parties will withstand torture because they have anticipated it, whereas the innocent person will confess to anything. Thus the risk of false confessions is high. When this happens the innocent are punished for acts they have not committed while the guilty are free to commit further criminal acts. The police do not develop the skills necessary to solve crimes properly, and the general population are left with a false sense of security because they believe that serious criminals have been caught when in fact they are still at large. In some countries where torture has been accepted as normal, it has been used by a few policemen to extract confessions to cover up their own criminal acts.

Courts have said that acts are now recognised as being torture that were not considered as such in the past. There is a subjective element to whether an act is or is not torture. It is the overall experience that affects the victim physically and psychologically rather than any one act, from the first point of contact with the authorities until the victim feels safe again. The consequences of torture on an individual depend on a number of factors, and an experienced clinician can indicate them.

To say that an act is torture is a complex one and it is for a court to decide when they have all the information available. A medico-legal report should not suggest that a particular set of actions is or is not torture. If the term is used as a quote, this should be shown. For example:

"He said that he was taken back to the "torture room" the following morning". Sometimes organisations such as the International Committee of the Red Cross use a phrase like "tantamount to torture" to indicate an opinion that has not been confirmed by a court, but again this' would be inappropriate in a medico-legal report.

These guidelines are for the documentation of torture shortly after its infliction, while the injuries are still fresh. It is also necessary to document torture months or years after the event for which guidelines are available elsewhere (see, for example, www.torturecare.org.uk and www.unhchr.ch/pdf/8istprot.pdf).

Inhuman Treatment

In human rights terms, inhuman treatment is ill-treatment by a state agent that does not meet the criteria for torture, for example because it does not meet the criterion of severity, or because there is no apparent purpose. It is still a criminal assault and, if complaints are not properly managed by the national authorities, inhuman treatment is a breach of human rights law.

In some documents the term is used in combination with others such as “humiliating” and “degrading”. These are alternatives, and perpetrating any of them is an offence. These terms demonstrate the subjectivity of this field of human rights, as what is humiliating to one person might not be to another, and vice-versa.

Terrorism

Terrorism is the use of violence and the threat of violence to achieve political ends. It is almost never possible to tell the purpose of an assault from the examination of a victim other than perhaps from the account given by the victim, which is normally considered to be hearsay evidence (see below). It is therefore a term, which should not be used, in medico-legal reports.

Assault

An assault is any act in which a person intentionally or recklessly is caused to believe he or she is about to be subjected to a violent act. Thus a threat is an assault if the violence is a realistic possibility. It is very unlikely that a threat alone will leave physical signs that can be documented medically. However, if extreme they could cause significant psychiatric effects (see below).

The act known colloquially as an assault, in which violence is used against a person unlawfully, is legally “battery”. Physical contact is not generally unlawful where there is consent (although there are exceptions) but, for example, clinicians must be careful that consent is fully informed before touching a patient except in a genuine emergency. Consent is assumed in sporting activities and in crowds, unless the person performing the act is reckless. It might sometimes be possible for a clinician to tell from the severity of an injury if the perpetrator has been excessive.

It is also lawful to use force to prevent crime or to arrest someone, but that force must be “reasonable”. It is not for a clinician to decide whether the force used was or was not reasonable. He or she must describe the injuries, and could, with sufficient expertise, quantify the force used, but cannot say whether or not that force was appropriate under the circumstances. This is particularly relevant when the allegation is of torture as there are other associated factors (see below) that cannot be identified by medical examination.

Injuries

Superficial injuries sustained in battery are generally classified as bruises (also known as contusions), abrasions (also known as grazes), lacerations, incisions and burns. Many wounds 'are mixtures of these types. More serious injuries include dislocations, fractures, internal bleeding and concussion. These latter should be managed medically and a report produced when the patient is stable.

It is important to describe the degree of injury accurately as this will affect the offence with which the accused is charged. For example, extensive bruising, wounds that need to be sutured, broken teeth, displacement of the nose, any injury likely to leave permanent disfigurement, damage to bones or joints, and loss of consciousness all increase the severity of the offence and the punishment of the perpetrator if found guilty.

Bruises

When there is a blow to the skin, the small blood vessels below the surface burst and a small quantity of blood leaks out. The area is immediately tender and may feel boggy. Over a few hours the blood moves towards the surface and a bruise develops and, in paler skins, becomes visible. In darker skins, bruising is much more difficult to see, but the site is tender and the bruise may be palpable.

Over time, the blood pigments are denatured and change colour. Bruising does not develop any yellowish hue until it is about 24 hours old, but otherwise it is not possible to say anything about the age of a bruise from its colour. Resolution happens at different rates in different parts of the body, so several days after a single incident there may be bruises at different stages of resolution in different parts of the body. However, bruising of differing colours in the same part of the body could be evidence of several assaults at different times.

In many parts of the body the bruising can take the shape of the object that caused the blow or, for example, the pattern of an open-weave vest that was being worn when the victim was hit. Classically, blows from a truncheon or similar object leave two parallel lines of bruising (tram line bruises) as the blood is pushed sideways by the thin line of contact.

Bruises that develop in the deeper subcutaneous tissues may not be observed for several days after injury, when the blood has reached the surface. Therefore, in cases when there is an allegation of blunt force but no sign of bruising, re-examination should be performed after a day or so. In such cases the blood can track along tissue planes and emerge some distance away from the original blow. For example, blows to the abdomen may lead to bruising of the flank. Generally, bruising that has tracked is not painful to touch. It must be remembered that the final position and shape of such bruises bear no relation to the original trauma, and that other lesions may have faded by the time of re-examination.

In parts of the body where the tissues are lax, and especially in older people, the size of the bruising may be extensive, even from relatively minor injuries. Excessive bruising may be associated with a disease process, which, if possible, should be investigated. Spontaneous bruising is also seen in those taking certain types of medication.

Abrasions

An abrasion occurs when the surface of the skin is rubbed off. They are more common when there is only a thin layer of skin over a bone. Abrasions occur in one of two ways: either from falling onto a rough surface, or from being hit with a blunt object. The wound can indicate the direction of the impact, and its shape may also be significant, for example, elongated broad abrasions can be caused by the friction on the skin from objects such as ropes and cords.

A scratch is a linear abrasion caused by a pointed object such as a pin or the end of a wire. Symmetrical patterns of scratches may be caused by evidence of blows from an object of a particular shape, such as a belt buckle or fingernails.

Incisions

Incisions are sharp trauma wounds that are produced when the skin is cut with a sharp object such as a knife, bayonet, or broken glass. The acute appearance is usually easy to distinguish from the irregular and torn appearance of lacerations. One sub-category of incision is the stab wound, which is deeper than it is wide, and in which there is the danger of damage to deeper structures that must be investigated.

Lacerations

A laceration is caused when the skin is torn, usually from an oblique blow. Unlike an incision, the wound edges tend to be irregular, and often bruised and abraded. There might be bridges of intact skin along its length. The size of the wound can be an indicator of the force involved in causing it.

Colloquially, a laceration is known as a “cut”, but this term should not be used as it may be confused with an incision.

Burns

The skin can be damaged by dry heat (burns), hot liquids (scalds), or acids or alkalis (chemical burns). The level of the damage caused by application of hot objects depends on the intensity of heat and duration of exposure. First-degree burns are seen as reddening. The shape of the lesions may or may not reflect the shape of object that caused the thermal injury. The classical appearance of second-degree burns is a moist, red, blistered lesion. Sometimes third-degree burns are seen following assault, and such burns are a medical emergency.

Although it is more common for lit cigarettes to leave second-degree burns, first-degree burns can be detected in some cases of recent assault. Cigarette burns often leave a circular or ovoid moist reddening, 5-10 mm in diameter, with local oedema and blister formation. There may also be burnt hairs around the lesion.

Burns caused by liquids, either hot or caustic, can leave flow patterns on the skin showing how the liquid flowed on the body. Often this is reddening running away from the deeper wound, and

is related to the posture of the victim at the time of the incident. This should be noted, as it may be important corroborating evidence, for example, of the victim being restrained.

Mixtures

Many wounds are a mixture of the above types. For example, broken glass can cause wounds that are partly incision and partly laceration. Lacerations may well have areas of abrasion around them. The overall pattern of the wound can help corroborate the survivor's description of its causation.

The human bite is ovoid or elliptical in pattern and more blunt in appearance than those of some animals. Petechiae caused by sucking are only seen bite marks by humans. These marks can easily be seen one to twenty-four hours after infliction, and the assault from which they originate is generally sexual in nature. Animal bites are generally characterized by puncturing and tearing of tissues, and are often associated with scratch marks from claws.

Mental Health Issues

Victims of violent crime will also be affected psychologically by their experience to a greater or lesser extent. This is particularly true of victims of torture because their assailants are those who are supposed to protect them. In the immediate period after the episode the common responses are anxiety, depression, an acute stress response, although many victims may be too emotionally shocked to display any affect. The absence of emotion after a violent or threatening incident must never be described in a way that might imply that the event did not take place.

Those who have pre-existing mental health problems may have their symptoms aggravated by being assaulted. Unfortunately they are also at greater than average risk of being assaulted.

Post-traumatic stress disorder (PTSD) is a condition that develops weeks or months after a traumatic incident, whether a single episode or a series of events. Those suffering from relevant symptoms should be referred to a psychiatrist for full assessment.

Children

Injuries to children, especially head injuries, fractures and scalds, can sometimes be caused deliberately by parents or other carers. Where there is any suspicion of this, if possible the child should be treated by experts in managing child abuse. Torture of children, by State Agents or by criminal gangs, is generally performed to put pressure on parents. In such cases the family should be treated together.

Medical Evidence

A doctor might give evidence in one of three categories: as a witness of fact; as a professional witness; or as an expert witness.

Most witnesses in trials act as witnesses of fact. They tell the Court what they saw and heard of the events surrounding a particular incident. For example, if a doctor walking along the street

were to see a man break a shop window and steal the contents, he or she will be a witness to the facts of the incident, and will probably be asked to provide a statement on that basis.

More commonly a doctor will be asked to act as a professional witness. This means that he or she will provide information to the Court about incidents that they dealt with professionally, most commonly treating injuries. Again this means providing a statement about the facts, but they will be expected to provide a more detailed analysis than the ordinary person could give.

An expert witness is someone with, as the name suggests, particular expertise in a topic. This means specific training and experience, possibly supported by qualifications. The role of the expert is to assist the Court in areas where there is a need to understand a complex issue, such as the possible causation of injuries. Unlike the professional witness, the expert is required to interpret facts and provide an opinion. Sometimes an expert witness might be asked to comment on the findings of a colleague acting as a professional witness.

The distinction between a professional and an expert witness is blurred, as a witness can have expertise in some aspects of a situation but not others. It is up to the specific Court to decide whom they accept to be an expert, and on what points. It is essential that expert witnesses do not stray outside their areas of expertise.

Hearsay

Hearsay evidence is where a witness repeats what he or she was told by someone else. With few exceptions, legal protocol does not permit hearsay evidence, as it is better to have the original speaker. One exception therefore is if the victim is dead, missing or comatose. In medico-legal reports hearsay evidence is permitted where it is relevant to the establishment of the consistency between the victim's account and the medical findings.

Photography

Photographs of injuries can be important in demonstrating the development of injuries over time; they can allow an expert to give evidence about causation if the examining doctor does not have adequate expertise; and they can help a court to understand the severity of injuries. Digital cameras allow photographs to be embedded in reports if suitable printer is available. Ensure the date and time are set correctly before starting to take photographs. An initial photograph of the individual, which shows some of the injuries, permits a court to be sure that the images of injuries relate to that specific victim.

The flash on the camera rarely allows a clear representation of the wound: it is better to use background lighting or to work in natural light. It is not possible to know how the picture will look until it is displayed on a computer screen or printed so it is better to take a number of pictures 'and print the best ones. All the images (not only those printed) should be transferred to a secure computer as soon as possible, in a password protected directory. These are the originals and must not be altered. If it is necessary to crop or enlarge any image, copies must be used. The images must not otherwise be enhanced for reports or other medico-legal purposes.

Completing the Fiji Medical Officer's Report Form

Each form must have a Unique Reference Number (URN) so that it can be followed up as necessary. Ideally pads of forms should be numbered consecutively, and each pad numbered uniquely. Failing that, it comprises the doctor's initials, the year, and the next number in the sequence of reports that doctor has written in that year (for example: MRP/05/027). Any form started but not completed should have the fact indicated, so that it is clear when a form is missing.

1. The victim's full name should be given, including any alternative spellings.
2. Other identifying information could include the date of birth (if known); for a civil servant the EDP number; or for those who have one, an FNDF number.

SECTION A:

- 3-4 This part of the form must be completed by the person requesting the examination. Normally this will be a police officer, but the process can be initiated by one of a number of agencies. If the patient sees the doctor in the first instance, this part should be completed by the doctor him- or herself.
6. The purpose of the medical examination should be indicated clearly by the person requesting it. Normally this will be to document and treat injuries. It could also be to confirm that a witness is fit to be interviewed. Occasionally it might be necessary to examine a suspect, for example to take forensic samples following an alleged sexual assault.
7. This section should contain a summary only of those aspects of the incident that are likely to leave physical or psychological consequences, so that the doctor can focus his or her examination as necessary.

Declarations

The examinee should indicate that he or she has had explained the purposes of the medical examination and that he or she consents. This is to avoid victims and others being taken to hospital for an examination, only to refuse to consent on arrival.

SECTION B: Examining doctor

- 8-9 It must be possible to identify the doctor completing the form from this, in order to contact him- or her for any follow-up. Ideally the Fiji Medical Association should provide a unique registration number to each doctor working in Fiji. Failing this the EDP number could be used.

- 10 The brief resume (CV) will allow the court to establish the expertise of the doctor. It should include his or her medical school and date of qualification; years of relevant experience; and any specific forensic training and qualifications.

SECTION C: Medico-legal report

- 11 If there is a substantial delay' between the time the consultation is requested (paragraph 4) and the time the medical examination starts, this should be explained. Also if the examination is not in a clinic, the location and the reason for its use should be explained.

- 12 Although consent will normally have been taken by the person referring the patient, it is essential that the doctor confirm the validity of the consent (for example, that it was not coerced). Under most circumstances, verbal consent will be adequate, and the doctor can indicate this. Written consent must be obtained where there is any possibility that it might be challenged in court. Particularly if the patient is a suspect, it must be clear that he or she is aware that any information gained during the medical examination may' be produced in court.

Capacity to consent is important. For a child, consent must be by a parent or guardian. For an older adolescent, it is good practice to obtain consent from both the patient and the parent or guardian. If there is any doubt about capacity in an adult, the advice of a psychiatrist should be sought.

- 13 Whether or not there are others in the consulting room at the time of the interview is the decision only of the doctor. If the doctor is not the same gender as the patient, a chaperone should be offered and a refusal respected. Normally the chaperone should be a family member, or a nurse or other healthcare professional. However if an interviewing officer has developed a good relationship with a victim, especially one of sexual assault, she (or if the victim is male, he) can be present at the victim's request. If the patient is a suspect and said to be violent, a police officer can stand outside the room where the consultation can be seen but not heard. Only under exceptional circumstances should a doctor agree to examine a patient who is wearing handcuffs or other restraint, and this should be documented.
14. The history of the incident(s) related by the patient will be compared in the conclusion of the report with the medical findings. Thus it must focus only on those aspects that are likely to have physical or psychological consequences. Other aspects are hearsay (see above), and should not be in a medico-legal report. For example, accounts of conversations between the victim and the alleged perpetrator are rarely relevant.
- 15 The initial impression of the patient includes:
- The sex, race and age of the patient, and whether the physical appearance is consistent with this.

- The demeanour during the history taking, particularly if it changed for specific questions and answers.
 - Any physical features that will help to identify the patient in future (for example, physical disabilities, tattoos signs of old injuries).
 - Any specific signs of mental? health problems (for example, speech patterns, mood, delusions).
 - Is there any risk of self-harm (especially if the patient is a suspect)?
 - If the patient has been assaulted recently or if there are suspicions of mental health problems, the state of the clothing may be relevant.
- 16 The Specific Medical Findings should list each finding in turn, in the order of examination. In cases of severe assault or where there are allegations of ill treatment, there should also be noted those parts of the body' in which there are no injuries noted. If necessary, the list can be continued on the last page. There must only be findings of fact listed here. The patient's allegations and the doctor's opinion of causation should be documented later, in section 18.
17. The section labelled "other information" should contain any other findings of fact about the medical examination, including forensic samples taken.
18. The opinion section should contain a description for each injury of the patient's account of how it was caused, and how consistent the finding is with this attribution. The following phrases can be used both for individual lesions and the overall picture:
- Consistent with: The lesion could have been caused by the trauma described, but it is non-specific and there are common alternative possible causes.
- Highly consistent: The lesion could have been caused by the trauma described and there are few other possible causes.
- Typical of: This phrase is used for lesions that are "highly consistent" with the attribution and additionally the appearance is one that is usually found with this type of trauma (for example cigarette burns).
- Diagnostic of: This appearance could not have been caused in any way other than that described.
- Not consistent: The lesion could not have been caused by the trauma described. If there are good reasons why the victim has made a mistake, these should be explained.
- 20 This section should only' include the investigations and treatment that are relevant forensically. Although the patient has consented to medical information being released in

the report, this must be no more than legally necessary. The patient's confidentiality should still be maintained as far as possible.

- 21 The conclusions should bring together the various parts of the patient's account. These include the history of assault, and in cases of torture the doctor should include whether this account is consistent with other accounts 'from the same location; the overall physical appearance of the patient; his or her demeanour and behaviour during the interview; the pattern of physical and psychological findings; and the results of any investigations that are available at the time of writing.

When a person gives accounts of his or her experiences, there are inevitably points that are inconsistent with each other. Within an interview, it is essential for the interviewer to clarify these points. The medico-legal report should identify any remaining inconsistencies and, if possible, explain them. The report is a legal record of the interview and must not be amended to minimise these inconsistencies if this reduces its accuracy.

22. Recommendations and follow-up:

The doctor must indicate if the investigating officer should seek additional reports. These might include:

- further examinations, for example to look for new bruises;
- the results of any investigations;
- the outcome of surgery;
- if the patient has any residual disability as a result of the assault.

SECTION E: Continuation

This section is available for overflow from earlier sections where more space is needed. The original paragraph should be marked "continued in Section E". The extra text must be marked "continued from paragraph [number]". This is particularly important if several different entries overflow. In such cases the continuations should be in the same order as the entries in the main document.



Republic of the Fiji Islands

MEDICAL EXAMINATION FORM

Police File Number	Medical File Number

PART A	INITIAL INFORMATION (to be completed by requesting officer or other person)	
1	Name of Patient	
2	Father's Name	
3	Usual Residence	
4	Telephone No.	
5	Date of Birth	

PART B	REASON FOR EXAMINATION		
6	Medical Examination Requested By (If Police, give rank, number & name)		
7	Station	Telephone	
8	Date	Time	
9	Purpose of Examination		
	(1)	To confirm if patient injured	
	(2)	To document specific injuries/ to determine if fit for interview/ fit to be detained/ to take particular forensic samples/ or to carry out other requests (please describe)	

10	Circumstances of the Incident as related by the victim/parent/witness (circle as appropriate)

PART C	DECLARATION BY PATIENT <i>(Circle as appropriate)</i>
<p>11.</p> <p>(a) I confirm that I have had explained to me the purpose of the medical examination and I agree to be examined.</p> <p>(b) I consent for Dr to examine me and treat me as necessary, and to make such medico-legal reports as are required.</p> <p>(c) I consent to the taking of photographs</p> <p>(d) I consent to the taking of blood and other forensic specimens</p> <p>(e) I understand that these will be used as part of the medical record of my examination, and that they may form part of a report based on that examination and may be given in evidence in Court proceedings.</p> <p>(F) THIS HAS BEEN EXPLAINED TO ME IN THE LANGUAGE AND I UNDERSTAND WHAT HAS BEEN RELATED TO ME.</p>	
..... Signature or left thumb mark of patient	Left thumb mark

PART D	DECLARATION OF INTERPRETATION (if relevant)
12	<i>By patient:</i> This interview has been interpreted for me in the language, and I have understood what was related to me. Signature or left thumb print of patient
13	<i>By interpreter:</i> I (name) confirm that I have interpreted the interview between the doctor and the patient accurately Signature..... Telephone No. :

PART E	EXAMINING DOCTOR
14	Full name of doctor completing this report
15	Practice or Hospital Department Address
16	Position Held
17	Telephone No. & Ext
18	Qualifications
19	Years of Experience

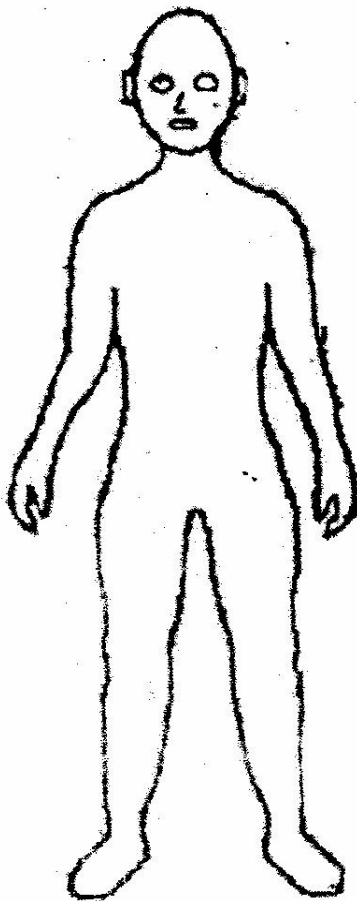
PART F	MEDICAL EXAMINATION
20	Date
21	Location of Medical Examination
22	Time Started
23	Consent obtained from patient : verbal/written/through interpreter (see last page)
24	Other persons present:
25	History As Related by the Patient:

26	Doctor's Initial Impressions of the Patient:
27	Specific Medical Findings:
	(a)
	(b)
	(c)
	(d)
28	Other Observations:
29	Professional Opinion [e.g. Age of bruise or injury, with what consistent, causation, gravity]
30	Whether admitted to Hospital? Yes / No Hospital/Ward:
31	Whether Investigations Ordered:

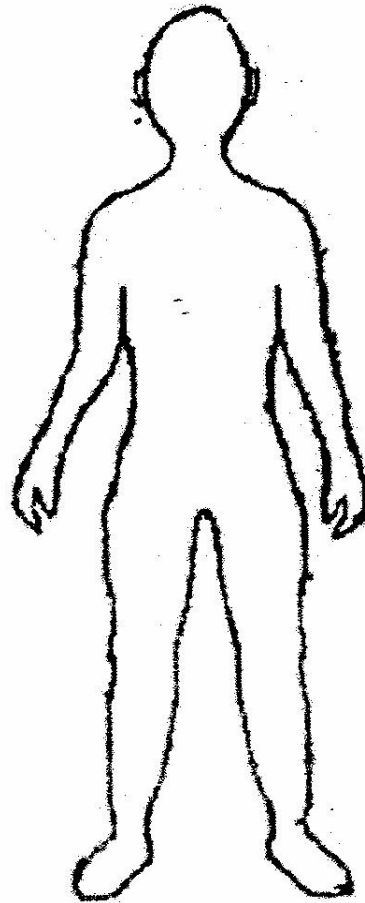
32	What Treatment Prescribed:
33	Summary & Conclusions:
34	Recommendations & Follow-Up
35	<p>Declaration: This statement, consisting of four pages, each initialed or signed by me is true to the best of my knowledge and belief, and I make it knowing that I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.</p> <p>Signed: (Examining Doctor) Date:</p>

PART G	DISTRIBUTION OF REPORT
36	Top Copy of this Report Delivered to:
37	Copy filed in..... section of Records Department
38	Signature of Examining Doctor : Date :

Please indicate on body diagram below any injuries, visible distinguishing marks or tattoo visible on the Complainant.



Front View



Back View

Glossary

Abrasion	A wound in which the surface of the skin is rubbed away by blunt trauma.
Bruise	An injury in which the skin is intact and blood released from damaged vessels remains under surface.
Burn	A wound caused by heat which maybe dry, moist (a scald), or chemical.
Concussion	A state of loss of consciousness of less than 6 hours that is associated with loss of memory for the period of concussion and for some time before and afterwards.
Contusion	See "bruise" above
Child Abuse	Ill-treatment of children, generally by their parent or regular carer, causing harm to the child that might be physical, emotional, sexual or neglect.
Defence Wound	A wound sustained by a person defending themselves, generally to the hands and forearms.
Epilepsy	A condition in which the person has fits or seizures.
Forensic Medicine	That branch of medicine involved with assisting the courts in the investigation of medico-legal cases.
Hemorrhage	The medical term for bleeding
Haematoma	A large collection of blood below the skin, i.e. a large bruise.
History	The patient's account of what happened to him or her. Note that the use of this word by a Clinician does not necessarily imply that the account is true.
Incision	A wound caused by a sharp object.
Laceration	A tear of the skin caused by blunt force.
Stab Wound	An incision (see above) that is deeper than it is long.
State Agent	Any person working directly or indirectly for the state.
Wound	A break in the continuity of the skin or mucus membranes caused by the application of force.

Appendix 3

The Optional Protocol to the United Nations Convention against Torture: a practical tool for preventing torture [\[1\]](#)

Dr Matthew Pringle, Association for the Prevention of Torture

Introduction

The Asia Pacific region is one of great diversity, a characteristic reflected at many different levels, not least with regard to human rights protection. While certain countries in the region ensure a high level of human rights protection, including from acts of torture and other forms of ill-treatment, it is deplorable that in other states a wide range of human rights violations, including torture and other forms of ill-treatment, are commonplace. The rights to protection from torture and other forms of ill-treatment are guaranteed as a rule of customary international law as well as in several international treaties, to which states in the Asia Pacific region are State Parties. The principle that torture and other forms of ill-treatment is absolutely prohibited in all circumstances is also clearly stated in the domestic legislation of several of these same states.

Yet irrespective of these international and domestic legislative guarantees, human rights monitors have continued to document alleged acts of torture and other forms of ill-treatment of persons deprived of their liberty by public officials throughout the region. According to a range of human rights monitors, acts of torture and ill-treatment take place in various official places of detention. While the incidence of such acts may vary significantly from country to country, their loci rarely do.

Paradoxically, many states in the Asia Pacific region - as well as worldwide - could still do a great deal more to put an end to the practices of torture and other forms of ill-treatment in their countries and to build up public trust in their law enforcement agencies. The ratification of the Optional Protocol to the UN Convention against Torture [\[2\]](#) is an example of one simple, albeit effective measure, which States could undertake to counter such unacceptable abuses. Taken together with other torture prevention measures, the Association for the Prevention of Torture (APT) believes that the Optional Protocol to the UN Convention against Torture will help to create a culture of prevention within places of detention throughout the Asia Pacific region.

It is notable that the Torture Background Paper prepared by the Advisory Council of Jurists recommends that “[i]mmediate steps should be taken by all relevant authorities to ensure that torture and ill-treatment in whatever context cease immediately.” The ratification and effective implementation of the Optional Protocol to the UN Convention against Torture should be regarded as one such step the authorities in the region should take as a matter of priority.

The timing of this conference is especially favourable in the context of the ever-greater attention being given to the concept of the monitoring of places of detention and the ever-greater importance being attached by states to the Optional Protocol to the UN Convention against Torture. Even though the instrument was only adopted by

the United Nations General Assembly in December 2002 some 11 countries have already ratified it, while a further 37 countries have signed it. [3] It is envisaged that the Optional Protocol will come into force one year after the 20th state ratifies or accedes to it, possibly sometime in 2007.

The overall aim of the presentation today is to give an introduction to the Optional Protocol and to raise a number of issues in relation to its importance to Asia Pacific region. While certain conference participants may know the Optional Protocol inside-out, the knowledge of others may be less advanced. So as not to exclude anyone from today's discussion, the presentation will initially give the conference a brief introduction to the Optional Protocol to the UN Convention against Torture before highlighting some of its more important features.

The framework of the Optional Protocol to the UN Convention against Torture

Practical experience has shown that visits to places of detention are one of the most effective means to prevent torture and to improve conditions of detention. Visits not only have a deterrent effect but they also enable experts to examine at first-hand the treatment of persons deprived of their liberty and their conditions of detention. The Optional Protocol to the UN Convention against Torture embodies this concept by creating a system of independent inspection of places of detention to prevent torture and other forms of ill-treatment and to monitor the conditions of detention found in such facilities.

Under the Optional Protocol, on the one hand, an international visiting mechanism will be created - the International Sub-Committee which will initially consist of 10 international experts - while on the other, State Parties to the Optional Protocol will have the obligation to designate, maintain or create one or more national visiting bodies - the so-called national preventive mechanisms. As will be revealed later, there are certain trends regarding the types of national visiting bodies for which states are currently showing a preference: namely most commonly, states are designating an existing visiting body, usually a national human rights institution as the domestic visiting body.

One year after the Optional Protocol comes into force both the International Sub-Committee and the national visiting bodies will conduct regular, periodic visits to places of detention. While the visits of the International Sub-Committee and its subsequent reports of its findings will not initially be public (unless a State Party agrees to declassify a report), the work and reports of the national visiting mechanisms will be available for public scrutiny. It is intended that the visits and subsequent reports of both bodies will result in a dialogue between the authorities and the monitoring mechanisms with the aim of preventing human rights violations and addressing other shortcomings.

It is important to stress that the visits are not an aim in themselves, but only the means of strengthening the protection of persons deprived of their liberty. Thus, the follow-up to visits and ability to make recommendations is really essential to the procedure. The effectiveness of such an approach has already been seen in the Council of Europe region with the establishment of the European Committee for the Prevention of Torture.

The need for the Optional Protocol to the UN Convention against Torture?

Thus, the fundamental concept behind the Optional Protocol is quite simple. Unsurprisingly, the question has arisen from certain quarters why was there a need for another international instrument to counter the practices of torture and other forms of ill-treatment and why an Optional Protocol to the UN Convention against Torture? Regrettably, it remains very disturbing, albeit very true, that irrespective of multiple international and domestic legislative guarantees prohibiting acts of torture and ill-treatment in all circumstances, human rights monitors have continued to document alleged acts of torture and ill-treatment of persons deprived of their liberty by public officials throughout the world. Even in countries where one expects a high degree of human rights protection, human rights monitors continue to document acts of torture and other forms of ill-treatment, most commonly in official places of detention. [\[4\]](#)

The contexts, in which torture and other forms of ill-treatment most commonly occur, include at the moment of arrest, in police detention (often for the purpose of extracting a forced “confession” from a detainee), in pre-trial detention and in prison. Other less typical places of detention have also been the milieu for acts of physical and mental abuse by public officials, including psychiatric institutions, social care homes for mentally and physically disabled persons and centres for detained immigrants and asylum-seekers.

In addition to deliberate acts of physical and mental abuse by public officials against persons deprived of their liberty, the egregious conditions of detention found in many detention facilities have also been a source of acute concern for human rights monitors in the region. Such concerns relate to a wide range of detention facilities, including those referred to above.

Disturbingly, there is little to suggest this intolerable situation will improve in the short term. The frequent inclusion of the issue of torture prevention on the agenda of various national and international meetings in years gone by - of which the 10th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions is a case in point - is an indicator of the serious challenge which the international community faces, particularly those actors engaged in the promotion and defence of human rights. In short, the APT believes that the ratification of the Optional Protocol to the UN Convention against Torture, if implemented appropriately, is an example of an effective measure, which states could undertake to counter such unacceptable abuses.

The Optional Protocol to the UN Convention against Torture as an effective means to prevent torture and other forms of ill-treatment

The APT is actively promoting the Optional Protocol as it believes that it will prove to be an effective tool for preventing torture. The general concept underpinning the Optional Protocol is not only straightforward, but one that has existed for several decades. The approach enshrined in the instrument is based on the premise that the more open and transparent places of detention are, the less abuse will take place. Since places of detention are by definition closed to the outside world, persons deprived of their liberty are most at risk of torture, ill-treatment and other types of abuses. Furthermore, respect for their fundamental rights depends exclusively upon the authorities in charge of the place of detention and they are dependent upon others for the satisfaction of their most basic needs. Violations to people deprived of liberty

can arise from a policy of repression, such as torture and other forms of ill-treatment, as well as inadequate systems of oversight.

Opening places of detention to external control mechanisms, as the Optional Protocol does, is therefore one of the most effective means to prevent abusive practices and to improve conditions of detention. This fact is confirmed by the extensive experience of entities such as the International Committee of the Red Cross and the European Committee for the Prevention of Torture and has demonstrated how regular visits to detention facilities can be effective in practice. Such visits can be effective for a number of reasons: first and foremost, the simple fact of being subjected to external control can have an important deterrent effect on authorities that might otherwise believe that they will never be held accountable for their actions. Visits also enable independent experts to examine first-hand the treatment granted to persons deprived of their liberty and to judge the conditions in which they are detained. Based on the concrete situation observed, experts can then make realistic, practical recommendations and enter into dialogue with authorities in order to resolve any problems detected. Finally, visits from the outside world can be an important source of moral support for persons deprived of their liberty whose human rights are being violated.

Important features of the Optional Protocol to the UN Convention against Torture

As was previously illustrated, the Optional Protocol to the UN Convention against Torture creates a dual system of detention monitoring: visits conducted by an international body and those conducted by one or more domestic bodies. In reality, however, much of the monitoring of places of detention in any given country will be conducted by the domestic visiting bodies, primarily due to their permanent presence in the country. The visits of the International Sub-Committee will be conducted on a periodic, albeit less frequent basis. Nevertheless, both the international and national entities have several important features under the treaty, as the following points illustrates:

(1) Independence and composition of national preventive mechanisms

In order to guarantee the effective and independent functioning of the national preventive mechanisms and to ensure that they will be free from any undue interference, the Optional Protocol sets out for the first time in an international instrument specific guarantees and safeguards which must be respected by State Parties. These include the independence of the members of the national preventive mechanisms, the functional independence of the mechanisms (namely that their mandate and activities should not be influenced by the authorities), and their financial independence by having the necessary resources made available to them.

Regarding the composition of the national preventive mechanisms, states have an obligation to ensure a certain effectiveness of the body and take into consideration the quality of members regarding their professional background, gender balance and representation of ethnic and minority groups in the community.

(2) Authority during visits

Members of both the international and national mechanisms will be mandated to conduct visits to places of detention on a regular, periodic basis. However, the powers they have to conduct such visits are extremely significant. When a state ratifies the Optional Protocol, it gives its consent to allow both types of bodies to enter any place of detention in the territory under its jurisdiction without prior consent. Visiting experts will be allowed to conduct interviews, in private and without witnesses, with any person deprived of his or her liberty. They will also have the right to interview other persons such as security or medical personnel and family members of detainees. The members will have unrestricted access to the full records of any detainee or prisoner and the right to examine disciplinary rules, sanctions and other relevant documents such as those recording the number of persons deprived of their liberty and the number of places of detention. Finally, the visiting team will regularly inspect the entire detention facility and be allowed access to all the premises including, for example, dormitories, dining facilities, kitchens, isolation cells, bathrooms, exercise areas, and healthcare units. Thus, the powers of both types of visiting bodies are without question far-reaching.

(3) Wide range of places of detention that can be visited

The term “place of detention” is very broadly defined in the Optional Protocol. This is to ensure the full protection of all persons deprived of liberty under all circumstances. This means that visits by the national and international expert body will not be limited to prisons and police stations, but will also include places such as pre-trial detention facilities, centres for juveniles, places of administrative detention, security force stations, detention centres for migrants and asylum-seekers, transit zones in airports, check-points in border zones as well as medical and psychiatric institutions. Thus, the potential reach of the International Sub-Committee and the national preventive mechanisms is therefore very long.

(4) Obligation to enter into a dialogue in an atmosphere of openness

The Optional Protocol infers that there is an obligation for states to enter into a dialogue with both the international and domestic mechanisms on possible implementation measures. This obligation should not be underestimated. After all, if states were simply to ignore the findings of both international and domestic bodies the overall exercise would be pointless. Thus, State Parties are required to work towards implementation of these recommendations in a spirit of good faith.

Moreover, an atmosphere of openness will complement part of this dialogue, namely the exchanges between the state authorities and domestic visiting bodies. While the dialogue between the International Sub-Committee and the states will remain confidential (unless a state agrees to a report and its recommendations being made public), the reports of the national visiting bodies are not subject to this confidentiality. Moreover, State Parties have the positive obligation to publish the annual reports of such bodies. However, it is also hoped that - as has been the experience of the visit reports of the European Committee for the Prevention of Torture - most states in time will also choose to declassify the reports of the International Sub-Committee.

As the visits are not an aim in themselves, rather the means of strengthening the protection of detainees, this obligation on State Parties to enter into a dialogue in good faith with both bodies and their ability to make recommendations is really essential to this procedure.

(5) Relations between the International Sub-Committee and national preventive mechanisms

Ultimately, however, a system of inspection will only be as good as the people and the structures undertaking the inspections. Fortunately, the Optional Protocol addresses this important point, as the International Sub-Committee has an innovative role to play in relation to the effective functioning of the national mechanisms. The International Sub-Committee will be mandated to advise State Parties on the establishment of national mechanisms and to make recommendations on the strengthening of their capacity to prevent torture and other forms of ill-treatment.

The International Sub-Committee will also be able to maintain direct, if necessary, confidential, contact with national mechanisms and to offer them training and technical assistance with a view to enhancing their capacities. It will also be able to advise and assist the national mechanisms to evaluate the needs and means necessary to intensify the protection of person deprived of their liberty. Importantly, a fund will also be made available to help national bodies with training needs.

The implementation of the Optional Protocol to the UN Convention against Torture into practice

The Optional Protocol will come into force one year after the 20th state ratifies or accedes to it. To briefly recapitulate, there are currently 11 ratifications and 37 signatures. Of the 37 countries, which have signed the Optional Protocol it is expected that there will be a series of ratifications - as well as new signatories - in the course of 2005 and 2006. It is therefore not inconceivable that the 20th ratification may well come as soon as mid-2006.

From the outset it must be stressed that for State Parties to the Optional Protocol there is no burden to produce periodic reports, like under the UN Convention against Torture or the International Covenant on Civil and Political Rights. Thus, states should not be deterred from signing and ratifying the Optional Protocol because they feel that their ministries do not have the capacity to produce lengthy reports to the various international treaty bodies.

At the present moment many of the states, which have signed or ratified the instrument, are in the process of examining the issue of what to do in relation to the national visiting bodies. It is important to mention that the text of the Optional Protocol does not set out any particular form these mechanisms must take. Consequently, State Parties to the instrument have a significant amount of flexibility on this issue and are therefore free to create an entirely new structure or designate one or more existing visiting mechanisms. These could include human rights commissions, ombudsmen, parliamentary commissions, lay people schemes, civil society organisations, as well as composite schemes combining elements of some of the above.

Over the past two-and-a-half years since the Optional Protocol was adopted by the UN General Assembly the APT has been closely following developments at the national level, particularly in relation to the national visiting bodies, which State Parties have designated or created. From the information received by the APT it would appear that the majority of states are considering designating one existing national visiting mechanism - usually, an existing human rights commission or ombudsman's office. It is possible for such bodies to be designated as part of the national preventive mechanism foreseen by the Optional Protocol, as designation as such could greatly enhance their monitoring role.

There are also a smaller number of countries where states have or are set to designate more than one existing visiting mechanism. These states have included the United Kingdom, which has designated more than 20 existing bodies, and possibly Denmark, where there is an ongoing discussion about designating a mixture of prominent non-governmental organizations and a national human rights institution. Thus, in certain countries it is expected that non-governmental organizations will also have a vital role to play in this connection.

Finally, there are a minority of countries, which have or are considering creating an entirely new structure to function as the national visiting body, namely Switzerland and Germany, both of which are federal states. It will therefore be interesting to see whether any other states - federal or not - adopt this approach to the requirement of putting in place one or more national visiting mechanisms.

Irrespective of whether a state decides to designate one or more existing national bodies or creates an entirely new mechanism from scratch, the most important element is that such bodies fulfil the criteria laid down in the Optional Protocol text regarding their independence, composition, powers and authority. The APT is advocating that there should be a national debate or discussion on this issue with all relevant actors, including government representatives, non-governmental organizations, national human rights institutions, parliamentary commissions, and independent experts so that the most effective solution can be found. The ultimate aim of Optional Protocol is to create a system of monitoring which effectively monitors the treatment of persons deprived of their liberty and the conditions of their detention. It is there less important how many and which types of bodies carry out these activities, but whether they undertake the task effectively.

Final remarks

The essential importance of the Optional Protocol is that it provides for a system of visits to places of detention. The system to be established by the Optional Protocol places the emphasis on preventing violations rather than reacting to them once they have already occurred. The preventive approach foreseen in the Optional Protocol is based on the regular and periodic monitoring of places of detention through visits to these facilities conducted by expert bodies in order to prevent abuses. In contrast, most existing human rights mechanisms monitor the situation once they receive allegations of abuse.

The Optional Protocol is also based on a premise of collaboration with the State Parties to prevent violations, rather than on public condemnation of State Parties for violations already committed. While existing human rights mechanisms also seek constructive dialogue, they are based on the public examination of states' compliance

to its obligations through the reporting or individual communications systems. The system foreseen in the Optional Protocol is based more on a process of long-term sustained cooperation and dialogue in order to assist State Parties to implement any necessary changes to prevent torture and other forms of ill-treatment in the long term. The Optional Protocol is therefore both an important and a novel human rights instrument.

Several of the Optional Protocol's most important features are also worthy of recapitulation. Firstly, the global mandate of the Sub-Committee is unique and no other international detention monitoring body has this global reach. Moreover, not all regions of the world are currently subjected to a regular international system of inspection, the most notable exception being the Council of Europe and its European Committee for the Prevention of Torture. If the Optional Protocol is ratified globally and implemented effectively, it will symbolise a major step forward in the worldwide fight against torture and other forms of ill-treatment.

The broad definition of "place of detention" should also be regarded as a further success of the Optional Protocol, as human rights abuses by state officials do not just take place in police stations, pre-trial detention centres and prisons. There are many other contexts in which serious human rights violations may occur.

Ultimately, a system of inspection is only as good as the individuals and the structures undertaking the inspections, an issue which the Optional Protocol addresses. State Parties are obliged to grant domestic visiting mechanisms certain powers in respect of their visits to places of detention and to afford them certain safeguards to ensure their independence. The significance of these obligations should not be understated.

The information collected by national preventive mechanisms in the course of their visits to places of detention will also be of great importance. Firstly, the International Sub-Committee will be able to draw upon the information that will be made available through the more frequent visits carried out by national bodies. Secondly, the emergence of information regarding the treatment of persons deprived of their liberty into the public domain may also have a human rights awareness-raising impact within society, informing concerned individuals, members of civil society and the media, and fueling debate.

The Optional Protocol is now open for signature and ratification and will probably enter into force sometime in 2007. The APT believes that the Optional Protocol is a unique international instrument that will assist State Parties to the UN Convention against Torture to better implement their existing obligations to prevent torture and other forms of ill-treatment. After all, Article 2 (1) of the latter convention states that State Parties "shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" and the Optional Protocol is arguably one such measure.

Regrettably, however, the only country represented in the Asia Pacific Forum, which has yet signed or ratified the instrument, is New Zealand. Thus, there exists the danger that the countries of the Asia Pacific region will be significantly underrepresented among those states, which have become or are in the process of becoming State Parties to the instrument. Only the countries of the Middle-East presently remain as underrepresented as the Asia Pacific region in this respect.

The APT is actively encouraging states to be among the first 20 states to ratify the Optional Protocol. The organization believes that ratification of this important human rights instrument will send a strong signal to the international community of the importance, which each state attaches to combating torture. Moreover, it will place them in a strong position to determine the work of the International Sub-Committee. The International Sub-Committee will be comprised initially of 10 independent experts from a variety of professional backgrounds (this number will increase to 25 members after the 50th ratification). These initial 10 experts, who will be nominated by State Parties, will have an important role to play in influencing the formative work of this international body, which will directly influence its effectiveness as an international visiting mechanism and particularly how it coordinates its activities and supports the work of the national preventive mechanisms to ensure their respective effectiveness. For this reason it is essential that the Asia Pacific region is not excluded from these important discussions.

The APT is committed not only to ensuring that the Optional Protocol to the UN Convention against Torture enters into force in a timely manner, but also that it is effectively implemented in practice. To these ends the organizations is willing to offer its advice and materials and work with relevant actors who are genuinely interested in making this novel human rights instrument a reality. Interested parties are kindly urged to contact the APT about this matter.

For further information about the issues raised in this statement or to obtain other APT materials please refer to the APT website (www.apr.ch) or contact the Europe and Central Asia Programme Officer, Matthew Pringle (mpringle@apr.ch), or the United Nations and Legal Programme Officer, Edouard Delaplace (edelaplace@apr.ch), during the meeting.

[1] For further background reading to this presentation please refer to the following APT-IIHR publication, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (June 2004) and the APT Position Paper, *The Role of National Human Rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment and punishment* (February 2005).

[2] Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[3] Information accurate as of the 12th August 2005.

[4] It should also not be forgotten that in some states persons continue to fall victim to acts of torture and other forms of ill-treatment committed in non-official places of detention.

Appendix 4

TENTH ANNUAL MEETING OF THE ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS

24-26 August 2005
Ulaanbaatar, Mongolia

Statement of the Pre Forum NGO Consultation on the Right Against Torture and Other Cruel, Inhuman and Degrading Treatment⁶⁶⁴

Thank you Chair.

The Pre Forum NGO Consultation expresses profound concern over the fact that not all States whose national institutions are members of the Asia Pacific Forum have signed or ratified the Convention Against Torture. In other words, many States have not even professed a commitment to eradicating torture. The efforts of NHRIs in this respect are, therefore, crucial, and we would urge NHRIs to adopt a dynamic approach in their engagement with governments on this issue.

As a first step, NHRIs must urge States that have not yet done so to ratify the Convention Against Torture (CAT) without reservations and include declarations under Articles 21 and 22 of the Convention.

States that are party to the Convention must be urged to withdraw any reservation and also ratify the Optional Protocol without further delay.

We also urge NHRIs to publicly and unequivocally express their concern at the lack of political will to ratify these instruments. They must write to individual members of Parliament asking them to take up this issue both inside Parliament and outside it.

As governments in the Asia Pacific region are sensitive to international perceptions, NHRIs in the Asia Pacific region must comment forcefully on their governments' positions on the issue of ratification at international forums such as the UN Commission on Human Rights. Given the enhanced space they now have at the CHR, they can make interventions under the relevant agenda item at the 62nd session of the CHR in 2006. The general tenor of the statements made by the Northern Ireland Human Rights Commission is a good example.

States must also be asked to review their derogations from the provision relating to the right to compensation and provide an enforceable statutory remedy of compensation for torture and other forms of ill treatment. Victims and their families must have an enforceable right to reparation for the suffering caused.

⁶⁶⁴ Facilitated by: Asia Pacific Human Rights Network (APHRN). Secretariat: South Asia Human Rights Documentation Centre (SAHRDC), B-6/6, Safdarjung Enclave Extension, New Delhi - 110029, India. Phone: +91-11-2619 2717, 2619 2706, 2619 1120. Fax:+91-11-6191120. Email: secretariat@aphrn.org.

Home page: <http://www.hrdc.net/sahrdc>

NHRIs must also unequivocally condemn the use of diplomatic assurances as a means of “outsourcing” torture and cruel, inhuman or degrading treatment. They must monitor the possible use of diplomatic assurances and the extra-territorial rendition of suspects, which could result in the use of torture.

We encourage NHRIs to conduct training programmes for law enforcement officials and others that include practical methods to prevent torture in addition to teaching of legal provisions and human rights standards.

We also urge NHRIs to review legal provisions and operational guidelines of law enforcement agencies that provide for impunity for torture perpetrators. NHRIs must ensure that all allegations of torture and cruel, inhuman or degrading treatment are investigated in accordance with international human rights law and standards, and ensure that the perpetrators are brought to justice.

We call upon NHRIs to build on the recommendations of the APF’s Reference on the Rule of Law in Countering Terrorism and monitor the provisions of national security legislation to ensure that measures to counter terrorism are enacted in accordance with international human rights law, international humanitarian law and international refugee law and do not employ the use of torture in any way,

We urge NHRIs to substantively contribute to the work of the human rights expert appointed to the UN Security Council’s Counter Terrorism Committee by sending periodic updates on the impact of counter terrorism measures on the enjoyment of human rights in their respective countries.

NHRIs must also encourage governments to contribute to the United Nations Voluntary Fund for Victims of Torture.

We look forward to the final report of the Advisory Council of Jurists on this subject, and urge NHRIs to use the ACJ’s recommendations in their deliberations with their respective governments on this important subject.

I thank you for your attention.