

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**

INTERIM REPORT

26 August 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 four references: 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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MEETING OF THE ADVISORY COUNCIL OF JURISTS

ULAANBAATAR, MONGOLIA

24-26 AUGUST 2005

This is the interim report of the Advisory Council of Jurists after its meeting 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), Chairman of the Meeting
- 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)

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.

The Council was greatly aided at the meeting in its deliberations and analysis by Ms Jessica Wyndham of the APF Secretariat and 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 like particularly 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.

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
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, & relating to the Protection of Victims of Non-International Armed Conflicts
APT	Association for the Prevention of Torture
Basic Principles on the Use of Force	(UN) Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
Body of Principles	(UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CAT	(UN) Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	(UN) Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	(UN) Committee on Economic, Social and Cultural Rights
CRC	(UN) Convention on the Rights of the Child
Declaration against Torture	(UN) Declaration on the Protection of All Persons from Being Subjected to Torture
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	(UN) Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	(UN) International Covenant on Civil and Political Rights
ICESCR	(UN) International Covenant on Economic, Social and Cultural Rights

ICTY	International Criminal Tribunal for the Former Yugoslavia
Istanbul Principles	(UN) Principles on the Effective Investigation & Documentation of Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment
NGOs	Non-governmental organisations
NHRI	National Human Rights Institution
OHCHR	(UN) 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.
Principles of Medical Ethics and	(UN) 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	(UN) Convention relating to the Status of Refugees
Rome Statute	Rome Statute of the International Criminal Court
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
Standard Minimum Rules	(UN) 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
UDHR	(UN) Universal Declaration of Human Rights
Vienna Convention	Vienna Convention on the Law of Treaties

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.¹

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;
- (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;

¹ '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/activities/annual_meetings/eighth/concluding.htm

- (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.

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 Rights² 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 the Convention for the Protection of Human Rights and Fundamental Freedoms³ and the American Convention on Human Rights. 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**’);⁴
- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (‘**OPCAT**’);⁵
- International Covenant on Civil and Political Rights (‘**ICCPR**’);⁶

² 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).

³ *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.

⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

⁵ Adopted on 18 December 2002 by General Assembly resolution A/RES/57/199. Protocol is available for signature, ratification and accession as from 4 February 2003.

- International Covenant on Economic, Social and Cultural Rights (**'ICESCR'**);⁷
- Convention on the Rights of the Child (**'CRC'**);⁸
- Convention on the Elimination of All Forms of Discrimination against Women (**'CEDAW'**)⁹ and
- Convention relating to the Status of Refugees (**'Refugees Convention'**).¹⁰

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;¹¹
- Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;¹²
- Convention relative to the Treatment of Prisoners of War;¹³
- Convention relative to the Protection of Civilian Persons in Time of War;¹⁴
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts;¹⁵ and

⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981.

¹⁰ 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.

¹¹ 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.

¹² 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.

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 Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, 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 establishing a Convention for the Protection of Civilian Persons in Time of War, entry into force 21 October 1951.

- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.¹⁶

Finally, the Rome Statute of the International Criminal Court¹⁷ 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;¹⁸
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁹
- 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;²⁰
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;²¹
- Standard Minimum Rules for the Treatment of Prisoners;²²

¹⁵ 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.

¹⁶ 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.

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

¹⁸ Adopted by UN General Assembly resolution 3452 (XXX) of 9 December 1975.

¹⁹ Adopted by UN General Assembly resolution 55/89 Annex of 4 December 2000.

²⁰ Adopted by UN General Assembly resolution 37/194 of 18 December 1982.

²¹ Adopted by UN General Assembly resolution 43/173 of 9 December 1988.

- Rules for the Protection of Juveniles Deprived of their Liberty;²³
- Code of Conduct for Law Enforcement Officers²⁴; and
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.²⁵

General Comments

Specific provisions in each of the ICCPR, CAT and CRC relating to torture, have been elaborated on in ‘General Comments’.²⁶ 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).²⁷ The General Comment provides practical guidance to individuals who wish to bring a communication before the Committee on the issue of non-refoulement.

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;

²² 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.

²³ Adopted by UN General Assembly resolution 45/113 of 14 December 1990.

²⁴ Adopted by UN General Assembly resolution 34/169 of 17 December 1979.

²⁵ 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.

²⁶ 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.

²⁷ *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.*

- 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.

INTRODUCTION

There is an absolute prohibition on torture. The challenges caused by terrorism and other threats call for increased vigilance when articulating and implementing this prohibition.

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 regional common 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.

PART A

General Recommendations and Observations

The ACJ makes a number of recommendations and observations in relation to NHRIs and the protection of individuals from torture. Foremost among them 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.

Ratification of relevant international instruments

- NRHI'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 individuals having a right to make a complaint to relevant international bodies and therefore the importance of their States becoming 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 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 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 the extraterritorial acts of torture committed both by national and non nationals.

Other implementation measures

- 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, 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. Consideration should be given to introducing mandatory reporting regimes and the introduction of ‘whistle blowing’ legislation where there is any suspicion that a person has been subjected to torture or cruel, inhuman or degrading treatment or punishment.
- 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 drafting shadow reports.
- NHRIs 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 NHRIs have a supportive role to play.
- NHRIs should promote policy reform on the issue of immunity of UN officials and state representatives for torture and cruel, inhuman or degrading treatment or punishment.

Training and education

- NHRIs should take an active role in educating all sectors of the community, for example, lawyers, journalists, doctors, medical personnel, teachers, police, the military, senior public officials, the judiciary and legislators, on the meaning and application of the international law on torture, cruel, inhuman or degrading treatment or punishment.

- NHRIs should work with the Office of the High Commissioner for Human Rights ('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.

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 full implementation of the MIS may require extra resources. NHRIs should seek the necessary funding.
- The MIS should be translated into national and other languages and disseminated to all relevant public officials. They should also be made available to all those involved in the justice system, and in particular the judiciary and the legal profession.

Reporting

- NHRIs should report on a regular basis to the OHCHR 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.
- NHRIs should ensure that there is a systematic recording of complaints received specifically alleging torture or cruel, inhuman or degrading treatment or punishment. NHRIs should include reference to such complaints in their annual report to parliament.

Alternative measures to combat torture

- Even 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 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.
- NHRIs should work with their governments to improve the current infrastructure of detention facilities so as to ensure that human dignity is respected.
- They should also take a proactive role in monitoring detention facilities.

Remedies

- NHRIs should facilitate redress for victims of torture and cruel, inhuman or degrading treatment or punishment.
- The legal capacity to refer cases to the courts would support this role.
- NHRIs should have jurisdiction over all the armed forces of their States.

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 the 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 the 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.

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.

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 evidence against another.
2. Interrogation of detainees 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 of and place of detention.
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, changes of clothing, washing facilities and, if needed, medical treatment taking into account any particular characteristic of the individual including age, gender, religion, medical needs and any disabilities or other vulnerabilities.
5. There should never be a threat of the removal of basic necessities such as hygiene provisions, food, rest, sleep, in exchange for information or cooperation.
6. No method of interrogation should be employed that impairs a person's capacity of decision-making or judgement.
7. Before any interrogation commences, the interrogated person should be informed of the reason for the interrogation and any charges against him or her.
8. 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.
9. An individual for whom the language of interrogation is not his or her first language, should always be informed of his or her right to have a competent and impartial interpreter for any interrogation. If there are any issues about the person's understanding of the interrogation process or questions, an interpreter should be provided whether requested by the person being interrogated or not.
10. Every interrogated person should, before any interrogation begins, be given a proper opportunity to consult a lawyer of his or her choice without delay and in private. Officials have

an obligation to facilitate contact with the lawyer of choice. The provision of a lawyer should be provided free of charge if the person does not have the means to pay for his or her services.

11. 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. The interrogated person should also have the right, if requested during the course of the interview, to be able to consult with his or her lawyer in private.
12. Where a lawyer is not available, or the interrogated person does not want to have a lawyer present, the individual 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.
13. The time of arrest or detention and/or the arrival at the place of interrogation should be recorded.
14. 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.
15. 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 or vulnerability.
16. 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.
17. Particular care should be taken in interrogating persons with an intellectual disability, mental illness or personality disorder or any other relevant characteristic.
18. 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 case where there is no video or audio recording, a comprehensive contemporaneous written record should be kept.
19. Procedures should be instituted to ensure the integrity of such records, including proper storage. Evidence from non-recorded interrogations should be excluded from court proceedings (ie no 'verballing').
20. 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.
21. After any interrogation, the interrogated person should have the right to request a medical examination by a competent and impartial medical practitioner.
22. Appropriate penalties should exist and be enforced for any breach of these standards.

PART B
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, 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 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.
- Article 7 of the ICCPR also applies to persons under detention, whether 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 to breaches of 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 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.
- 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.

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.

Medical treatment and facilities

- Article 12 of the ICESCR provides that the denial of proper medical treatment and facilities may constitute torture or cruel, inhuman or degrading treatment or punishment.
- According to Article 12, everyone 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.
- Where necessary, persons should be transferred to specialist medical facilities such as a hospital.
- Practical standards have also 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).

Interrogation

- Prior, during or subsequent to interrogation, no person shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.
- 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, see above.

Medical and scientific experimentation

- Article 7 of the ICCPR gives as a particular example of torture or cruel, inhuman or degrading treatment, 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.

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, 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 sentence involving corporal punishment regardless of whether it is permissible under domestic law will 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 some 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).
- 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. It is 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 including 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.

- 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.
- The minimum interrogation standards developed by the ACJ and set out above should be adhered to when an individual is being questioned.

Monitoring requirements

- Regular and unannounced visits by independent monitoring bodies to places of detention play an important pro-active 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 a place of detention include treatment, protection measures, material conditions, regimes and activities, medical services, prison staff and detention by police.
- The 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, States 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 torture template developed by the Fiji Human Rights Commission in conjunction with Physicians Against Torture for the examination of such persons may provide a useful template for training (see Appendix 4).

(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 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 may also 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.
- 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 Factor 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 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 21 of CAT and the First Optional Protocol of the ICCPR provide some effective remedies.
- 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 in regard to a person who is a danger to the security of the country where he or she is, or who having been convicted by a final judgement of a particularly serious crime, constitutes a danger to that country. This is the position according to the 1951 Convention relating to the Status of Refugees 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 any other type of transfer of a person to a country in the case 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, that is also the requirement under Article 3 of CAT.
- The relevant State for the purpose of determining where torture may occur is any State to which the individual concerned is being expelled, returned or extradited, 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 or extradite 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 that a person will not be subjected to torture upon return are also prohibited because of the principle of non-refoulement (see for example *Agiza v Sweden* of the Committee against Torture).
- 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.

(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 International Criminal Court ('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.

- States have an obligation under CAT to ensure that acts amounting to torture or cruel, inhuman or degrading treatment or punishment are rendered criminal under domestic laws and subject to the jurisdiction of local tribunals.
- 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 territorial and nationality 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.
- CAT requires States to assert jurisdiction – in addition to the territorial and nationality grounds – when the alleged offender is present within the State and not extradited for trial in another State (Article 7(1)).
- The International Court of Justice ('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 international court in the *Congo v Belgium* recognised the right of a serving minister of government to immunity from the 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 therefore not be protected by sovereign immunity.
- CAT imposes a treaty obligation on States parties to assert jurisdiction over torture, cruel, inhuman and degrading treatment or punishment (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.
- Ninety-nine States ratifying the Rome Statute have 'delegated' their universal jurisdiction to the International Criminal Court 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 Human Rights Committee and the Committee against Torture.
- In addition to the power to receive State to State complaints, these bodies may consider individual complaints when the states of which they are a national have accepted the Optional Protocols and made a declaration under Article 21 of CAT.

- The Committee against Torture can also conduct inquiries on its own initiative (Article 20).
- 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 forces’ 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, leaving prosecution to the State of nationality. 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 States 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 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, jurisdiction of the ICC 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.
- Non-state actors will be also responsible for acts of torture committed during armed conflict under the general principles of international humanitarian law.

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 Conventions	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 3.

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”²⁸ 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 Paris Principles can also be applied to those institutions with a more restricted geographical or thematic mandate.

²⁸ The Paris Principles can be downloaded at <http://www.nhri.net/pdf/ParisPrinciples.english.pdf>

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**.²⁹ According to the Paris Principles,³⁰ 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).

²⁹ Including local legislation in federal systems.

³⁰ 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.³¹

- (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.

³¹ 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>

- (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 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.³²
- (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.

³² 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).

- (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.

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.

APT
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Appendix 4 .

Fijian Medical Officer's Report Form

Unique Reference Number: _____

1. Name of patient: _____
2. Other identifying information: _____

Section A: Reason for examination

3. Medical examination requested by: _____
4. Rank, location, telephone number: _____
5. Date and time: _____
6. Purpose of examination: documentation of injuries / fitness for interview / fitness to be detained / forensic samples / other (please describe) _____
7. Circumstances of the incident as related by the victim parent / witness (delete as applicable)

Declarations

I confirm that I have had explained to me the purpose of the medical examination and agree to be examined. I understand that the results of the examination maybe made into a statement and provided to a Court.
Signed _____ (patient)

I confirm that I have explained the purpose of the examination to the above, and request a medical examination and report.
Signed _____ (patient)

Section B: Examining doctor

8. Name of doctor completing this report: _____
9. Registration number or EDP number: _____
10. Brief professional resume: _____

Declaration

This statement (consisting of _ pages each signed by me), is true to the best of my knowledge and belief and I make it knowing that, I shall to prosecution if I have willfully stated in it anything which I know to be false or do not believe to be true.

Signed _____ (doctor) DATE: _____

SECTION C: Medical examination

11. date and location of medical examination: _____

Time started: _____ Time finished: _____

12. Consent obtained from patient: verbal /written/ with interpreter (see last page).

13. Other persons present: _____

14. History as related by the patient: _____

15. Initial impression of the patient:

16. Specific medical findings:

a) _____

b) _____

c) _____

d) _____

17. Any other observations: _____

Name _____

Signed _____ (Doctor)

SECTION D: Professional opinion

18. Opinion of medical findings:

- a) _____

- b) _____

- c) _____

- d) _____

19. Admitted to hospital yes/ no

20. Investigations ordered and treatment prescribed: _____

21. Summary and conclusions:

22. Recommendations and follow- up:

Name _____

Signed _____ (doctor)

Appendix B

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 the surface.
Burn	A wound caused by heat which may be 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 fit or seizures. It can be caused by trauma to the brain.
Forensic medicine	That branch of medicine involved with assisting the courts.
Graze	See “ abrasion” above
Haemorrhage	The medical term for bleeding
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 integrity of the skin or mucus membranes caused by the application of force