

HUMAN RIGHTS IN THE ASIA-PACIFIC REGION

Address to AGM Wellington Women Lawyers' Association

**By the Hon Justice Susan Glazebrook
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Thanks so much for inviting me to speak this evening. I do wonder at your stamina after such a nice dinner and good company for an address on human rights but that is what I have been asked to speak to you about. I also apologise in advance to those who may have heard me on this topic before as inevitably there will be some overlap with what I have said on previous occasions.

I intend to concentrate this evening on some aspects of New Zealand's role in the Asia-Pacific region with regard to human rights. The Asia-Pacific region is the only major region of the world that has not adopted a regional human rights instrument. One of the main reasons for this is the diversity of the region as defined in the United Nations system. The region covers an area that ranges from Syria to the Solomon Islands. It includes all major religions and has diverse social systems, cultures and ethnic groupings. It is likely, therefore, that any regional human rights instrument is some way off.

Despite the difficulty in realising a regional human rights charter, there has been progress in regional human rights networking and co-operation in recent years. Generally the view is that a gradual approach to building regional arrangements offers the best prospects for making progress in the human rights area in the region. A framework has been developed which focuses on national human rights institutions, human rights education, national plans of action and the promotion of economic, social and cultural rights and the right to development.

One of the initiatives taken in the region is one that I have been involved in for the last four years. This is the Advisory Council of Jurists for the Asia-Pacific Forum of National Human Rights Institutions. I have told them that they have to think of a title that is a bit less of a mouthful, although I have also urged them to avoid those successions of acronyms the United Nations so loves but which often mean little to outsiders.

You will no doubt have noticed that this is hardly a role that my background in practice as a tax and finance lawyer prepared me for. When I tell you, however, that my doctoral thesis was on crime and criminal justice in France during the French Revolution you will see that wide swings in topic have been a bit of a hallmark of my career. I said recently at a University graduation ceremony that I was a great believer in lifetime education and the theory that no learning is ever wasted. Despite this, I had to admit that I had not as yet found a direct application for my thesis in my everyday work. I have not, however, given up hope.

Anyhow back to the Asia-Pacific Forum itself. This was established in 1996 and is dedicated to supporting the establishment and development of national human rights institutions in the region that fulfil at the least the minimum standards set out in what are called the Paris Principles. These were endorsed in 1993 by the United Nations General Assembly. The Paris Principles require human rights institutions to be independent from government and autonomous, and to have sufficient resources, adequate powers of investigation and a broad mandate based on universal human rights standards.

The Forum currently has 12 full member institutions from the region that fulfill those criteria and a number of associate member institutions which are working towards fulfillment of the criteria. The New Zealand Human Rights Commission was a founding member of the Forum. The idea of setting up an Advisory Council of Jurists was first mooted by the Forum in 1997 and it was formally approved in 1998. The Advisory Council's mandate is to provide advice on the interpretation and application of relevant international human rights standards as they apply to member states. The Council can only advise, however, on matters referred to them by the Forum or by a national institution that is a member of the Forum.

The Council first met in 1990 in Rotorua under the capable presidency of our own Dame Silvia Cartwright, before she became Governor-General. It has so far considered six references – two when Dame Silvia was President, on child pornography and the death penalty – and four since I have been a member of the Council. In 2002 the reference was on people trafficking (considered at the annual conference in New Delhi) and in 2004, at the annual conference in Kathmandu, the Council considered a reference on terrorism and human rights. In 2005 the meeting headed for Mongolia and a reference on torture. Last year the meeting was education in Fiji. This year it is the environment in Australia.

The process for the references to the Council begins by the Forum deciding on the topic to be referred. It then set out specific questions it wants answered. A background paper is prepared for the consideration of the jurists. The jurists meet for three days in conjunction with the annual meeting of the Forum and produce a report for presentation to the Forum meeting. I can tell you that the timeframe is in itself a challenge, although we do have two months after the meeting to finalise our report.

It is a very rewarding (and humbling) experience to work with eminent jurists from around the region, even within such time constraints. The jurists involved include university professors, politicians, barristers and judges. They therefore come from a wide range of backgrounds. There are also major differences in the conditions they work under. One of the jurists, for example, told us of a “Godfather-type” experience he had had. Someone who did not like his views had sent his family a package with a severed dog’s head. This was certainly a reminder of the importance ensuring respect for human rights and in particular the right to freedom of speech.

The reports of the Advisory Council answer the particular questions set out in the reference to us but they also make recommendations as to further action. All of the reports done so far are available on the Forum website at www.asiapacificforum.net and the Forum members report to each meeting on the progress made in their jurisdictions in implementing those recommendations, so there is follow up. In my view, the Forum and the Advisory Council fulfil an important function. They have their roots in the region and can concentrate on the issues of particular relevance to the States in that region. I think it is important that the work of the Forum and the

Council becomes more widely known and I am grateful for the opportunity to talk about them tonight.

I have been asked to concentrate particularly on trafficking but I will first mention a few key points about the other references. Taking the terrorism reference first, our report made it clear that terrorism, particularly where it is aimed at civilians, is in itself a gross breach of human rights and never justifiable, whatever the motive. Equally, however, we said that to meet breaches of human rights with further breaches of human rights not only diminishes moral authority but is likely in the long run to be counter-productive. It is instructive in this regard to take note of an important judgment of the Supreme Court of Israel on torture. After referring to the security situation in Israel, the President of the Court said:¹

Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

The UN Security Council has recognised the importance of ensuring that international human rights standards are met when taking measures to combat terrorism. The Advisory Council endorsed that approach. It pointed out that the international human rights law and standards were designed to be interpreted in an evolving context and that they are flexible enough to meet the current security challenges.

In our report we commented on a widening and disturbing gap between commitment to international human rights standards and their implementation in national laws and administrative practices related to counter-terrorism measures. We drew attention to a number of disturbing trends in the region, including:

- Detention for prolonged periods without criminal charges being laid and with no opportunity for timely judicial review of the legality of the detention;

¹ *Public Committee Against Torture in Israel v The State of Israel and the General Security Service* ("the GSS case") HCJ5100/94 6 September 1999 at [39] (President Barak).

- Detention without notification to family (in some cases amounting effectively to disappearances);
- The targeting of minority groups solely on the basis of ethnic or national origin or religious or political persuasion;
- The misuse of anti-terrorism legislation to stifle legitimate political dissent and other fundamental freedoms.

Countries like New Zealand should lead by example in this area. We must remember that draconian laws have the potential to be used against everyone and not just against terrorists. History has shown in other countries and in other contexts that complacency in this area is misplaced. It is the human rights of all New Zealanders that are at stake.

This leads naturally on to a consideration of the reference on torture. I say this because the right to be free from torture is one of the fundamental freedoms on which our civilisation is based. I remember naively thinking because of this that this reference was a much more confined topic than terrorism, and therefore easier, but naturally that was not the case. The issues remain complex even in relation to the definition of torture.

Rather than go into details I want to mention one aspect of our report that was in my view innovative and of particular benefit to New Zealand. The Council devised a set of minimum interrogation standards based on international human rights principles (attached as an appendix to this paper). These were designed not only to ensure freedom from torture and ill-treatment but also to ensure fair treatment of all those subject to investigation by the police. I am pleased to say that our Human Rights Commission has used those standards in discussions with the New Zealand Police and I understand that the police have been very receptive to these discussions.

This year's reference was on education. This also was a very wide topic and one raising the whole issue of whether there is a distinction between political and civil rights and economic, social and cultural rights. Economic, social and cultural rights

have traditionally been seen as “soft” rights, much harder to enforce, and for which considerations of policy make them unsuitable for adjudication in any traditional sense. Our report challenges that view. Under international law, States have obligations to respect, fulfil and nurture the right to education in the same way as, for example, freedom of expression and other political and civil rights. Indeed, it can be argued quite cogently that education is a pre-requisite for the enjoyment of civil and political rights.

I now move to the topic that I have been asked to concentrate on this evening, that of trafficking. This was the reference at the first meeting I attended in 2002 in New Delhi. Before joining the Council, I only had a very vague idea of what trafficking is and you may still be in a similar position. Up until December 2000 we would have had a lot in common with the international community in general as the term “trafficking” had never been precisely defined in international law before then. In particular, the factors distinguishing trafficking from people smuggling had been difficult to identify.

This changed with the finalisation of the Trafficking Protocol² to the United Nations Convention Against Transnational Organized Crime. In some ways the fact that the Protocol is associated with a convention on organised crime means that a human rights focus is obscured. On the other hand, the focus on the criminal aspects of trafficking may bring the issues more into the mainstream of international co-operation. Increases in prosecutions of traffickers can only be a positive move (as long as the rights of victims are not forgotten).

The Protocol came into force on Christmas Day 2003 and for the first time provides a comprehensive definition of trafficking. The definition concentrates not only on the use or threat of force. It also talks of the use of deception or abuse of power for the purpose of exploitation of a person. In the case of children, exploitation alone is sufficient to be deemed trafficking.

The main victims of traffickers are women and children and, arguably, the main destination is the sex trade, although trafficking takes place also to provide domestic

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, adopted by G A Res 55/25 25 December 2003.

or sweatshop workers or other forced labour (including criminal activity) and in some cases for trade in human organs. The problem is rife in many of the Forum countries, both internally and between countries, with some countries serving as countries of origin, transit and destination for trafficked people. It is really akin to a modern day slave trade.

Just to put some more flesh on the bones, I would like to recount a couple of stories of trafficked women and children. The first story I have chosen is from a Human Rights Watch report on Thai women trafficked into debt bondage in Japan. The study was completed in 2000. This is not to single out Thailand or Japan in particular. As I said earlier, the problem is rife throughout the region.

The story I have chosen from that report is that of M and it is a composite profile of women who were interviewed in a women's shelter in Tokyo in 1999. Before arriving at the shelter, M had spent more than two months working as a hostess in what was quaintly termed a dating snack bar. Her tasks included serving drinks at the bar but also accompanying clients to nearby hotels to provide sexual services. She had been recruited from Thailand with the promise of a generous monthly salary for factory work. When she arrived she was told, not only that she was to be working at the snack bar, but that she would be working without pay until she had paid off a debt of approximately \$70,000 for travel and job placement expenses.

Her manager confiscated her passport and warned her that, if she tried to escape, she would be followed and caught by Japanese gang members or the police. She was housed under constant surveillance in an apartment next door to the snack bar, where a motion sensitive light outside the door meant that she could not go outside unnoticed. After working for about two months, M's debt had almost doubled. This was because of the cost of board, HIV tests and what were called protection fees, as well as a hefty fine for giving the snack bar's telephone number to her parents. This sum naturally far exceeded the amount she had been able to earn, particularly as the accounting systems left a great deal to be desired.

The next story is from a book given to me while I was at the Forum conference in New Delhi by an organisation that helps trafficked children. The book is a simple publication describing the work of the organisation but it mainly lets the children

speak for themselves by providing a selection of stories. I am a strong believer in the power of stories. It turns the abstract into the personal.

I have chosen the story of a girl identified by her initial, K. This, in fact, is one of the less harrowing stories in the book. K came from a small West Bengali village. Her family consisted of two young brothers and her father who was a village priest. The father became ill and was diagnosed with cancer and this obviously put a major financial strain on the family. A family friend offered to get K work as a maid in Calcutta with a good family so that she would be able to support her father and brothers. K went with the friend and was taken to Calcutta where she was put into the care of an elderly woman.

She was given something to eat and she remembers nothing more until she woke to find herself in Mumbai. There she was put to work as a prostitute expected to service over 20 customers a day. This came to an end eventually after a raid on the brothel by the police. She had been hidden behind a false wall but took the risk of banging on the wall during the raid. Rescue came too late for K, however, as she was already HIV-positive. The heartbreaking part for me was the narrator recording that K is sure that the drugs she had been given since her rescue will cure her and that she will have a brighter future. She was then only 16 years old.

There were numerous other stories in the book, often telling graphic tales of rape, violence, intimidation and lack of attention to basic needs, including medical care.

The situation is not necessarily better for the trafficked women and girls after rescue. Often they will find themselves detained for long periods before being summarily deported, or they may find themselves the subject of prosecution for prostitution while their traffickers go free. This is sometimes because of the corruption of officials. Indeed trafficked women and children often tell stories of money changing hands with police and immigration officials. There are also, however, difficulties of prosecution, including the difficulty of cross-border prosecutions and that of persuading the trafficking victims to testify. Someone once said that the trouble with prosecuting traffickers and people smugglers is that the evidence had legs and frequently used them.

There is also the problem of reintegration of trafficked women and children back into society. Many of the girls whose stories were in the book said that, even in cases where their families were willing to take them back, they felt more comfortable staying with others who had had the same type of experiences they had.

Where adult victims are concerned, many in fact had made a positive decision to escape their previous lives. This is where matters become more complicated. Many of the women trafficked across borders are like M. They are seeking a better life. In some cases the situation is worse than that – they are searching for survival. They are escaping a situation of extreme poverty, often coupled with gender discrimination and violence at the hands of men. It is no solution for them to be forced back to the very life they wanted to escape. Some of them do not necessarily even wish to be rescued from prostitution but they do want their situation to be improved by ensuring, for example, proper payment and medical care.

The UN Special Rapporteur on Violence against Women tells the story of a group of women she met in Bombay in November 2000. They explained to her that they belonged to a caste that traditionally gives their younger daughters into temple prostitution. They had left the temple for Bombay in search of a better life. In Bombay they earned enough to send money home to their parents who were caring for their children. Their main concerns were health protection and earning enough to give their children a good life, including good schooling.

They worked at night, played cards during the day and said they were reasonably happy. They certainly became extremely offended when it was suggested that a rehabilitation centre be set up and that they be trained for another occupation. They did not want to change occupation and they did not want the State or the police in their lives. They were, however, considering forming a trade union like the sex workers in Calcutta to ensure better conditions.

The Advisory Council in its report noted that the root causes of trafficking lie in poverty and social injustice and, in particular, gross gender discrimination. It also recognised, however, that the new international laws targeted specifically at trafficking provide important tools for combating trafficking. To give substance to

this we urged all member States to ratify the Protocol on Trafficking and I note that New Zealand was one of the first States to do so.

We also urged States to implement the Protocol even before ratification and to ensure the proper enforcement of existing laws to combat trafficking. This has to be coupled with measures to ensure that the victims of trafficking will come forward to testify. Finally, we exhorted States to ensure that the human rights of victims of trafficking were secured, including their right to self-determination. It is worth repeating in this regard the words of the UN Special Rapporteur in a speech she gave here at the end of 2002.

She said:³

In our attempts to fight trafficking, we must not forget our first concern – the woman victim. All these measures are made meaningful only because they allow women to live a life of respect and dignity. In promoting these measures we must keep this in mind. We must validate the lives of these women and give them the respect they deserve. The women involved may be victims but they are also human beings with aspirations and experiences. Any measure to be successful must learn to understand their needs and desires. In their suffering they have insights and ideas from which we can benefit. Too often they become pawns in someone else's game. Their voices and interests are compromised as States uphold sovereignty and stem the tide of migration. Whatever measures are taken should give centre place to the rights of the woman victim. Immigration laws, refugee procedures, and asylum practices must surely ensure and protect their right to live in dignity.

I do recognise that telling stories and writing reports only takes us so far. This is not to diminish the importance of bringing a problem into the open. A problem that is not known about is a problem that can be ignored. It is, however, action that is needed now. I know that the Forum members are determined to facilitate that action to the extent they can and that the report, coming as it does from a group of jurists from the region, will help them in that task.

I end with some thoughts on why it is important for New Zealand to be involved in groups like the Forum. The first of course is just good world citizenship. New

Zealand has cause to be proud of its involvement over the years in international affairs and in particular with human rights initiatives. There are also, however, more selfish reasons. The promotion of human rights in the Asia-Pacific region, and particularly economic and social rights, can only be of benefit to the region and therefore to New Zealand. It is too easy for New Zealanders to become complacent and to forget why the protection of human rights is important. Looking outwards to countries in the world, where human rights are less secure, can guard against that tendency and renew the determination that is required to bring about a common understanding and universal respect for the human rights of all people.

³ Speech at the 5th World Conference of the International Association of Refugee Judges, Wellington, October 2002.

Appendix

Minimum Interrogation Standards

Contained in the Advisory Council of Jurists, Asia-Pacific Forum of National Human Rights Institutions, *Final Report on the Reference on Torture (December 2005)*⁴

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,

⁴ For full report, go to www.asiapacificforum.net

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.

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 Advisory Council of Jurists (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.*⁵

In addition, Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁶ and Article 5 of the Universal Declaration of Human Rights (UDHR)⁷ 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 1949⁸ and the two Additional Protocols of 1977⁹ (relating to armed conflict) also prohibit torture and related practices.

Torture, under Article 1 of the Convention Against Torture (CAT),¹⁰ is defined as being:¹¹

- *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*

⁵ Article 53, Vienna Convention on the Law of Treaties.

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

⁸ 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.

⁹ 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.

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

¹¹ 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 65 – 96.

- *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.

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”.*¹²

*Such disappearances can constitute torture or cruel inhuman or degrading treatment or punishment for relatives as well as the person involved.*¹³ *Secret places of*

¹² 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.

¹³ 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

*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.*¹⁴

*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.*¹⁵

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 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 judgment. Save in exceptional circumstances, no interrogation should take place at night.

ECHR explained that the focus is the authorities' reactions and attitudes to the situation when it is brought to their attention (at para 98).

¹⁴ 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)

¹⁵ 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 31. See also Article 36(1) of the Vienna Convention on Consular Relations; and Principle 16(2) of the Principles for Persons under Detention.

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 worse at night than during the day, interrogations should not take place at night except in exceptional circumstances.

*The Principles for Persons under Detention*¹⁶ 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.*

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.

Commentary

*Principle 24 of the Principles for Persons under Detention states that:*¹⁷

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.

¹⁶ 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.

¹⁷ 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 by the Economic and Social Council by its resolution 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

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.

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 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.
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.¹⁸ 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.¹⁹

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 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.

¹⁸ 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).

¹⁹ 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).

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;²⁰*
- *the information recorded should be available to the interrogated person and, when provided by the law, to his or her counsel;²¹*
- *interrogation of detained persons should only take place at official interrogation centres.²²*

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.

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.

²⁰ 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.

²¹ 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.

²² 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

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.²³ Statements made as a result of torture or other ill-treatment should be excluded from any proceedings.²⁴ 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.

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 act²⁵. Article 2(3) of the ICCPR requires states to ensure that where 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

²³ For a more detailed discussion on this issue, please refer to the Advisory Council of Jurists *Reference on Torture: Final Report* at 118 - 127.

²⁴ For a more detailed discussion on this issue, please refer to Advisory Council of Jurists *Reference on Torture: Final Report* at 115 – 117.

²⁵ See Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V Pol.), (1928) P.C.I.J., Sr.A, No.17.

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.²⁶

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.²⁷*
- *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.²⁸*

²⁶ 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.

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

²⁸ 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.