

CHINA

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

China has a population of over 1.4 billion people. The majority of these are Han Chinese, constituting just slightly over 90% of the population, while there are several other sizeable minorities such as Tibetans and Uighurs.¹

China, unified in 221 BC, became the People's Republic of China on 1 October 1949. It is composed of 23 provinces, five autonomous regions and four municipalities. Hong Kong and Macau are special administrative regions whose laws differ from those applicable to the rest of China.²

Its present Constitution was promulgated on 4 December 1982. Chapter Two of the Constitution sets out the fundamental rights and duties of citizens of the People's Republic of China. This chapter guarantees several fundamental civil and political as well economic, social and cultural rights but contains neither an express right to life nor an explicit prohibition of torture and other forms of ill-treatment.³

According to Section VII, Article 123 of the Constitution, the peoples' courts are the judicial organs of the state. These courts comprise the Supreme Peoples' Court, local peoples' courts and special peoples' courts. The local peoples' courts hear criminal, economic, civil and administrative cases and operate on a three-tier level of first instance, intermediary, and higher courts. The intermediary and higher courts are partly first-instance, partly appeal courts.⁴ Special courts are established for a specific subject matter, such as military courts. The highest judicial organ is the Supreme Peoples' Court, which, according to Article 127, supervises the administration of justice by the local peoples' courts at different levels and by the special peoples' courts. Article 126 guarantees the independence of the judiciary: "The peoples' courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations, or individuals."

1.2. Incorporation and status of international law in domestic law

China has ratified the following relevant international treaties:

- Geneva Conventions (28 December 1956)
- CEDAW (4 November 1980; 3 September 1981)
- CERD (29 December 1981; 28 January 1982)
- Genocide Convention (18 April 1983)

¹ See for general information on China, Core Document Forming Part of the Reports of States Parties UN Doc. HRI/CORE/1/Add.21/Rev.2, 11 June 2001.

² See *ibid.*, Part Two and Three. The law and practice of Hong Kong and Macau are not considered in this study.

³ However, see Article 38: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge, or frame-up directed against citizens by any means is prohibited."

⁴ Core Document, *supra.*, paras. 177-196.

- Additional Protocols I and II to Geneva Conventions (14 September 1983)
- Convention against Torture (4 October 1988; 3 November 1988; Reservations to Art. 20 and 30)
- CRC (3 March 1992; 1 April 1992)
- ICESCR (27 March 2001; 27 June 2001)

Article 67(14) of the Constitution stipulates that in order for a treaty to become binding under Chinese law, accession to the treaty must be approved by the Standing Committee of the National People's Congress. No further incorporation is required.

There appears to be some uncertainty as to how general international law is to be implemented under Chinese law. Whereas some hold that all international treaties should automatically be applied in China,⁵ others stress the need for specific implementing legislation to be adopted.⁶ According to a third view, it depends on the treaty in question; some treaty rules may apply automatically if they are self-executing while all other provisions require the adoption of legislation to become binding.⁷ Declarations by Chinese officials and the jurisprudence of Chinese courts concerning this question have not allowed any authoritative conclusion to be drawn. As a general rule, any international agreement ratified or acceded to by China will take precedence over domestic law.⁸

2. Practice of Torture: Context, Occurrence, Responses

2.1. The practice of torture

Ever since the Communist Party gained power in 1949, China has gone through several periods that were marked by severe repression of civil and political rights. Throughout the 1980s and 1990s, political dissidents are known to have been persecuted and their rights violated.⁹ Growing discontent with the rule of the Communist Party led to massive student protests in Beijing in the late 1980s. In a well-known example, Chinese government forces responded by excessive use of force that resulted in several hundred deaths in and around Tiananmen Square.¹⁰ In the 1990s, economic liberalisation did not result in greater political freedom. The emergence in 1992 of the Falun Gong, a religious meditation movement, was seen as a threat by the Party. They reacted with a policy of persecution that was marked by human rights violations against the adherents.¹¹ The last decade also witnessed a steep increase in the

⁵ Some cite the Civil Procedure Law as an example of such direct application. Article 238 of the Civil Procedure Law, promulgated by the National People's Congress on 9 April 1991, states: "in the case that there is a conflict between this law and the treaty to which the People's Republic of China is a party, the rules of the treaty shall prevail, unless there is specific reservation made by the People's Republic of China on the rules in question."

⁶ See Zhu Qiwu, *International Law: Theory and Practice in China (zhongguo wuojifa de lilun yu shijian)*, Law Press, 1998, at 416-417.

⁷ See *ibid.*, at 416.

⁸ See Core Document, *supra*, para.53.

⁹ See Amnesty International, *No One Is Safe, Political repression and abuse of power in the 1990s*, 1996, AI Index: ASA 17/01/96, pp.31 et seq.

¹⁰ Amnesty International, *People's Republic of China, Ten Years after Tiananmen*, May 1999, AI-Index: ASA 17/007/1999.

¹¹ See Human Rights Watch, *Dangerous Meditation, China's Campaign Against Falun Gong*, January 2002; *The Falun Gong Report*, March 2002, compiled by the Falun Gong Human Rights Working Group, and for the position of the Chinese government, on Falun Gong, Replies by Mr. Qiao Zonghuai, China, to the questions put by Committee members, in UN Doc. CAT/C/SR.419, 12 May 2000.

imposition and execution of the death penalty in China, the methods of which may amount to inhuman treatment.¹²

China contains within its border two regions that have strong independence movements. Tibet, which was occupied by the Chinese army and subsequently integrated into the State structure of China in 1951, has a strong claim to self-determination that has been repeatedly expressed by Tibetans, in particular the Tibetan Government in Exile. Any moves of Tibetans to gain independence or stronger autonomy have been met with a policy of repression. Allegations of torture are rife, and Tibetans have also been denied a series of civil and political as well as cultural and social rights.¹³ Equally, the Uighurs, constituting the majority of the population in the Xinjiang Uighur Autonomous Region in the North-West of China, have repeatedly emphasised their distinctiveness from the rest of China and have called for greater political self-determination. These claims have, especially after September 2001 in the wave of policies under the banner of anti-terrorism worldwide, led to repression on the part of the Chinese government.¹⁴

Over the past two decades torture has remained systematic in China. According to China's conservative official statistics, torture may have increased over the past several years, and 1996 -- the year of the largest anti-crime campaign since 1983-86 -- saw the biggest number of torture cases since 1990.¹⁵ It is evident from the statistics from the Supreme People's Procuratorate (hereafter SPP) on criminal cases of confessions obtained through torture between 1979 to 1996 and the statistics of the Minister of Public Security, that there have been a continuous and high number of torture cases, often resulting in death.¹⁶ Even considering the overly narrow definition of torture adopted by the Chinese authorities, these figures probably represent only a fraction of actual cases. The 1993-1994 SPP statistics, for example, suggest that a startling $\frac{1}{4}$ to $\frac{1}{3}$ of all torture cases resulted in death, however a more plausible explanation for these figures might be that most torture cases are not reported or prosecuted unless they result in death or other serious consequences.

A wide range of officials has reportedly used torture. While the majority of torture has been committed by the police forces, the staff of other state institutions, such as drug rehabilitation centres, psychiatric hospitals, administrative camps, detention centres, prisons as well as persons acting in an official capacity as security staff are said to have perpetrated acts of torture and ill-treatment.¹⁷ With a wide arsenal of methods, often of severe brutality causing death, torture is routinely used to force confessions, as a means of repressing political dissent, to "crack-down" on crimes and also as a means of extortion. Torture victims include those suspected of having committed crimes, detainees and prisoners, political opponents, human

¹² See the Committee against Torture in its consideration of China's second periodic state report, UN Doc. CAT/C/SR.254, 10 May 1996, para.5.

¹³ See Torture in Tibet, The Government of Tibet in Exile, April 2000 and for China's position on Tibet: Position Paper of the Chinese Government on the Issue of Tibet, in: UN Doc.E/CN.4/2002/173, 11 April 2002, Annex.

¹⁴ Amnesty International, *People's Republic of China, Gross Violations of Human Rights in the Xinjiang Uighur Autonomous Region*, April 1999, AI-Index: ASA 17/18/99.

¹⁵ See Wang Gangping, ed. *The Crime of Torture Confession (Xingxun bigong zu)*, Beijing, People's Procuratorate Press, 1997, at 9.

¹⁶ Wang Gangping, supra, at 19 and "MPS Situation Report on the Public Security Departments Opening Up a Special Education and Rectification Program on Stopping Tortured Confessions" (*Gonganbu guanyu gong'an jiguan kaizhan zhizhi xingxun bigong zhuanxiang jiaoyu zhengdun de qingkuang tongbao*), Law Enforcement Handbook (*Zhifa shouce*) (hereafter ZFSC), Vol. 18 (1996), at 378-379.

¹⁷ Amnesty International, *People's Republic of China, Torture: A growing scourge in China- Time for Action*, February 2001, AI Index: ASA 17/004/2001, pp.3 et seq.

rights defenders, Falun Gong members, members of ethnic minorities, particularly Tibetans and Uighurs and marginalized groups such as prostitutes and vagrants.¹⁸

2.2. Domestic Responses

China has, throughout the 1990s, taken several steps to combat torture, such as reforming existing laws and enacting a series of new ones, conducting education and training courses for law enforcement officials and publication of human rights instruments.¹⁹ However, China has so far not set up a national human rights commission or comparable body with a mandate to protect human rights. Furthermore, independent human rights organisations are not allowed to operate in China.

Officially, China has neither acknowledged the systematic practice of torture nor apologized for it.²⁰ However, the extent of the problem of torture was acknowledged by the Chairman of the National People's Congress Committee for Internal and Judicial Affairs.²¹ China's Minister of Public Security, Jia Chunwang, admitted at a public security conference in summer 1998 that "tortured confessions are still a routine part of law enforcement."²² In his annual report to the National People's Congress in March 1999, the Chief Procurator of the Supreme People's Procuratorate, Han Zhubin, admitted to a catalogue of abuse and corruption within the prosecution service, including "illegal handling of cases, the use of forceful measures against suspects and even the extraction of false confessions".²³ The Chinese media has also highlighted several cases of torture recently and underscored the systemic and widespread nature of torture, especially in the course of investigations to extract confessions.²⁴

2.3. International Responses

China has submitted three reports to the Committee against Torture.²⁵ The Committee against Torture has, in considering these reports, repeatedly expressed its concern: "about the continuing allegations of serious incidents of torture, especially involving Tibetans and other national minorities."²⁶ The Special Rapporteur on Torture has also inquired into a large number of cases of alleged torture in China.²⁷ Equally, the Special Working Group on Involuntary

¹⁸ Ibid.

¹⁹ Find details in country reports submitted by China under CAT, infra 2.3. See also overview in statement by Mr. Quiao Zonghuai, in UN Doc. CAT/C/SR.416, 18 May 2000, paras.3-8.

²⁰ See, by way of example, statements by members of the Chinese delegation replying to questions put by Committee members in relation to its third country report, UN Doc. Doc. CAT/C/SR.419, 12 May 2000. According to Yu Ping, HRIC, China generally attributes the epidemic of torture to cultural tradition.

²¹ AI, Torture, supra, p.5. The Chairman is quoted as having stated that torture to extract confessions: "is rather serious in certain places, causing terrible social consequences" and must be "conscientiously dealt with rather than tolerated."

²² "Minister Jia Chunwang's Speech" to the Dalian Conference on building the public security corps, 12 June 1998, in *Theory and Practice on Standardizing Construction of the Public Security Corps (Gong'an dui wu zhengguihua jianshe lilun yu shijian)*, Beijing, China People's Public Security University Press, 1998.

²³ *Agence France Presse (AFP)*, March 10, 1999.

²⁴ See *ibid.*, p.4, for translated extracts of the article which appeared in the Legal Daily on 4 June 2000.

²⁵ The initial report is contained in UN Doc. CAT/C/7/Add.5, 27 April 1990, Supplementary Report in UN Doc. CAT/C/7/Add.14, 18 January 1993, second report in UN Doc. CAT/C/20/Add.5; 15 February 1996 and third report CAT/C/39/Add.2; 5 January 2000.

²⁶ Conclusions and Recommendations of the Committee against Torture: China, UN Doc.A/55/44, paras.106-145, 9 May 2000, para.116. See also Conclusions and Recommendations of the Committee against Torture concerning the second country report contained in UN Doc. CAT/C/SR.254, 10 May 1996, D. 1:"The Committee is concerned that, according to information supplied by non-governmental organizations, torture may be practised on a widespread basis in China; D. 3:"The allegations drawn to the attention of the Committee by non-governmental organizations that torture occurs in China in police stations and prisons in circumstances that often do not result in investigation and proper resolution by the authorities."

²⁷ See report by Special Rapporteur Nigel Rodley, UN Doc. E/CN.4/2001/66, 26 January 2001, paras.237-331.

Disappearances and the Special Rapporteur on violence against women, its causes and consequences, have, in their respective reports,²⁸ drawn attention to cases of disappearances and violence against women, in particular against members of the Falun Gong movement. The Special Representative of the UN Secretary-General on the Promotion and Protection of Human Rights Defenders has highlighted several cases of violations of the rights of defenders who work in China.²⁹ The human rights record in China, with particular regard to torture, has also drawn widespread criticism from several states as well as from human rights organisations.³⁰

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The Chinese Constitution does not contain an express prohibition of torture. The relevant provisions of the Constitution in this context are Articles 37 and 38 that protect the personal dignity of China's citizens. Article 38 reads: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge, or frame-up directed against citizens by any means is prohibited."

There are various provisions in statutory law spelling out the prohibition of torture. The Criminal Law of the People's Republic of China specifically prohibits state functionaries from extracting confession from criminal suspects by means of torture.³¹ Article 14 of the Prisoner Law forbids prison officials from "coercing confession by torture, physical abuse, imposing corporal punishments against imprisoned,"³² and "from insulting the dignity of the imprisoned."³³ Other similar provisions include the Regulations on Detention House of the People's Republic of China, which states that beating, cursing, mistreating or torturing the imprisoned is strictly prohibited.³⁴ Likewise, the Judges Law, the Prosecutors Law, as well as the People's Police Law all forbid torture and mistreatment of prisoners.³⁵

Furthermore, the Criminal Procedure Law (hereafter, CPL) bans the extortion of confessions by means of torture.³⁶ In apparent implementation of the prescriptions of the CPL, the Supreme People's Court (hereafter SPC), SPP, and the Ministry of Public Security (hereafter MPS) all enacted their own similar rules to exclude the practice of torture as a means of extorting confessions.³⁷

²⁸ UN Doc. E/CN.4/2000/64; 21 December 1999, paras. 30,31 and UN Doc. E/CN.4/2001/73/Add.1; 13 February 2001, paras.15-21.

²⁹ UN Doc.E/CN.4/2002/106, 27 February 2002, paras.50-62.

³⁰ See overview in Human Rights Watch, World Report 2003, China.

³¹ Article 247, Criminal Law of the People's Republic of China, promulgated by the National People's Congress on July 1,1979 and amended on March 14, 1997.

³² Article 14 (3) of the Prison Law of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 29 December 1994.

³³ Article 14 (4) *ibid*.

³⁴ See the Regulations of Detention House of the People's Republic of China, promulgated by the State Council on 17 March 1990, article 4.

³⁵ See the Judges Law of the People's Republic of China, promulgated by the NPC Standing Committee on 28 February 1995, article 30; the Prosecutors Law of the People's Republic of China, promulgated by the NPC Standing Committee on 28 February 1995, article 33; and the People's Police Law of the People's Republic of China, promulgated by the NPC Standing Committee on 28 February 1995, article 22.

³⁶ Article 43, Criminal Procedure Law of the People's Republic of China, promulgated by the National People's Congress on 1 July 1979 and amended on 17 March 1996: "Adjudication personnel, procuratorial personnel, and investigation personnel must, in accordance with legally prescribed procedures, gather various types of evidence that can prove the defendant's guilt or innocence and the gravity of the circumstances of the crime. The use of torture to coerce statements and the gathering of evidence by threat, enticement, deceit, or other unlawful methods are strictly prohibited."

³⁷ See AI, Torture, *supra*, pp.39, 40.

Torture in Chinese law is still defined as the use of physical force, which has serious consequences, resulting in permanent injury or death, to coerce a statement or confession. It does not incorporate "mental" torture. It also fails to incriminate perpetrators of torture, who, while not being officially employed by the state, carry out official functions.³⁸

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive law: Criminal offences and punishment

While the criminal offence of extorting confessions by means of torture exists, there is no specific criminal offence of torture in line with the definition of torture found in Article 1 of the Convention against Torture. Acts of torture could fall within the scope of several criminal offences. In addition to the offence of using torture to extract confessions, which carries a maximum punishment of three years imprisonment,³⁹ maltreatment of prisoners, punishable by up to ten years imprisonment in serious cases,⁴⁰ and infliction of bodily injury, punishable by up to ten years imprisonment in cases of grievous bodily harm also exist.⁴¹ Similar punishments will be imposed if bodily injuries are inflicted on anyone in the course of unlawful detention.⁴² If torture results in death, perpetrators can, if committed intentionally, be held accountable for homicide, which is punishable, depending on the circumstances, by imprisonment of not less

³⁸ See Human Rights in China, *Impunity for Torturers Continues Despite Changes in the Law, Report on the Implementation of the Convention against Torture in the People's Republic of China*, April 2000, Article 4.

³⁹ Article 247 CL: "Judicial workers who extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses, are to be sentenced to three years or fewer in prison or put under criminal detention. Those causing injuries to others, physical disablement, or death, are to be convicted and severely punished according to articles 234 and 232 of this law."

⁴⁰ Article 248 CL: "Supervisory and management personnel of prisons, detention centers, and other guard houses who beat or physically abuse their inmates, if the case is serious, are to be sentenced to three years or fewer in prison or put under criminal detention. If the case is especially serious, they are to be sentenced to three to 10 years in prison. Those causing injuries to injuries, physical disablement, or death, are to be convicted and severely punished according to article 234 and 232 of this law. Supervisory and management personnel who order inmates to beat or physically abuse other inmates are to be punished according to stipulations in the above paragraph." See for a critical examination of the limited definitions of Articles 247 and 248, AI, Torture, supra, pp.35 et seq.

⁴¹ Article 234 CL: "Whoever intentionally injures the person of another is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control. Whoever commits the crime in the preceding paragraph and causes a person's serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; if he causes a person's death or causes a person's serious deformity by badly injuring him with particularly ruthless means, he is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death. Where this Law has other stipulations, matters are to be handled in accordance with such stipulations." Article 235 CC: "Whoever negligently injures another and causes him serious injury is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention. Where this law has other stipulations, matters are to be handled in accordance with such stipulations."

⁴² Article 238 CL: "Whoever unlawfully detains another or deprives him of his freedom of the person by any other means is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights. In circumstances where beating or humiliation are involved, a heavier punishment is to be given. Whoever commits one of the crimes in the preceding paragraph and causes a person's serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; when he causes a person's death, he is to be sentenced to not less than 10 years of fixed-term imprisonment; when he causes a person disability or death by violent means, he is to be punished in accordance with the stipulations in Article 234 and Article 232 of this law. Whoever unlawfully detains or takes somebody into custody for the purpose of demanding the payment of a debt is to be given a punishment in accordance with the stipulations stated in the two preceding paragraphs. Where an employee of a state organ abuses his authority to commit any of the three aforementioned crimes, he is to receive a heavier punishment in accordance with the stipulations stated in the three preceding paragraphs."

than three years up to the death penalty,⁴³ or negligent homicide, which carries a maximum punishment of seven years imprisonment.⁴⁴

Rape is also a criminal offence carrying a minimum punishment of three years and in case of any of the listed aggravated circumstances, with a maximum penalty of death. Rape in custody is not included as an aggravated circumstance.⁴⁵

Moreover, criminal law also recognises several applicable war crimes, such as abusing and maltreating subordinates,⁴⁶ ill-treating civilians in the course of military action⁴⁷ and mistreating prisoners of war.⁴⁸ These criminal offences can be committed by military officers on active duty, civilian cadres, soldiers, and cadets with military status in the Chinese People's Liberation Army (PLA) or the Chinese People's Armed Police and personnel of the reserve force and others carrying out military tasks.⁴⁹

Any authority receiving a complaint about torture or ill-treatment may launch its own investigation and impose disciplinary penalties within its jurisdiction. In most cases, administrative supervision departments possess a wide range of powers to investigate and impose disciplinary sanctions for official misconduct.⁵⁰

2. The Procedural Law

2.1. Immunities

The law does not provide for any immunity for perpetrators of torture.

⁴³ Article 232 CL: "Whoever intentionally kills another is to be sentenced to death, life imprisonment or not less than 10 years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment."

⁴⁴ Article 233 CL: "Whoever negligently causes the death of another is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not more than three years of fixed-term imprisonment. Where this Law has other stipulations, matters are to be handled in accordance with such stipulations."

⁴⁵ Article 236 CL: "Whoever, by violence, coercion or other means, rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment. Whoever has sexual relations with a girl under the age of 14 is to be deemed to have committed rape and is to be given a heavier punishment. Whoever rapes a woman or has sexual relations with a girl involving one of the following circumstances is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death: (1) rape a woman or have sexual relations with a girl and when the circumstances are odious; (2) rape several women or have sexual relations with several girls; (3) rape a woman in a public place and in the public; (4) rape a woman in turn with another or more persons; (5) cause the victim serious injury, death, or other serious consequences. Article 237: "Whoever, by violence, coercion or other means, forces, molests, or humiliates a woman is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention. Whoever assembles a crowd to commit the crimes described in the preceding paragraph, or commits such crimes in the public is to be sentenced to not less than five years of fixed-term imprisonment."

⁴⁶ Article 443 CL: "Those who abuse their powers and maltreat their subordinates in vicious circumstances that result in serious injuries or give rise to other serious consequences shall be sentenced to not more than five years in prison or criminal detention. If deaths result, they shall be sentenced to not less than five years in prison."

⁴⁷ Article 446 CL: "Those cruelly injuring innocent residents or looting innocent residents' money or other property on military action areas are to be sentenced to five years or fewer in prison. If the case is serious, they are to be sentenced to five to 10 years in prison. If the case is extraordinarily serious, they are to be sentenced to 10 years or more in prison, given a life sentence, or sentenced to death."

⁴⁸ Article 448 CL: "Those mistreating prisoners of war, if the case is serious, are to be sentenced to three years or fewer in prison."

⁴⁹ Article 450 CL.

⁵⁰ See Article 2, Administrative Supervision Law of the People's Republic of China (hereafter ASL), promulgated by the National People's Congress Standing Committee on 9 May 1997.

2.2. Statutes of Limitation

The applicable statutes of limitation are five years for offences with a prescribed maximum punishment of less than five years, such as forcing confessions by torture, maltreatment of prisoners and rape; ten years for offences with a prescribed punishment from five to ten years imprisonment; fifteen years for offences carrying a punishment of less than ten years and twenty years if the punishment is life-imprisonment or death.⁵¹ The penalties for crime of torture can be from less than five years up to life, even the death penalty, therefore, the statutes of limitation for the crime of torture varies from five years to twenty years depending upon the circumstances.⁵²

2.3. Criminal Investigations

Chinese laws allow individuals to complain about official misconduct, including torture, to state organs.⁵³ A torture survivor has the right to complain to a relevant authority.⁵⁴ The complaint can be made orally or in writing and the authorities shall ensure the safety of the complainant.⁵⁵ The public security organs are competent to investigate cases whereas the People's Procuratorate is the sole organ to prosecute perpetrators of criminal offences.⁵⁶ There are no independent agencies charged with investigating allegations of torture or ill-treatment.⁵⁷

While the institution of an investigation appears to be mandatory,⁵⁸ public authorities enjoy considerable discretion in deciding whether to proceed with an investigation, depending on their assessment of the available evidence.⁵⁹ If the competent authorities decide not to proceed with

⁵¹ Articles 87-89 CL.

⁵² Article 247 CL stipulates that the penalty for crime of torturing for confession or forcing a statement can be sentenced to less than three year imprisonment, however, torture with severe consequences, such as resulting in disability or death, will be punished by reference to Articles 232 or 234, which carry penalties of up to life sentence and death penalty. Article 232 prescribes the crime of murder, while Article 234 the crime of intentional assault.

⁵³ See article 41 of Constitution, which states that "Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary...".

⁵⁴ Article 84 Criminal Procedure Law: "Any unit or individual, upon discovering facts of a crime or a criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a People's Procuratorate or a People's Court. When his personal or property rights are infringed upon, the victim shall have the right to report to a public security organ, a People's Procuratorate or a People's Court about the facts of the crime or bring a complaint to it against the criminal suspect. The public security organ, the People's Procuratorate or the People's Court shall accept all reports, complaints and information. If a case does not fall under its jurisdiction, it shall refer the case to the competent organ and notify the person who made the report, lodged the complaint or provided the information. If the case does not fall under its jurisdiction but calls for emergency measures, it shall take emergency measures before referring the case to the competent organ."

⁵⁵ Article 85 CPL: "Reports, complaints and information may be filed in writing or orally. The officer receiving an oral report, complaint or information shall make a written record of it, which, after being read to the reporter, complainant or informant and found free of error, shall be signed or sealed by him or her. The public security organs, the People's Procuratorates and the People's Courts shall insure the safety of reporters, complainants and informants as well as their near relatives. If the reporters, complainants or informants wish not to make their names and acts of reporting, complaining or informing known to the public, these shall be kept confidential for them."

⁵⁶ Article 18 CPL.

⁵⁷ The Chinese government has stated that the public security organs have set up their own watchdog bodies to oversee the conduct of policemen and, if competent, to undertake an investigation itself. See Third report to UN Committee against Torture, *supra*, paras.45, 46. However, it is not clear whether their mandate encompasses cases of torture and ill-treatment or how these bodies work in practice and can be accessed by torture victims. See Human Rights in China, *Impunity for Torture*, *supra*, p.17.

⁵⁸ Article 83 CPL provides that the public security organs or the People's Procuratorates shall, upon discovering facts of crimes or criminal suspects, file the cases for investigation within the scope of their jurisdiction.

⁵⁹ Article 86 CPL: "A People's Court, People's Procuratorate or public security organ shall, within the scope of its jurisdiction, promptly examine the materials provided by a reporter, complainant or informant and the confession of an offender who has voluntarily surrendered. If it believes that there are facts of a crime and criminal responsibility should be investigated, it shall file a case. If it believes that there are no facts of a crime or that the facts are obviously incidental and do not require investigation of criminal responsibility, it shall not file a case and shall notify the complainant of the reason."

an investigation, the complainant may ask the relevant authority for reconsideration.⁶⁰ The People's Procuratorate has the power, either *proprio motu* or upon complaint by a victim, to review the decision of a public security organ not to file an investigation or a case and can order it to do so.⁶¹

The SPP issued a guideline in the 1980s, which was amended in 1999, spelling out detailed circumstances under which acts of torture should be investigated and prosecuted. According to these guidelines, an investigation is required in the following situations:

"The method [of infliction of torture] is very cruel and has an extremely negative influence on society; the torture] results in suicide or causes a mental disorder; [The torture] causes [the torture victim to confess to a crime s/he did not commit]; [The torturer] commits torture more than three times or tortures more than three people; [The torturer] instigates, instructs or forces [a third party to commit] torture."⁶²

In case of an investigation, the investigating authority may detain an alleged torturer. It also has the power to order a medical examination of the victim⁶³ or an autopsy if the cause of death of the victim is unclear.⁶⁴ There is no corresponding right of the victim or his/her relatives to demand a medical examination or an autopsy. In all cases requiring initiation of a public prosecution, the People's Procuratorate examines the available evidence with a view to deciding whether to file an indictment within the prescribed time limits.⁶⁵ When examining a case, the People's Procuratorate shall heed the opinions of the victim and of the persons entrusted by the victim.⁶⁶ The People's Procuratorate may either request a public security organ to conduct a

⁶⁰ Ibid.: "If the complainant does not agree with the decision, he may ask for reconsideration."

⁶¹ Article 87 CPL: "Where a People's Procuratorate considers that a case should be filed for investigation by a public security organ but the latter has not done so, or where a victim considers that a case should be filed for investigation by a public security organ but the latter has not done so and the victim has brought the matter to a People's Procuratorate, the People's Procuratorate shall request the public security organ to state the reasons for not filing the case. If the People's Procuratorate considers that the reasons for not filing the case given by the public security organ are untenable, it shall notify the public security organ to file the case, and upon receiving the notification, the public security organ shall file the case."

⁶² See Section 3 (2) of The Supreme People's Procuratorate, Trial Rules on the Standard of Filing for Investigation of the Cases Directly under Investigation by People's Procuratorates (*guanyu renmin zhijie shouli lian zhencha anjian lian biao zhun de guiding shixing*), issued on 16 September 1999.

⁶³ Article 105 CPL: "An examination may be conducted of the person of the victim or criminal suspect in order to ascertain some of his characteristics or physiological condition, or the circumstances of the injury." Article 120 CPL: "After evaluating a matter, the experts shall write a conclusion of expert evaluation and affix his signature to it. Reverification necessitated by disputes over medical verification of personal injuries and medical verification of mental illness shall be conducted by a hospital designated by a people's government at the provincial level. After verification, the expert shall make a conclusion in writing, to which his signature and the hospital's seal shall be affixed. Article 129 After a public security organ has concluded its investigation of a case, the facts should be clear and the evidence reliable and sufficient and, in addition, it shall make a written recommendation for prosecution, which shall be transferred, together with the case file and evidence, to the People's Procuratorate at the same level for examination and decision."

⁶⁴ Article 104 CPL: "If the cause of a death is unclear, a public security organ shall have the power to order an autopsy and shall notify the family members of the deceased to be present."

⁶⁵ Article 136 CPL: "All cases requiring initiation of a public prosecution shall be examined for decision by the People's Procuratorates." Article 137 CPL: "In examining a case, a People's Procuratorate shall ascertain: (1) whether the facts and circumstances of the crime are clear, whether the evidence is reliable and sufficient and whether the charge and the nature of the crime has been correctly determined; (2) whether there are any crimes that have been omitted or other persons whose criminal responsibility should be investigated; (3) whether it is a case in which criminal responsibility should not be investigated; (4) whether the case has an incidental civil action; and (5) whether the investigation of the case is being lawfully conducted. Article 138 A People's Procuratorate shall make a decision within one month on a case that a public security organ has transferred to it with a recommendation to initiate a prosecution; an extension of half a month may be allowed for major or complex cases. If jurisdiction over a case to be examined and prosecuted by a People's Procuratorate is altered, the time limit for examination and prosecution shall be calculated from the date on which another People's Procuratorate receives the case after the alteration."

⁶⁶ Article 139 CPL: "When examining a case, the People's Procuratorate shall interrogate the criminal suspect and heed the opinions of the victim and of the persons entrusted by the criminal suspect and the victim."

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supplementary investigation,⁶⁷ decide not to initiate a prosecution⁶⁸ or file an indictment.⁶⁹ The decision not to file an indictment shall be announced publicly⁷⁰ and the victim shall be notified. The victim may, within seven days after receiving the written decision, appeal to the People's Procuratorate at the next higher level. If the People's Procuratorate upholds the decision not to initiate a prosecution, the victim may bring a lawsuit to a People's Court. The victim may also bring a lawsuit directly to a People's Court without presenting a petition first.⁷¹

Moreover, the People's Procuratorate, in a case in which they have decided not to initiate a prosecution, shall make suggestions as to which administrative penalty or administrative sanction should be given, if any. The case will be transferred to the competent organ, which shall inform the People's Procuratorate how it has handled the case.⁷²

Victims and, if the victim has died or is deemed unfit to conduct a case, their relatives, have the right to bring a suit to a People's Court.⁷³ A private prosecution may be brought for cases that are prosecuted only upon complaint, in minor criminal cases and in cases in which victims have sufficient evidence but the public security organs or the People's Procuratorate have decided not to investigate the case.⁷⁴ Cases brought by way of private prosecution are subject to specific procedures before the People's Courts.⁷⁵ Victims of crimes do also enjoy a number of procedural rights throughout the course of criminal proceedings.⁷⁶

⁶⁷ Article 140 CPL.

⁶⁸ Ibid.

⁶⁹ Article 141 CPL: "When a People's Procuratorate considers that the facts of a criminal suspect's crime have been ascertained, that the evidence is reliable and sufficient and that criminal responsibility should be investigated according to law, it shall make a decision to initiate a prosecution and shall, in accordance with the provisions for trial jurisdiction, initiate a public prosecution in a People's Court."

⁷⁰ Article 143 CPL.

⁷¹ Article 145 CPL: "If the People's Procuratorate decides not to initiate a prosecution with respect to a case that involves a victim, it shall send the decision in writing to the victim. If the victim refuses to accept the decision, he may, within seven days after receiving the written decision, present a petition to the People's Procuratorate at the next higher level and request the latter to initiate a public prosecution. The People's Procuratorate shall notify the victim of its decision made after reexamination. If the People's Procuratorate upholds the decision not to initiate a prosecution, the victim may bring a lawsuit to a People's Court. The victim may also bring a lawsuit directly to a People's Court without presenting a petition first. After the People's Court has accepted the case, the People's Procuratorate shall transfer the relevant case file to the People's Court."

⁷² Article 142 CPL: "With respect to a case for which the People's Procuratorate has decided not to initiate a prosecution, the People's Procuratorate shall, at the same time, cancel the seizure or freeze of the property or things of value seized or frozen during the period of investigation. If the person against whom prosecution is not to be initiated need be given administrative penalty or administrative sanction or his illegal gains need be confiscated, the People's Procuratorate shall make suggestions to such an effect and transfer the case to the competent organ for handling. The competent organ shall, without delay, inform the People's Procuratorate of how it has handled the case."

⁷³ Article 88 CPL: "As to a case of private prosecution, the victim shall have the right to bring a suit directly to a People's Court. If the victim is dead or has lost his ability of conduct, his legal representatives and near relatives shall have the right to bring a suit to a People's Court. The People's Court shall accept it according to law."

⁷⁴ Article 170 CPL: "Cases of private prosecution include the following: (1) cases to be handled only upon complaint; (2) cases for which the victims have evidence to prove that those are minor criminal cases; and (3) cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims' personal or property rights, whereas, the public security organs or the People's Procuratorates do not investigate the criminal responsibility of the accused."

⁷⁵ Article 171 CPL: "After examining a case of private prosecution, the People's Court shall handle it in one of the following manners in light of the different situations: (1) If the facts of the crime are clear and the evidence is sufficient, the case shall be tried at a court session; or (2) In a case of private prosecution for which criminal evidence is lacking, if the private prosecutor cannot present supplementary evidence, the court shall persuade him to withdraw his prosecution or order its rejection. If a private prosecutor, having been served twice with a summons according to law, refuses to appear in court without justifiable reasons, or if he withdraws from a court session without permission of the court, the case may be considered withdrawn by him. If during the trial of a case the judges have doubts about the evidence and consider it necessary to conduct investigation to verify the evidence, the provisions of Article 158 of this Law shall apply." Article 172 CPL: "A People's Court may conduct mediation in a case of private prosecution; the private prosecutor may arrange a settlement with the defendant or withdraw his prosecution before a judgment is pronounced. Mediation shall not be conducted for cases stipulated in sub-paragraph (3) of Article 170 of this Law." Article 173 CPL: "In the

2.4. Trials

All Chinese courts, civilian or military, depending on where the torture occurs, are competent to try torture cases. However most torture cases are dealt with by the courts of first instance. The proceedings are largely inquisitorial but have adversarial elements.⁷⁷ The victim may present evidence and question witnesses.⁷⁸ The accused is to be sentenced if there is sufficient evidence of culpability.⁷⁹ Judges have discretionary sentencing powers whereby any sentence of less than a three-year prison term can be suspended for a probationary term of not less than the original term of sentence but no more than five years.⁸⁰ Therefore, if a sentence for torture is less than three-year imprisonment, it may be suspended. There is no restriction on official pardons for convicted torturers though pardons have rarely been invoked during the past five decades.⁸¹

3. The Practice

3.1. Complaints

In 1988, the Procuratorates received 1,048 complaints about torture used to extract confessions, but only 170 were filed for investigation.⁸² The statistics from the Supreme People's Procuratorate (hereafter SPP) on criminal cases of confessions obtained through torture between 1979 to 1996 indicate an average of 364 cases per year between 1979 and 1989, and upward of 400 cases per year for most years in the 1990s.⁸³ The SPP reported that between 1993 and 1994, at least 241 persons were tortured to death, while at least 64 others suffered "severe injuries".⁸⁴ Although the MPS launched an internal campaign against torture one year later, in late 1995, a confidential report conceded that the campaign had been, at best, only partly successful. According to MPS statistics, there were 67 torture cases involving 109 police officers in the first half of 1996 (an annual rate of 134 cases), and between July and August, some 32 persons had been tortured to death.⁸⁵ The SPP's statistics do not accord with this number, reporting that the official torture rate was really more than three times higher (493

process of the proceedings, the defendant in a case of private prosecution may raise a counterclaim against the private prosecutor. The provisions governing private prosecutions shall apply to counterclaims.

⁷⁶ See supra iii) and infra 2.4.

⁷⁷ See on trial proceedings, Part III, Chapter 1, Articles 147 et seq.

⁷⁸ See Articles 150, 155, 156, 159 and 160 CPL.

⁷⁹ Article 162 CPL.

⁸⁰ Articles 72 and 73 of the CL.

⁸¹ Such pardons were issued for specific groups of criminals in a few occasions during the era of the People's Republic of China, mostly for Japanese war criminals of World War II and military officers or Kumintang officials detained after the CCP seized power. There are not known to have been any pardons since 1979 after the CPL and CL were first enacted. See also Article 32 CL: "Where circumstances of an offence are minor and do not require a person to be sentenced or punished, exemption from criminal penalty may be granted him, but he may, depending on each case, be reprimanded or ordered to make a statement of repentance or formal apology, or make compensation for losses, or be subjected to administrative sanctions by the competent department cited in the Chinese country report to the Committee against Torture, supra, UN Doc.CAT/C/7/Add.14, para.118.

⁸² See 1988 Yearbook of China's Procuratorate, People's Procuratorate Press, 1989, at 410. Earlier and later editions of the yearbook did not include the number of complaints of torture.

⁸³ Wang Gangping, supra, at 19.

⁸⁴ Ibid.

⁸⁵ Id.

cases), and the trend evident between 1995 to 1996 had deteriorated, with cases increasing more than 20%.⁸⁶

While there have apparently been numerous complaints about torture and ill-treatment, those that remain in detention have rarely complained, because of the difficulty of obtaining access to a legal representative and the lack of protection against further ill-treatment that might result from bringing a complaint.⁸⁷

3.2. Investigations

There are no independent agencies to investigate cases of torture. The bulk of cases are investigated by the same agents of the public security organs who are alleged to have committed the torture in the first place. If the alleged torture is deemed to be prosecutable under the CL, people's procuratorates act as sole organs to investigate the crimes.⁸⁸ In the majority of cases, the usual reaction to complaints of torture has been inaction or putting pressure on the complainants to withdraw their complaint. If the modality of torture does not fall within the guidelines for investigating torture, and this applies in particular to forms of mental torture, it is unlikely that a complaint will be investigated further, thus excluding a wide range of acts of torture from investigation and prosecution. Investigations are, if carried out at all, reportedly not conducted thoroughly, in particular with regard to medical examinations, as torture survivors have no right to insist on such examinations and reports are often inadequate. Police officers have reportedly manipulated evidence. Consequently, the majority of investigations result in closing the case for lack of evidence as the investigating bodies enjoy a wide margin of discretion in practice. They are also subject to outside interference by government bodies in deciding whether or not to proceed with a prosecution. As a result, it is usually only the high profile cases of torture, often those resulting in serious injuries or death that are investigated and prosecuted.⁸⁹

The judiciary, which has been said to lack genuine independence⁹⁰, has not taken a pro-active stance against torture. The extortion of confessions through torture is prohibited by law.⁹¹ However, there are no clear rules excluding evidence obtained by means of torture⁹² and, in practice, defendants carry the burden of proof that their statements were not elicited by means of force.⁹³ Judges have also not called for the investigating bodies to launch an investigation following allegations of torture raised by defendants in criminal cases.⁹⁴

⁸⁶Wang Gangping, *supra*, at 9.

⁸⁷ See AI, Torture, *supra*, pp. 46 et seq.

⁸⁸ Article 18 of CPL, *supra*.

⁸⁹ See on investigations into allegations of torture, Human Rights in China, Impunity for Torturers, *supra*, and AI, Torture, *supra*, pp.49 et seq.

⁹⁰ See HRIC, Impunity for Torturers, *supra*, p.8.

⁹¹ See *supra* II.

⁹² See on this point the information and statements by the government with regard to Article 15 CAT in or in relation to the Third Country Report, *supra*, and critical assessment of existing law by HRIC, Impunity for Torturers, *supra*, pp.27 et seq. and AI, Torture, *supra*, pp.39 et seq.

⁹³ For a general situation report on evidence, see Human Rights in China, *Empty Promises: Human Rights Protections and China's Criminal Procedure Law*, New York, 2001, at 77. Some prosecutors who REDRESS' contacts had interviewed believed that at least some of the truthful statements should be admissible even they are the products of torture.

⁹⁴ See for examples AI, Torture, *supra*, pp.49, 50.

3.3. Prosecutions

According to official figures, Chinese courts tried 409 torture cases in 1996 and 412 cases in 1997. From January 1998 to July 1998, 154 cases of torture, violence and mistreatment were tried and penalties were imposed in 136 cases.⁹⁵ In 1997, 14 out of 55 prison guards prosecuted for verbal or physical abuse of inmates were sentenced to prison terms.⁹⁶

While courts have convicted and punished those accused of torture in some high profile cases of extremely brutal torture, the majority of torture cases either do not reach trial or do not result in a conviction.⁹⁷ Courts are subject to considerable influence and direct interventions from the outside, especially the CCP and the government.⁹⁸ As the CCP and government have their own policy of dealing with those of its officials accused of torture, the cases finally reaching the court are usually those that have been decided by the CCP or the government beforehand. Alternatively, courts have had to wait for final decision from those authorities before a final judgment could be made.

A number of torture trials have resulted in acquittals for lack of evidence. This is often due to the lack of medical evidence, which has not been collected during investigations, and the difficulties of a torture survivor to present conclusive evidence in the light of inadequate investigations. Accordingly, a determination of guilt depends on the credibility of the statements by the torture survivor as set against the statement of the public official in question.

While disciplinary punishments have been imposed against some perpetrators of torture,⁹⁹ there appears to be no consistent practice of taking adequate disciplinary actions against those suspected of or found guilty of torture.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. The Constitution

The Constitution, while not containing an express right to reparation for torture, stipulates a right to compensation pursuant to Article 41: "Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law."

1.2. The State Compensation Law

1.2.1. Substantive Law

⁹⁵ See Third Country Report to UN Committee against Torture, UN Doc. CAT/C/39/Add.2, *supra*, para.38.

⁹⁶ *Ibid.*, para.39. No later figures are available.

⁹⁷ See *ibid.*, citing a case of 1996 where two police officers tortured a suspect to death. The police officers were sentenced to eight years and three years imprisonment respectively for manslaughter. The head of public security of the municipality was dismissed from his post by the inspector's office.

⁹⁸ See HRiC, *Empty Promises*, *supra*, Summaries, I. Judicial Infrastructure and AI, Torture, *supra*, p.50.

⁹⁹ In relation to the 1996 case, the head of public security of the municipality was dismissed from his post by the inspector's office. See also e.g. case mentioned in AI, Torture, 16.

The State Compensation law came into force in 1995,¹⁰⁰ providing for the first time an express right to compensation against the state for the illegal infliction of physical injury.¹⁰¹ Article 2 of the State Compensation Law (hereafter SCL) provides that: "Where State organs or State functionaries, in violation of the law, abuse their functions and powers infringing upon the lawful rights and interests of the citizens, legal persons and other organizations, thereby causing damage to them, the victims shall have the right to State compensation in accordance with this Law."¹⁰²

The SCL provides for two kinds of compensation: administrative and criminal compensation.

Administrative compensation arises when administrative personnel carry out specifically listed illegal acts in the exercise of their functions and powers, causing injury or death. Article 3 of the SCL states that the victims of such acts (and their relatives, if the victims died in the course of the attack) are entitled to compensation if they have been injured by administrative personnel.¹⁰³ The administrative organ which itself, or whose functionaries, infringed the rights of the victim is liable for compensation.¹⁰⁴

Criminal compensation is provided for any official misconduct during the criminal process that causes injuries or death.¹⁰⁵ Torture, among other crimes, is defined as official misconduct. Article 15 of the SCL specifically includes in the scope of compensation, torture to extract confession or evidence by officers.¹⁰⁶ The organ in charge of the judicial functions is liable for compensation.¹⁰⁷ However, there are various grounds that exclude the liability of the State.¹⁰⁸

As a general principle, State compensation shall take the form of payment of damages.¹⁰⁹ The law provides for pecuniary damages but not expressly for non-pecuniary damages. In cases of bodily injury, medical expenses and loss of income are to be paid. In cases of disability, the compensation is to be assessed on the basis of the degree of lost working capability. The maximum amount of compensation for partial loss of working capability shall be ten times the State average annual salary of staff and workers in the previous year, and twenty times for total

¹⁰⁰ The State Compensation Law of the People's Republic of China (hereafter SCL) was promulgated by the NPC Standing Committee on 12 May 1994 and set to enter force on 1 January 1995. See for the legislative development of the SCL and state compensation in China, Lin Feng, *Administrative Law Procedure and Remedies in China*, 1996, p. 270, and on the question as to whether the State Compensation Law belongs to private or public law, *ibid.* p.272. Feng argues the former, pointing out that the distinction between public and private law is not recognised in the Chinese socialist legal system.

¹⁰¹ See Lin Feng, *supra*, p.286. The Administrative Law, adopted in 1989, did not provide for compensation in such cases. Compensation for any acts of torture committed before 1995 could only be based on claims under the Civil Code, see *infra*. See, for the different scope of application of SCL and ALL, Lin Feng, *supra*, p.286.

¹⁰² Damages caused through the illegal exercise of military power by members of the armed forces are excluded from the scope of the SCL, see Lin Feng, *supra*, p.279.

¹⁰³ See Article 3 (3), (4), and (5). Also, Article 6 of the SCL states that the heir or the certain family members of the victim may pursue the compensation on victim's behalf in those cases where the victim has died.

¹⁰⁴ Article 7 SCL.

¹⁰⁵ Article 15 SCL.

¹⁰⁶ Article 15 (4) of the SCL.

¹⁰⁷ Article 19 (1) of the SCL.

¹⁰⁸ Article 17 of the SCL: "The State shall not be liable for compensation in any of the following circumstances: (1) The taking into custody or sentencing being due to a citizen's own intentionally made false statements or fabricated evidence of guilt; (2) The person taken into custody being one not liable for criminal responsibility in accordance with Articles 14 and 15 of the Criminal Law; (3) The person taken into custody being one who shall not be investigated for criminal responsibility in accordance with Article 11 of the Criminal Procedure Law; (4) Individual acts of functionaries of organs in charge of investigatory, procuratorial, judicial or prison administration work of the State, which have nothing to do with the exercise of their functions and powers; (5) Damage being caused by intentional acts of a citizen such as self-wounding and self-mutilation; or (6) Other circumstances as stipulated by law."

¹⁰⁹ Article 25 of the SCL.

loss, in which case living expenses shall also be paid to those persons who are unable to work and have been supported by the disabled.¹¹⁰ In cases of death, compensation for death and funeral expenses shall be paid.¹¹¹

The SPC has recently issued a judicial interpretation,¹¹² which holds that Chinese courts, both in a supplementary civil lawsuit and in an independent civil lawsuit, should, as a general rule, not award compensation for emotional and psychological damage.¹¹³ However, for certain specifically listed acts, the liable organ shall eliminate the evil effects for the victim, rehabilitate his reputation, and extend an apology for certain specifically enumerated acts considered to be injurious to the victim's reputation and honour.¹¹⁴ None of these acts relate to torture and ill-treatment. Accordingly, torture survivors and relatives of torture victims are, under the SCL, only entitled to pecuniary damages but to no other forms of reparation.

1.2.2. Procedure

While the various provisions in the SCL refer to citizens, the act also applies to foreign nationals, albeit on the basis of the principle of reciprocity, whose rights have been infringed by the Chinese authorities on Chinese territory.¹¹⁵ The torture survivor, or, if the victim died, his legal guardian or heir¹¹⁶ shall first seek administrative compensation directly from the administrative organ to which the perpetrator of torture belongs, or may make such demands simultaneously when applying for administrative reconsideration of the case or when bringing an administrative action.¹¹⁷ Thus, the SCL requires that all victims first seek a "confirmation" of the official misconduct in question. Only if the misconduct is "confirmed" officially, can the state compensation be awarded. The authority to confirm an official misconduct is the very authority whose official has committed the alleged abuses.

While the SCL allows victims to seek a reconsideration of the decision not to "confirm" the official misconduct, it is unclear which authority will review the unfavourable administrative decision against victims.¹¹⁸

As a general rule, the organ liable for compensation shall pay the compensation, as determined by it, within two months from the date of receiving the application. The liable organ may reclaim any compensation paid to the victim from the responsible functionaries or individuals who have caused the infringement of rights in question, either intentionally or with gross negligence.¹¹⁹ In

¹¹⁰ See Article 27 (2) of the SCL.

¹¹¹ See Article 27 (3) of the SCL.

¹¹² Two judicial organs in China can issue so-called judicial interpretation, namely the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP). Judicial interpretation, especially the one issued by SPC, is widely regarded legislation-like general guidelines for judiciary at all levels. During the past two decades, SPC, through such broad "interpretation", successfully clarified and renovated existing legislation, in some cases, materially altered legislation itself.

¹¹³ SPC: "Reply to the Question whether the People's Courts Should Accept Mental Damage Claim by A Victim of A Criminal Case in A Supplementary Civil Lawsuit", issued on 15 July 2002 and set to take effects on 20 July 2002. This Reply asks the People's Court to turn down such a claim not only in the supplementary civil lawsuits but also in any independent civil lawsuit.

¹¹⁴ Article 39 of the SCL.

¹¹⁵ Article 33 of the SCL.

¹¹⁶ Article 6 of the SCL.

¹¹⁷ Article 9 (2) of the SCL. See, for the details of the application, Article 12 of the SCL.

¹¹⁸ Articles 9 and 20 all state that the reconsideration may be initiated but fail to specify which state organ is the authority of such review. See for criticism of this lacuna in the SCL, "Experts on the State Compensation Law", a report from People's Police journal, No.1, 2001, at 16.

¹¹⁹ Article 14 (1) of the SCL.

addition, those who are responsible for the matter shall be given administrative sanctions or, if a crime has been constituted, shall be investigated for criminal responsibility.¹²⁰ If payment has not been made within this period, or if the claimant is not satisfied with the amount of compensation, he/she may bring a suit before a people's court within three months from the date of expiration of the period.¹²¹

The applicable procedure for criminal compensation resembles the one described above for claiming administrative compensation. Thus, a claimant shall first apply to the liable organ for compensation. An organ liable for compensation shall, after compensating the damage, recover part, or the whole of the compensation expenses from its functionaries who are involved in using torture or unlawful use of weapons.¹²² These functionaries shall be given administrative sanctions or be subjected to a criminal investigation if their conduct constitutes a crime.¹²³ If payment is not made within two months from the date of receiving the application, the claimant has only thirty days to apply for reconsideration to an organ at a higher level.¹²⁴ If the decision following such reconsideration, for which there is a time limit of two months, is still to the dissatisfaction of the victim or if no decision is made within the time limit, the victim may apply within thirty days to the Compensation Commission of the People's Court for a decision on compensation.¹²⁵

The statutes of limitation relating to claims for state compensation are two years from the time of official confirmation of an "illegal official conduct".¹²⁶ If a case reaches the court, the state compensation committee that has been established within the courts at the intermediate and higher levels will adjudicate the trial.¹²⁷ The state compensation committees consist of three to seven judges. They debate a given case and make decisions by means of a majority vote.¹²⁸ The committees reportedly lack any transparent procedure in the hearing of compensation cases, and are governed by a sketchy working rule issued by the Supreme Court in 1999.¹²⁹

The majority of state compensation cases have been tried *in camera* and it has been questioned whether such trials have gone beyond a mere paper review of the requests in question. Partly responding to criticism voiced concerning this procedure, a number of provincial courts have recently begun to hold open hearings in state compensation cases.¹³⁰ In early 2002, the SPC announced that it would reform the process of state compensation trials and introduce a public

¹²⁰ Article 14 (2) of the SCL.

¹²¹ Article 13 of the SCL.

¹²² Article 24 (1) of the SCL.

¹²³ Article 24 (2) of the SCL.

¹²⁴ Article 21 of the SCL.

¹²⁵ Article 22 of the SCL.

¹²⁶ Article 32 of the SCL.

¹²⁷ Article 23 of the SCL.

¹²⁸ *Ibid.*

¹²⁹ See Supreme People's Court: Working Rules on Compensation Committee, issued on 26 April 1999. The SPC issued two rules with respect to trying state compensation cases in 1996 and 1997 respectively. None of them, however, addressed the procedure of trial. The 1996 Rules, Provisional Practices of People's Courts State Compensation Committees Concerning Trial of Compensation Cases, even publicly announced that all process of dealing with state compensation cases by the committees should be held *in camera*. See Article 13.

¹³⁰ For instance, the High People's Court of Jilin province introduced a measure so-called "open hearing police" for trying state compensation case. It announced that all trials of compensation cases that do not have an open hearing will be automatically voided. See Xinhua News Agency Wired News: "Jilin Courts: Trial of State Compensation Cases Not Having A Hearing Will Be Considered A Mistrial", 4 August 2002.

hearing, making the process more transparent.¹³¹ The decision of the State Compensation Committee is final.¹³²

1.3. Civil Law

In addition to state compensation, a victim of torture may pursue remedies through civil litigation. According to the General Principles of Civil Law of the People's Republic of China (hereinafter GPCL), a citizen suffering physical injury has a right to compensation.¹³³ The responsible state organ and the individual public official bear joint liability in such cases.¹³⁴ In contrast to the SCL, liability is fault-based and the individual perpetrator is fully liable.¹³⁵ Compensation takes the form of damages for direct and indirect losses, medical expenses and loss of income as well as living subsidies in case of disability resulting from the injury. In case of death, the relatives of the victims are entitled to recover the funeral expenses and the necessary living expenses if they are dependents.¹³⁶ In cases of an injury of the rights relating to a person's reputation, the victim has a right to rehabilitation and an apology.¹³⁷ The court has a wide discretion in ordering other forms of reparation, including the power to impose a fine and detention.¹³⁸

A torture survivor, relatives of a torture victim, or his or her legal representative, may bring a civil lawsuit in a competent court against the responsible state organ or the individual perpetrator of torture.¹³⁹ The statute of limitations for such claim is two years in general and one year for compensation claims for bodily injury, from the time when the torture survivor has or should have knowledge of the violation of his/her rights or interests.¹⁴⁰ The plaintiff has to pay a litigation fee, payment of which might be, upon application, postponed, reduced or waived

¹³¹ See report "Difficulties in State Compensation", by Dong Yingchun, recited by the Southern Weekend, 24 January 2002, at 7. It cited that Li Guoguang, the vice president of the SPC, stated that the SPC would introduce a number of reforms on trying state compensation cases, including to have an open hearing.

¹³² Article 23 of the SCL. The party disagreeing with the decision may, however, petition the trial court or the court of higher level. However, to do so does not necessarily initiate the process of review. Any attempt to reopen a case is by and large up to the discretion of the court in question.

¹³³ Article 119 GPCL. The General Principles of Civil Law of the People's Republic of China, promulgated on 12 April 1986 and set to take effect on 1 January 1987. Lin Feng, *supra*, p.277, notes that under section 121 of the GPCL any person can claim damages so long as their lawful rights or interests have been infringed by a state organ or its personnel in execution of its duties. Under the SCL, a person can only claim compensation if some sort of special relationship is proved to exist between the claimant and the state organ.

¹³⁴ Article 121 GPCL: "If a state organ or its personnel, while executing its duties, encroaches upon the lawful rights and interests of a citizen or legal person and causes damage, it shall bear civil liability."

¹³⁵ See Lin Feng, *supra*, p.272 et seq.

¹³⁶ Article 119 GPCL: "Anyone who infringes upon a citizen's person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses."

¹³⁷ Article 120 GPCL: "If a citizen's right of personal name, portrait, reputation or honour is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses. The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honour."

¹³⁸ Section IV GPCL: Methods of Bearing Civil Liability Article 134: "The main methods of bearing civil liability shall be: (1) cessation of infringements; (2) removal of obstacles; (3) elimination of dangers; (4) return of property; (5) restoration of original condition; (6) repair, reworking or replacement; (7) compensation for losses; (8) payment of breach of contract damages; (9) elimination of ill effects and rehabilitation of reputation; and (10) extension of apology. The above methods of bearing civil liability may be applied exclusively or concurrently. When hearing civil cases, a people's court, in addition to applying the above stipulations, may serve admonitions, order the offender to sign a pledge of repentance, and confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom. It may also impose fines or detentions as stipulated by law."

¹³⁹ Article 58 of the Civil Procedure Law.

¹⁴⁰ Articles 135, 136 (1) and 137 of the GPCL.

by the People's Court if there is difficulty in paying the fee.¹⁴¹ The plaintiff needs to back up his/her claim by evidence, proving that the torture undergone caused the injury for which damages are claimed, and is free to submit any evidence available to him/her.¹⁴²

The enforcement of civil law judgements is governed by the Civil Procedure Law.¹⁴³ A legally effective civil judgment or ruling shall be executed by the Trial Court of First Instance.¹⁴⁴ If the debtor refuses to carry out the judgment, the creditor may petition the court within one year. If it finds the claim for enforcement justified, the Court will request the enforcement section established at the concerned court to commence enforcement proceedings.¹⁴⁵ The debtor's assets, income and property are liable to seizure except for the necessary living expenses needed to support the person concerned and his/her family.¹⁴⁶

1.4. Criminal Law

The CPL stipulates that all victims of crime suffering material loss as a result of the defendant's criminal act may bring a supplementary civil lawsuit against the individual offender in addition to the official public prosecution of crimes.¹⁴⁷ The competent court shall hear the incidental civil action together with the criminal case.¹⁴⁸

The torture survivor and/or his/her lawyers may question the defendant¹⁴⁹ and cross-examine witnesses and other evidence.¹⁵⁰ The court competent for trying the criminal case will decide on the civil claim as well but will only do so in exceptional circumstances, should the conclusion of the civil action require more time than the criminal trial.¹⁵¹ Due to the nature of the supplementary civil lawsuit, its result depends on the verdict in the criminal trial even though the CPL does not contain any express provisions on this matter.

2. The Practice

The data contained in the table below demonstrates the situation of national judicial compensation for the period 1995-2001. It indicates that only 1/3 of all cases resulted in an award of state compensation.¹⁵²

¹⁴¹ Article 107 Civil Procedure Law.

¹⁴² Chapter IV, Civil Procedure Law, Articles 63 et seq.

¹⁴³ See on Enforcement of Judgements in the Chinese People's Courts, Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, Boston College International & Comparative Law Review, Vol.25 (2002) No.1, 59-96.

¹⁴⁴ Article 207 Civil Procedure Law.

¹⁴⁵ See Chapter XXI, Articles 216 et seq.

¹⁴⁶ See Chapter XXII, Articles 221 et seq. See Chapter XXIII for the Suspension and Termination of Execution.

¹⁴⁷ Article 77 of the CPL.

¹⁴⁸ Article 78 of the CPL.

¹⁴⁹ Article 155 of the CPL.

¹⁵⁰ Article 47 of the CPL.

¹⁵¹ Article 78 CPL: "An incidental civil action shall be heard together with the criminal case. Only for the purpose of preventing excessive delay in a trial of the criminal case may the same judicial organization, after completing the trial of the criminal case, continue to hear the incidental civil action"

¹⁵² Chen Chunlong: *Judicial Compensation in China: Discussion of Practice and Theory* (zhongguo sifa peichang shiwu caozuo yu lilun tangtao), Law Press, Beijing, 2002, at 49. See also the report: "the Beautiful Appearance of the State Compensation" (guojia peichang kan shangqu henmei), by Guo Guanghua, People's Police (*Renmin Gongan*), no. 5, 2001, at 5. See also China's

TABLE: STATE JUDICIAL COMPENSATION FOR THE PERIOD OF 1995-2001¹⁵³

YEAR	THE NUMBER OF CASES RECEIVED	THE NUMBER OF CASES COMPLETED	THE NUMBER OF STATE COMPENSATION AWARDED
1995	197	154	64
1996	398	291	74
1997	531	425	226
1998	1,632	1,431	482
1999	2,154	2,113	817
2000	2,447	2,430	925
2001	2,674	2,705	910
TOTAL	10,033	9,549	3,498

No separate nationwide statistics on torture-related reparation are available. According to one survey of the city of Chengdu, Sichuan province, during 1995-1996, only one out of 35 complaints was related to torture.¹⁵⁴

Compensation has also been awarded in relation to criminal proceedings but no specific data is available.¹⁵⁵ There have also been some instances in which the local authorities have, in the light of media pressure or possible legal action by the victim, settled torture cases out of court.

While a number of applications and subsequent cases are brought under the SCL, only few cases have been filed before civil courts, mainly due to high litigation costs and low compensation awards resulting in a preference for the procedure provided for under the SCL. A case concerning supplementary civil proceedings during a criminal trial has apparently failed because the victim was not informed of the trial.¹⁵⁶ However, a considerable number of cases brought under the SCL have been unsuccessful as there are several in-built obstacles that militate against the chances of obtaining compensation.

The SCL requires that torture victims obtain first a "confirmation" of the official misconduct from the very authority whose personnel has perpetrated torture. While victims may request a reconsideration, the existing procedures are unclear and do not often result in a successful claim, given the reluctance of state authorities to pay out money.¹⁵⁷ Moreover, victims of torture face difficulties proving the occurrence of torture given the inadequacy of investigations in torture cases. Compensation has also in several cases been denied on the basis of the exclusionary clauses of the SCL.¹⁵⁸

While the SCL has been in place for more than six years, it appears so far to have failed to achieve the goal of holding state organs accountable for their misconduct through compensating innocent citizens. Torture victims have hardly benefited from such compensation mechanisms.

third report to the UN Committee against Torture, *supra*, para.68, according to which the Chinese inspectorate had until 1999 received 762 formal applications of compensation, of which 179 had been granted.

¹⁵³ *Ibid.*

¹⁵⁴ Xu Jingcun et al: *Study on Implementing Process of State Compensation Law (guojia peichang fa shishi chengxu yanjiu)*, Law Press, Beijing, 1999, at 17.

¹⁵⁵ *Ibid.*, *supra*, para.38, where the government stated that victims of torture had received compensation in regard of criminal cases referred to above, see III, 3.3., for the period between January and July 1998.

¹⁵⁶ See the exemplary case described in AI, Torture, *supra*, p.16.

¹⁵⁷ See on a discussion on this point "Experts on the State Compensation Law", a report from PEOPLE'S POLICE journal, No. 1, 2001, at 16.

¹⁵⁸ Article 17, 1) SCL, see *supra*.

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As many recent surveys have proved, the establishment of special funds for state compensation, have been left untouched in many places. For instance, in the city of Shenzhen, Guangdong Province, the special fund amounting to 50 million Yuan (\$ 6,000,000) has not been called upon since its inception five years ago.¹⁵⁹ In Gansu Province, an estimated 80% of victims who had filed claims have not been awarded any compensation.¹⁶⁰

If compensation is awarded, it tends to be low since courts do not take into account any mental or psychological damages.¹⁶¹ In one case, a teenage girl was tortured by a policeman and a driver employed by the police and suffered serious mental distress. She claimed 5 Million Yuan (\$600,000) for trauma suffered but the Court in Xianyang County awarded only 74.66 Yuan (roughly \$ 9) for two days custody in addition to the fees for medical treatment, travel and accommodation, as well as damages for loss of working time, but nothing for the mental suffering. The court refused the girl's request to order the police to make a public apology. The guilty men were dismissed or transferred.¹⁶² Another case, in which a man was locked up for sixty days and his wife detained for five days and severely beaten, demonstrates a similar pattern. In the end, the couple was compensated 1,500 Yuan (\$ 180) for physical injuries suffered but not for mental damages.¹⁶³ Scholars have criticized such legal deficiencies and urged China to adopt a standard of compensation for moral damages.¹⁶⁴

V. GOVERNMENT REPARATION MEASURES

According to the Chinese government, there is a compensation scheme run by the judicial and administrative authorities under which the state has, according to departmental regulation, an obligation to award compensation to the victim in cases where a prison guard violates a prisoner's personal rights.¹⁶⁵ However, no further information has been made available as to whether this scheme has in effect been accessible to prisoners and compensation has actually been awarded.

There are no other reparation schemes either for victims of human rights violations, be it past or present, nor for victims of crime in form of criminal injuries compensation boards. No independent torture treatment centres operate in China.

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

¹⁵⁹ Su Zhongshan and Li Li: "How Far Are the Ordinary Citizens From State Compensation?", *Perspective of Special Zone*, No. 2, 2002, at 37.

¹⁶⁰ China Youth Daily report: "Why Is Not the Majority of Claims Awarded Seven Years After Inception of the SCL" by Wu Menghan, August 6, 2002.

¹⁶¹ The largest sum awarded to date has been 107,057.80 Yuan (ca.\$ 13,000) for 9 years wrongful imprisonment in a case, decided by the local judiciary in the Sichuan Province in January 2001, where the claimant had demanded 900,000 Yuan. See *People's Daily Online*, 16/01/2001.

¹⁶² Xing Bao, *Miscarriage of Justice*, Shanghai Star, 10 January 2001.

¹⁶³ See Su Zhongshan and Li Li, *supra*.

¹⁶⁴ Qin Yi: "Brief Comments on Mental Damage Compensation in the State Compensation System", *Law Review*, No. 6, 2000, at 134-139. Wang Baocheng: "Legal Thoughts on Several Issues With Respect to the State Compensation Law", *Journal of Nanjing University of Economics*, No. 1, 2002, 71.

¹⁶⁵ See third periodic report to UN Committee against Torture, *supra*, para.50.

1. Prosecution of Acts of Torture committed in a third country

1.1. The Law

1.1.1. Criminal Law

The Chinese Criminal Law recognises, albeit in a qualified form, the principles of active and passive personality and universal jurisdiction in so far as stipulated in international treaties binding on China. Moreover, the Criminal Law also applies in those cases having an extraterritorial connection where the consequences of a crime occur in China.¹⁶⁶ The active and passive personality principles apply to all crimes committed by or against Chinese nationals for which a minimum imprisonment of not less than three years is provided for by law.¹⁶⁷ Accordingly, the active and passive personality principle would allow the prosecution of cases of torture causing serious bodily injury or resulting in rape or death. It would not allow the prosecution of perpetrators of torture not causing serious bodily injury, such as mental torture. The Criminal Law is also applicable to the crimes specified in international treaties to which the China is a member state. China exercises criminal jurisdiction over such crimes within the limits of its treaty obligations.¹⁶⁸ Thus, China is able to prosecute perpetrators of torture committed abroad who are present in China in accordance with Article 5(2) of the Convention against Torture. Consequently, the various criminal offences of the Criminal Law applicable in cases of torture should also apply in such cases. However, as there is considerable uncertainty as to whether the Chinese criminal law covers all acts of torture as defined in Article 1 of the Convention, the Chinese Penal Code does not appear to prescribe adequate criminal offences to comply with the obligation spelled out in Article 5(2) of the Convention.

The investigation and prosecution of crimes committed abroad is carried out according to the general provisions of the Criminal Procedure Law.

There is no clear rule on diplomatic immunity. While, according to the Criminal Law, "the problem of criminal responsibility of foreigners who enjoy diplomatic privileges and immunity is to be resolved through diplomatic channels,"¹⁶⁹ diplomatic agents enjoy immunity from criminal jurisdiction under the Regulations of the People's Republic of China on Diplomatic Privileges and Immunities.¹⁷⁰

1.1.2. Extradition Law

While prior to December, 28, 2000, extradition was exclusively governed by any extradition treaties in place between China and other countries or carried out on a case by case basis, as from that date extradition is carried out according to the new Extradition Law as well as relevant

¹⁶⁶ Article 6 CL.

¹⁶⁷ Active personality principle: Article 7: "This law is applicable to PRC citizens who commit the crimes specified in this law outside the territory of the PRC; but those who commit the crimes, provided that this law stipulates a minimum sentence of less than a three-year fixed-term imprisonment for such crimes, may not be dealt with. This law is applicable to PRC state personnel and military personnel who commit the crimes specified in this law outside PRC territory." Passive personality principle: Article 8: "This law may be applicable to foreigners, who outside PRC territory, commit crimes against the PRC state or against its citizens, provided that this law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according the law of the place where it was committed."

¹⁶⁸ Article 9 CL.

¹⁶⁹ Article 11 CL.

¹⁷⁰ Article 14 (2) Regulations of the People's Republic of China on Diplomatic Privileges and Immunities, adopted on 5 September 1986 by the 17th Session of the Standing Committee of the 6th National People's Congress.

extradition treaties.¹⁷¹ The latter allows extradition in those cases where the act or omission for which extradition is requested is a criminal offence in China, as well as in the requesting country, provided that Chinese criminal law prescribes a minimum punishment of no less than one year imprisonment. Consequently, while perpetrators could not be extradited for the criminal offence of extorting confessions by means of torture and abuse of prisoners as such, these offences would be extraditable if the said acts cause serious injuries or death. Extradition may be refused if the person whose extradition is requested is a Chinese citizen, if the crime for which extradition is requested is of a political nature and if the person whose extradition is requested has been granted asylum in China; finally extradition is also refused if the person in question has been tortured or will likely be subjected to torture in the requesting country.¹⁷²

1.2. The Practice

China has exercised extraterritorial jurisdiction in a few cases concerning murder, hijacking, or endangering state security, i.e. involving acts considered to be of a terrorist nature, but has apparently not exercised any such jurisdiction with regard to serious human rights violations committed abroad, including torture, nor are there any cases known in which China has extradited alleged perpetrators of torture.

2. Claiming reparation for acts of torture committed in a third country

The general jurisdiction of Chinese courts to hear civil cases is based on the defendant's domicile. Such a jurisdiction can also be based on the habitual residence or the place where the defendant conducts his/her business.¹⁷³ In tort cases, an additional ground for jurisdiction is the place where the cause of action arose. This includes not only the place where the tort is committed but also the place where the harm occurred.¹⁷⁴ In the absence of any of these grounds, a defendant who is not residing in China is assumed to have consented to a Court's jurisdiction if he/she does not object to the jurisdiction of the court and files a reply to the suit brought by the plaintiff.¹⁷⁵ Consequently, a torture survivor will only be able to bring a civil action for acts of torture committed abroad, if either the perpetrator of torture is domiciled, a habitual resident or has a business registered in China, or if the harm resulting from the torture inflicted occurs in China, provided that the defendant does not reply to a complaint in other cases and thereby accepts the court's jurisdiction. Diplomatic personnel enjoy immunity from civil and administrative jurisdiction.¹⁷⁶

The court chosen by the torture survivor, which would in cases involving international civil litigation normally be a court at the intermediate level, could, however, decline to adjudicate the case by invoking the doctrine of *forum non conveniens*. The Supreme People's Court, while exhorting the People's Courts not to decline jurisdiction without reasonable cause, declared that

¹⁷¹ Extradition Law of the People's Republic of China, adopted at the Nineteenth Session of the Standing Committee of the Ninth National People's Congress on December, 28,2000, promulgated and became effective on 28 December 2000.

¹⁷² See Article 8 of the Extradition Law.

¹⁷³ Article 22 Civil Procedure Law.

¹⁷⁴ Article 29 Civil Procedure Law and Supreme People's Court "Opinions on Application of the Civil Procedure Law of the People's Republic of China, issued on 14 July 1992, cited in Mo Zhang, *supra*, p.60.

¹⁷⁵ Article 244 and 245 Civil Procedure Law.

¹⁷⁶ See Article 239 Civil Procedure Law and Article 14 (2) Regulations of the People's Republic of China on Diplomatic Privileges and Immunities, adopted on 5 September 1986 by the 17th Session of the Standing Committee of the 6th National People's Congress.

a court may advise the parties to take legal action in a third country in those cases in which all parties are non-Chinese and the dispute has no practical connection with China.¹⁷⁷

Against this background, it would appear unlikely that Chinese courts would be willing to adjudicate a case of a non-Chinese torture survivor claiming damages for torture committed outside Chinese territory by non-Chinese nationals unless the circumstances of the case establish a particular connection with China.

If a court has jurisdiction and decides to adjudicate the case in question, the applicable law would be based on the law of the place of tort.¹⁷⁸ As this may include both the place where the tort was committed and where the harm occurred, the people's court have discretion to determine the applicable law in those cases where the harm occurs elsewhere from the place of the committal of the tort.¹⁷⁹

Torture survivors could also bring a supplementary civil lawsuit in those cases where Chinese courts exercise universal jurisdiction over the perpetrator of torture.

China adheres to the principle of absolute state immunity but has in practice accepted exceptions for commercial activities.¹⁸⁰

There are no known cases in which torture survivors have brought a claim before Chinese courts for torture committed abroad.

¹⁷⁷ See Supreme People's Court "Notice on Several Questions in Adjudication and Enforcement Concerning Civil and Commercial Cases with Foreign Elements", Doc. No. 51, 17 April 2000, cited and discussed in Mo Zhang, *supra*, p.73.

¹⁷⁸ Article 146 Civil Code.

¹⁷⁹ Supreme People's Court "Opinions on Several Questions Concerning Implementation of the General Principles of Civil Law (Provisional)", 1988, cited in Mo Zhang, *supra*, p.76.

¹⁸⁰ See Hung Jing and Ma Jingsheng, "Immunities of States and their Properties: The practice of the People's Republic of China" in: Hague Yearbook of International Law, 1989, 163 et seq.