

BRIEFING ON  
CHINA'S 2013  
CRIMINAL  
PROCEDURE LAW:

IN LINE WITH  
INTERNATIONAL  
STANDARDS?

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# INTRODUCTION

China's amended Criminal Procedure Law (CPL), passed by the National People's Congress (NPC) on 14 March 2012, came into force on 1 January 2013.<sup>1</sup> The amended law introduces a number of positive elements but it is Amnesty International's assessment that there are set-backs with respect to certain rights and protections for criminal suspects and defendants, and that the new law does not meet the government's long stated goal to "govern the country according to law and build a socialist country under the rule of law".<sup>2</sup>

After nearly 15 years of deliberation, during which nearly all aspects of China's CPL were discussed extensively in legal circles both within China and internationally, the new law is still not in full compliance with international law and standards. The amendments to the law do not address significant areas where the old law failed to respect and protect human rights, including those considered customary international law binding on all states whether or not they have ratified relevant treaties.

Furthermore, with regard to the rights of persons in detention, the new law removes a number of existing protections and repeatedly restricts or excludes from the benefit of other provisions suspects or defendants accused of vaguely-defined "serious crimes" including "terrorism", and "endangering national security".

The new law significantly expands the powers of the police and public security organs without introducing corresponding and necessary mechanisms for oversight, monitoring, and restraint in the use of such powers in order to protect the rights of individuals to liberty and security of person, and the concomitant prohibition of arbitrary detention.

The long established supremacy of Chinese Communist Party policy over the criminal justice system and the resulting practice for judges to apply the law in accordance with Party policies have meant that the judiciary in China lacks independence. This is institutionalized through the Party's Political and Legal Commissions, which have a leading role in judicial work at every administrative level and therefore control the work of the courts.

The lack of progress in broader institutional reforms further restricts the ability of the judiciary to protect rights.<sup>3</sup> An independent and impartial judiciary is key to the pursuit of fairness and the rule of law, including preventing abuse of power by executive authorities at all levels and political influences over law enforcement and justice. An independent and impartial judiciary, in turn, relies on judges and the courts being institutionally independent from the political branches of government in practice, not just in theory, as well as independence for individual judges within their own courts, strong professional standards for all members of the judicial profession, and adequate financial and human resources for personnel within the judicial system.

# INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

The following international human rights rules and standards are central to this analysis of China's new CPL. They are enshrined in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) which China has signed and expressed an intention to ratify, and the UN Convention Against Torture which China has ratified, among others.

## THE RIGHT TO LIBERTY AND SECURITY OF PERSON

A key human right recognized in international law and standards is the right of all persons to liberty and security of person. This right is enshrined in Article 9 of the UDHR, the cornerstone of international human rights law, which states simply: "No one shall be subjected to arbitrary arrest, detention or exile." This provision is repeated in Article 9 (1) of the ICCPR: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

The prohibition of arbitrary detention is also a rule of customary international law.<sup>4</sup> Such rules are binding on all states irrespective of whether or not they have ratified relevant international treaties. The fact that this customary rule applies even in times of war<sup>5</sup> – arguably the direst of national emergencies – attests to the crucial importance that the international community attributes to the human right not to be subjected to arbitrary detention. Significantly, the UN Working Group on Arbitrary Detention has more than once addressed the Chinese government specifically to remind it that the "prohibition of arbitrary detention is customary international law".<sup>6</sup>

## IMPLICATIONS OF THE PROHIBITION OF ARBITRARY DETENTION

The prohibition of arbitrary detention means that anyone detained or arrested – be it formal or informal – by the authorities, whether or not they are facing criminal charges, has the following specific rights:

- The right to be informed at the time of arrest of the reasons for arrest;
- The right to be notified at the time of arrest of their right to legal counsel;
- The right to be informed promptly of any charges against them;
- The right to be held in a recognized place of detention;
- The right to have their family or friends promptly notified of the arrest and location of their detention;
- The right to remain silent;
- The right to legal assistance / representation of their own choice;
- The right to take proceedings before a court challenging the lawfulness of detention;

- The right to compensation in case of unlawful detention.

These standards hold for every person arrested or otherwise taken into custody. They apply whether or not the person is formally charged with a criminal offence. They apply regardless of the nature of any alleged offence or criminal charge.

## THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE OR OTHER JUDICIAL OFFICER

Anyone detained or arrested must be brought promptly before a judge or other judicial officer to subject the detention to judicial review.<sup>7</sup>

Principle 11(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles) states: "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority." The purpose of this is to provide for an independent assessment of the legal basis for detention and the need for detention before trial, and to protect the well-being of the detainees. States must establish procedures that are simple and expeditious so as to allow anyone deprived of his or her liberty to challenge the lawfulness of the detention and to be released if the detention is unlawful.

One key right that is protected by safeguarding the rights of detainees and those facing criminal procedures is freedom from torture and other cruel, inhuman or degrading treatment or punishment. Following his visit to China in 2005, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on torture) identified factors that facilitated the use of torture, including "rules of evidence that create incentives for interrogators to obtain confessions through torture, the excessive length of time that criminal suspects are held in police custody without judicial control, the absence of a legal culture based on the presumption of innocence (including the absence of an effective right to remain silent), and restricted rights and access of defence counsel."<sup>8</sup>

## THE RIGHT TO A FAIR TRIAL

Anyone arrested or detained on a criminal charge is entitled to be tried within a reasonable time in line with fair trial standards, or be released.<sup>9</sup>

In 1948, the UDHR proclaimed that "(e)veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." The Declaration goes on to provide for further fair trial rights:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."<sup>10</sup>

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time

when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”<sup>11</sup>

Since 1948, these and other components of the right to a fair trial have been recognized as rules of customary international law.<sup>12</sup> Here too, the fact that China, as a state party to the four Geneva Conventions, is prohibited even during war from “the passing of sentences... without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”<sup>13</sup> reflects the strength of this obligation.

In his report following his 2005 visit to China, the UN Special Rapporteur on torture recommended that legal reforms should conform to fair trial provisions, as guaranteed in Article 14 of the ICCPR, including “the right to remain silent and the privilege against self-incrimination; the effective exclusion of evidence extracted through torture; the presumption of innocence; timely notice of reasons for detention or arrest; prompt external review of detention or arrest; timely access to counsel; adequate time and facilities to prepare a defence; appearance and cross-examination of witnesses; and ensuring the independence and impartiality of the judiciary.”<sup>14</sup>

## THE RIGHT TO THE PRESUMPTION OF INNOCENCE AND THE RIGHT TO REMAIN SILENT

A fundamental component of the right to a fair trial is the right of every person charged with a criminal offence to be presumed innocent until and unless they are proved guilty according to the law after a fair trial. This imposes on the prosecution the burden of proving the charge beyond reasonable doubt. The right to be presumed innocent applies not only at trial but also before trial. It applies to the treatment of suspects before criminal charges are filed, and carries through until a conviction is confirmed following final appeal. Internationally this right is provided, for instance, in Article 14(2) of the ICCPR. The right not to be compelled to testify against oneself or to confess guilt<sup>15</sup> and the related right to silence are grounded in the presumption of innocence.

## THE DEATH PENALTY AND THE RIGHT TO A FAIR TRIAL

Under international law, sentencing a person to death and executing them following proceedings that do not meet international fair trial standards violates the right to life of that person.<sup>16</sup> A series of resolutions by the UN Economic and Social Council (ECOSOC) and the jurisprudence of human rights treaty bodies,<sup>17</sup> mainly the Human Rights Committee, have strengthened safeguards to protect the right to a fair trial for those facing the death penalty.<sup>18</sup> The Human Rights Committee has stated that in death penalty cases, “[t]he procedural guarantees [in the ICCPR] must be observed including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”.<sup>19</sup>

In a 2010 report, the UN Secretary-General stated that the 1984 ECOSOC Safeguards,<sup>20</sup> which were endorsed by the General Assembly, “should be considered the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty.”<sup>21</sup> The ECOSOC Safeguards include a requirement (paragraph 5) for a “legal process, which gives all



possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR...including the right to adequate legal assistance at all stages of the proceedings”.

The ECOSOC Safeguards are based on the premise that there should be special protection of the rights of those facing charges carrying the death penalty “above and beyond” the protections normally afforded to people facing criminal charges,<sup>22</sup> not least because of the irreversibility of the death penalty.

Amnesty International considers the death penalty a violation of the right to life and the ultimate form of cruel, inhuman and degrading punishment. The organization opposes the death penalty in all cases without exception regardless of the nature or circumstances of the crime, guilt, innocence or other characteristics of the individual or the method used by the state to carry out the execution.

The view that the death penalty in and of itself is a violation of human rights has progressively been gaining ground within the international community. Since 2007, the UN General Assembly has adopted four resolutions, supported by an increasing majority, which call on all states that retain the death penalty to establish a moratorium on executions with a view to abolishing the death penalty.<sup>23</sup>

#### THE RIGHT TO SEEK CLEMENCY

In a capital case, once all judicial appeals have been exhausted, an accused has the right to seek clemency – the right to seek pardon or commutation of sentence. This right is provided in the ICCPR and other international instruments.<sup>24</sup> Respect for this right is so widespread that it is considered a rule of customary international law.<sup>25</sup>

The Human Rights Committee has stated that this right requires the state to put in place procedural guarantees to ensure its meaningful exercise.<sup>26</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the right to seek clemency requires there to be procedural guarantees if it is not to become a meaningless formality without genuine consideration of the case. An individual making an application for clemency should be able to raise any considerations which they find relevant, including matters that may not have been brought before the courts, and should be informed of the process and timing of consideration of their request.<sup>27</sup>

ECOSOC Safeguards (paragraph 8) also stipulate that executions must not take place before appeal, pardon or commutation proceedings are concluded. Under Chinese legislation, there is no procedure for prisoners under sentence of death to seek pardon or commutation of their sentence.

# CHINA'S NEW CPL AND KEY HUMAN RIGHTS: SET-BACKS, POSITIVE CHANGES AND SIGNIFICANT GAPS

## SET-BACKS TO THE RIGHTS OF PERSONS DEPRIVED OF LIBERTY

Regrettably, China's amended CPL removes critical protections for some detainees, including full rights of notification and access to legal counsel, and fails to protect other key rights of persons in custody. It not only fails to correct deficiencies of the old law, but introduces added circumstances under which the rights of those in custody could be violated.

### RIGHT TO NOTIFICATION

International human rights standards call for notification to the family of a detained or arrested person to take place "immediately", "promptly" or "without delay" and for family to be notified of where an individual is being held. Those arrested have the right to notify their family immediately, according to Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).<sup>28</sup> Principle 16 of the UN Body of Principles specifies that:

"Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

China's old CPL, at a minimum, specifically provided for the right of individuals detained or arrested to have their family notified within 24 hours of *the reasons for and the place of custody* [old Articles 64 and 71].<sup>29</sup> Two exceptions where such notification was not required were "where such notification would hinder the investigation" and where "there is no way of notifying" family. While the second exception may be reasonable in very narrow circumstances, for instance where a detainee has no family, the first one provided a particularly dangerous loophole. Police were able to use the excuse that their work would be hindered to delay notification to family. As torture and other ill-treatment are common during interrogation in China, the inability of families to monitor the whereabouts and well-being of their family members would increase such risk of abuse.

The new Articles 73 and 91 dealing with "residential surveillance" and "arrest" respectively somewhat narrow the allowed exceptions. Both state that family members of the person in custody should be informed within 24 hours with the only exception being where it is impossible to furnish notice, thereby eliminating the legal exception based on notification hindering the investigation. New Article 83, dealing with police detention, also keeps the

general exception based on it being impossible for police to furnish notice, and allows the exception based on notification hindering the investigation, but only when crimes of “endangering state security” or “terrorism” are involved. While this formulation somewhat narrows the legal basis for withholding notification, the vague definition of “endangering national security” in Chinese law and its misuse in criminal proceedings in China to punish individuals for peacefully exercising their freedom of expression and rights to assembly, religion and culture, still leave a large loophole that place detainees at risk of incommunicado detention, torture and other ill-treatment.

While the new CPL narrows the exceptions to the requirement that police notify family of detention or arrest, it simultaneously undercuts the potential value of notification by removing the specific requirements that notification include the location and reasons for custody under “residential surveillance in a designated location”, police detention and arrest.

For instance, Article 83 of the amended law in full reads as:

“When the security forces detain an individual, they must present a detention warrant. After being taken into custody, the person in custody should promptly and no later than 24 hours be delivered into a detention facility. The family members of the person in custody should be informed within 24 hours after the person is taken into detention, save where it is impossible to furnish a notice or where crimes endangering state security or crimes of terrorism are suspected and a notice may impede the investigation. When circumstances impeding investigation disappear, family members of the person in custody should be notified immediately.”

The Procedural Regulations for Public Security Organs in Handling Criminal Cases (2012 Regulations), passed on 3 December 2012 and effective on 1 January 2013, do specify in Article 123 that notification of detention should include the reasons for and location of custody. However, since regulations do not carry the same weight as law, these protections should be clearly detailed in the law itself, although neither inclusion in law or regulations ensures that in practice police will deliver notification as required.

The failure to include these specific elements of notification – reasons for and location of custody – in the law has potentially the gravest consequences in the case of “residential surveillance in a designated location”. As individuals held in this form of custody may be kept in locations which are not detention or investigation facilities this means potentially that individuals could be kept for up to six months in locations not officially recognized as detention facilities without family knowing their whereabouts or well-being, thereby potentially increasing their risk of torture and other forms of ill-treatment.

#### RIGHT TO LEGAL COUNSEL

International standards call for a person in detention to have access to legal counsel during all stages of criminal proceedings, including pre-trial questioning. International human rights instruments, treaty bodies and independent experts have recognized that the right to a fair trial requires the assistance of a lawyer during detention, interrogation and preliminary investigations.<sup>30</sup> The Human Rights Committee has stated “all persons arrested must have immediate access to counsel.”<sup>31</sup> Principle 1 of the UN Basic Principles on the Role of Lawyers states that “(a)ll persons are entitled to call upon the assistance of a lawyer of their

choice to protect and establish their rights and to defend them in *all* stages of criminal proceedings.”<sup>32</sup> (emphasis added)

In order for the protections afforded by legal counsel to be effective, international human rights standards call for all persons to be “immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence,” according to Principle 5 of the UN Basic Principles on the Role of Lawyers. Principle 13 of the UN Body of Principles states:

“Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.”

A key purpose of these rules is to ensure prompt legal counsel to serve as a safeguard against torture and other ill-treatment, for instance to force a “confession”. For that reason, the UN Special Rapporteur on torture has recommended that anyone arrested “should be given access to legal counsel no later than 24 hours after the arrest.”<sup>33</sup> According to Principle 7 of the UN Basic Principles on the Role of Lawyers, a delay in access to counsel is only allowed in “exceptional circumstances”, but in no case should access to legal assistance be delayed more than 48 hours from the time of arrest or detention.<sup>34</sup> Those being held in detention have a right to legal counsel regardless of whether or not the person has been charged with a crime or the nature of the crime.

China’s amended CPL takes a positive step in providing for suspects to have access to legal advice and to be informed of this right earlier in the criminal process than in the old law, and also in clearing up inconsistencies within the old law with regard to these rights. In the Chinese justice system and in this briefing, distinction is made between the term “defender” which can include representation by a relative, friend, person from a public organization or lawyer and the more specific term “lawyer”, as defined in Article 2 of the Law of the People’s Republic of China on Lawyers, as a professional who has acquired a lawyer’s practice certificate or license.

Article 33 of the old law granted the criminal suspect the right to designate a defender from the date the case file is submitted to the procuratorate for review before prosecution, in other words, only after the initial police investigations are concluded and at the stage where the prosecution will make a decision as to whether or not to bring charges. The old Article 96, however, provided that suspects have the right to appoint a lawyer after the suspect is interrogated for the first time, or from the date “compulsory measures”<sup>35</sup> are first imposed on him or her, thereby establishing conflicting provisions regarding the timing of access to legal advice. Furthermore, the old Article 33 only provided for the procuratorate to inform suspects of their right to appoint a defender within three days of receiving the case from the investigating authorities.

The new CPL resolves these inconsistencies and grants criminal suspects the right to appoint a defender and to be informed of this right at an earlier stage. It provides, in amended Article 33:

“The criminal suspect has the right to appoint a defender as of the date on which the suspect is first interrogated by the investigating authority or is subject to compulsory measures.... When the investigating authority first interrogate the criminal suspect or subject a criminal suspect to compulsory measures, the criminal suspect should be informed of the right to appoint a defender.”

Amended Article 37 gives detention facilities up to 48 hours to arrange for a lawyer to meet with a detained criminal suspect or defendant from the time the lawyer makes such a request, still failing to meet the standard that, according to the UN Special Rapporteur on torture, detainees be given access to legal counsel within 24 hours of detention.<sup>36</sup> If an offense involves a crime of “endangering state security”, a crime of “terrorism” or a particularly serious crime of “bribery”, the defence lawyer must seek permission from the investigating authority to meet with the suspect. However the law does not specify a timeframe within which such approval must be given, potentially delaying or obstructing the right of suspects to promptly access legal counsel. Article 37 provides for defenders, who are not lawyers, to interview or correspond with the criminal suspect or defendant, but only with the permission of the court or procurator’s office.

The fact that police continue to be required, in new Article 84, to interrogate a person within 24 hours of their being taken into custody, greatly increases the probability that these initial interrogations will take place with suspects being denied the benefits of legal assistance.

The absence of an explicit provision of the right to access legal counsel during police interrogation and the provision in the amended CPL maintained from the previous law, which allows interrogation of suspects and defendants to begin before the latter may have been able to contact or gain access to a lawyer, increases the risk of self-incrimination and forced “confessions”. The new CPL still allows the first interrogation to take place without the benefit of legal advice, with legal advice likely available only after 48 hours at the earliest. To be in full compliance with international human rights law, the CPL would need to be amended to require police to inform suspects *at the time of their arrest*, or when first taken into custody, of their right to legal counsel. And to be effective in practice, the right of criminal suspects to access legal counsel, particularly during the investigation phase, should trigger duties on the part of the detaining authorities to facilitate such access, including for all types of defenders.

Article 33 of the new law also only allows a lawyer to act as legal counsel during the investigation period, potentially denying many suspects access to legal advice from other defenders during this phase, including lawyers who have lost their license. Frequently, they provide the only possible, and often pro-bono, representation in politically sensitive cases or cases authorities claim involve crimes of endangering state security. In China the authorities have refused to renew the licences of many qualified and competent lawyers who defend political dissidents, human rights defenders and others whom the authorities consider subversive.<sup>37</sup> As long as only lawyers with licenses to practice can provide advice during the investigation phase, certain defendants could be deprived of their right to appoint a legal representative of their choice.

The new CPL does provide, in Article 34, that authorities should notify legal aid organizations to assign a lawyer as a defender, but only in cases where the criminal suspect or defendant is

blind, deaf or mute or is a mentally ill person or if he may be sentenced to life imprisonment or death. In other cases, a lawyer should be provided if conditions for legal aid are satisfied. Many suspects however are not able to afford a lawyer and will not qualify for legal aid.

#### CHANGES TO SUMMONSED APPEARANCES

In Chinese law, “summonsing” (*chuanhuan*) or “compelled appearance” (*juchuan*) allows authorities to question or interrogate individuals who they determine need not be arrested or detained. China’s old CPL gave police the option of interrogating criminal suspects through “summonsing” or “compelled appearance” for up to 12 hours by requiring them to appear in a designated location, or allowing police to interrogate them in their residence. According to Article 92 of the old CPL, a “criminal suspect who need not be arrested or detained may be summonsed to a designated place in the city or county where the criminal suspect stays for interrogation, or he may be interrogated at his residence.” However, the old law made no mention of how an individual should be summonsed, including whether advance notification in writing was required. Nor did the law require police to inform summonsed individuals of their right to legal counsel, or to notify family that the individual is undergoing police questioning.

China’s new CPL further weakens the rights of criminal suspects by expanding the power of police to “summons” criminal suspects for interrogation “on the spot”, at a crime scene or elsewhere. The new CPL Article 117 states:

“Where a criminal suspect need not be arrested or held in custody, the suspect may be summonsed to a designated place within the city or county where the suspect is located, or to his domicile, for interrogation, subject to the presentation of a certificate issued by people’s prosecutor’s office or the public security authorities. Where a criminal suspect is identified on the spot, the suspect may be summonsed orally, upon presentation of the investigator’s ID, but this should be noted in the documentation of the interrogation.”

The new law, furthermore, extends the permitted length of time an individual can be held under summonsing from 12 to 24 hours “where a case is particularly serious and complicated and custody or arrest is required.”

The admonition, retained in Article 117 of the new law, against police using “successive summonsing” or “compelled appearance” as a disguised way to keep suspects in extended custody does not provide effective protection against the known risks experienced by those held in this type of detention as it does not explicitly limit the number of times it can be extended by the police. The new clause stipulating that detainees should have necessary food, drink and rest time guaranteed further suggests the risks of ill-treatment detainees may face in this type of custody. According to Article 117:

“No criminal suspect should be subjected to *de facto* detention in the form of successive summonsing or compelled appearance. Where a criminal suspect is summoned or compelled to appear before the investigator, he should be guaranteed food and drink and necessary time to rest.”

Chinese lawyers have reported to Amnesty International that police do in practice frequently use successive summoning as a way to extend the length of time a suspect can be held for questioning before protections associated with formal detention and arrest become applicable.<sup>38</sup> Suspects taken in under “summoning” or “compelled appearance” can, furthermore, continue to be held in custody through detention or formal arrest, effectively extending the time that individuals are deprived of their liberty before any of the protections provided in law upon detention or arrest are applicable.

Maintaining any type of custody, even of a short duration, which is not protected by safeguarding the rights due to all persons in detention as detailed in the first section of the briefing, is contrary to international human rights standards. Given the widespread practice of torture and ill-treatment of suspects during interrogation in China, the potential impact of these omissions is clear and may undermine the utility of other elements of the new law detailed below directed at combating torture.<sup>39</sup>

Not requiring notification to the family of suspects held under “summoning” or “compelled appearance” also undercuts the practical ability of individuals held under this form of compulsory measure to exercise their right, according to Chinese law, to appoint a defender as of the date on which a criminal suspect is subjected to compulsory measures (new CPL Article 33).

#### THE RIGHT TO REMAIN SILENT AND TO NOT INCRIMINATE ONESELF

Concern regarding timely notification and access to legal representation, particularly during preliminary investigations, is heightened by the fact that the amended law still does not explicitly provide for the right of suspects to remain silent. A positive aspect of the new CPL is the inclusion for the first time in national law of the principle that no suspect or defendant “may be forced to prove his own guilt” in the course of the investigation and evidence gathering (new CPL Article 50). However, it falls short of explicitly providing for the right of suspects to remain silent. The right to silence during police questioning is recognized to be implicit in the right to the presumption of innocence and the right not to incriminate oneself or not to be compelled to confess guilt.<sup>40</sup> Article 55(2)(b) of the Rome Statute of the International Criminal Court (hereafter ICC) provides that when a suspect is to be questioned by the ICC prosecutor or by national authorities, the suspect must be informed of the right to “remain silent, without such silence being a consideration in the determination of guilt or innocence”.<sup>41</sup>

The absence of an explicit provision of this right and the provision in the new law, maintained from the old law, that allows questioning of suspects and defendants to begin before the latter may have been able to contact or gain access to a lawyer or defender leave open the risk of self-incrimination and forced “confessions”. New CPL Article 118 maintains wording from previous Article 93, which provides that during interrogation a criminal suspect only has the right to refuse to answer questions “irrelevant to the case”, adding to the risk of self-incrimination.

For the new provision against self-incrimination to be effective in practice, the law would need to be revised to ensure that suspects and defendants are promptly informed of their right to remain silent, their right to legal counsel, and the right to prompt access to their legal counsel, including during questioning. It should be noted that both the Human Rights

Committee<sup>42</sup> and the UN Committee against Torture<sup>43</sup> have consistently criticized states for not allowing lawyers to be present during the questioning of suspects.

## USE OF VAGUELY DEFINED CRIMES TO RESTRICT OR DENY RIGHTS

China's new CPL continues to use vaguely defined crimes to deny rights to suspects and defendants based on the nature of the crimes. Suspects and defendants in cases involving "serious crimes", including "endangering national security," "terrorism," and major bribery cases, are not granted the same protections as suspects and defendants in other cases.

As discussed above, the new CPL restricts the right of defendants charged with these types of crimes to meet with their defence lawyers, makes an exception for notification to family or friends in similar cases, and extends summoning from 12 to 24 hours where "a case is particularly serious and complicated".

Perhaps of greatest concern with regard to the law's use of vaguely-defined crimes to restrict rights is the legalization of a form of custody referred to as "residential surveillance in a designated location" under which police may hold individuals suspected of such crimes for up to 6 months in locations which are not officially recognized as places of detention. Article 73 of the new law provides:

"Where there is suspicion of the crime of endangering national security, the crime of terrorism or major crimes of bribery, and residential surveillance at the domicile may impede the investigation, it may, upon approval by the next higher people's prosecutor's office or public security authority, be enforced at a designated place of residence, provided that the place of residence under surveillance is not a detention facility or an investigation facility. When residential surveillance is enforced at a designated domicile, the family members of the person under surveillance shall be informed within 24 hours upon enforcement, save where a notice cannot be furnished."

In a seeming contradiction, the new CPL takes a form of custody – "residential surveillance" – which was designed as a more lenient form of detention for suspects deemed not to pose a threat to society during the period of investigation, and utilizes it to codify a potentially more abusive form of custody for some serious crimes which usually carry severe penalties.

This potentially allows police to hold criminal suspects in locations that are not official places of detention for up to six months without family being told where or why they are being held. This not only violates the right of all persons held in custody to be kept in a recognizable place of detention, but also legalizes their being held under conditions that could amount to enforced disappearance under international law.

According to the UN Convention for the Protection of all Persons against Enforced Disappearance,

"For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty



or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

International law prohibits enforced disappearances strictly and in all circumstances. In addition to being a human rights violation on its own, enforced disappearances constitute violations of the right to liberty and security of the person, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, and violates or constitutes a grave threat to the right to life.<sup>44</sup> Enforced disappearances have often also been found to constitute ill-treatment of relatives and friends of the “disappeared” person in that the uncertainty about their fate and whereabouts, deliberately caused by the authorities’ denial of information, can cause extreme distress and fear.<sup>45</sup>

There is no legitimate basis in international human rights law for this type of discriminatory treatment. Relevant international human rights standards are applicable to all those arrested and detained without exception, and regardless of whether or not they are charged with a criminal offence, and - if they are charged - regardless of the nature of the crime.

Internationally recognized human rights standards, as reflected, for instance, in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (‘Johannesburg Principles’)<sup>46</sup> allow governments to restrict the exercise of some rights, including freedom of expression, on the ground of national security in order to “protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force”, whether from an internal or external force.<sup>47</sup> However, the same Principles emphasize that such restrictions are not legitimate if “their genuine purpose or demonstrable affect is to protect interests unrelated to national security”, including to protect a government from embarrassment or exposure of wrong-doing, or to entrench a particular ideology.<sup>48</sup>

Concepts such as “endangering national security” and “terrorist activities” in the law must be narrowly and clearly defined as offences which are internationally recognizable, and in line with the genuine purpose of protecting national security and cannot be legitimate grounds for violating human rights of suspects and defendants. In the context of national security laws, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has explained that the principle of legality (the requirement the crimes must be enshrined in laws that are clear, ascertainable and predictable<sup>49</sup>) means that legal provisions “must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.”<sup>50</sup> Analogously, the UN Working Group on Arbitrary Detention has expressed particular concern about “extremely vague and broad definitions of terrorism in national legislation”. It stated that the requirement for precise definition of crimes is key to the whole modern penal system. Absence of such definition or failure to specify precisely what acts or omissions someone is charged with violates the principle of lawfulness “with the attendant risk to the legitimate exercise of fundamental freedoms”.<sup>51</sup>

Laws criminalizing acts that endanger national security or public order or incite subversion of the state must not, under any circumstances, be used to deter or punish individuals for the legitimate exercise of their human rights, including to freedom of expression, association and peaceful assembly. However, Chinese authorities have in practice used precisely such crimes to frequently punish individuals for exercising these rights. Liu Xiaobo, Nobel Peace Prize laureate, activist Chen Wei, and prominent human rights lawyer Gao Zhisheng are just a few examples of people who have been sentenced to imprisonment for their writings and the peaceful exercise of their rights on charges of “inciting subversion of state power”.<sup>52</sup> The crime of “splitting the State”, one of the crimes listed under the category of crimes “endangering state security”, has also been used to punish people belonging to ethnic minorities, including ethnic Uighurs, Tibetans and Mongolians, for exercising their freedom of expression and right to enjoy their culture. Dhondup Wangchen, a Tibetan, and Nurmemet Yasin, a Uighur, were sentenced to six and ten years respectively for the crime of “inciting splittism” for exercising their freedom of expression.

## LIMITED IMPROVEMENTS IN RIGHT TO A FAIR TRIAL

### THE PRESUMPTION OF INNOCENCE

The new CPL introduces a number of provisions, which, if fully implemented, have the potential to ensure fairer trials. In a positive step it introduces a new article which clearly places the burden of proof of guilt on the prosecutor, rather than on the defence to prove the innocence of the defendant, as had previously been the case. Article 35 of the old law stated it was the defenders responsibility “to present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant...”.

The new Article 49, by contrast, provides that “(t)he onus of proof that a defendant is guilty shall be on the public prosecutor in a public prosecution case.” And in a further positive step the new CPL removes the clause “except where stipulated by law” which was in the first set of revisions issued on 30 August 2011 and which would have allowed for legislating exceptions to this rule. Amended Article 35 also removes the word “proving” from the responsibility of the defender. It now reads: “The responsibility of the defender is to present, according to the facts and the law, materials and opinions relevant to the innocence of the criminal suspect or defendant, to the pettiness of his crime and to the need for mitigated punishment or exemption from criminal liability, and to safeguard the procedural rights and other legitimate rights and interests of the criminal suspect or defendant.”

However, as discussed above, the new CPL fails to explicitly provide for the right of those charged with a criminal offence to be presumed innocent until proven guilty through a fair trial and through all levels of appeal as called for in international human rights law and standards.<sup>53</sup> And, in the absence of a clear articulation of the presumption of innocence, a shift on the wording of the responsibility of the defender from “proving the innocence” to “present(ing) materials and opinions related to the innocence” of the suspect or defendant may have limited practical impact.

### THE EXCLUSION OF ILLEGAL EVIDENCE

The new CPL takes the positive step of incorporating into national law the exclusion of illegally obtained evidence in all criminal cases which previously existed only in lower level

regulations, rules, and judicial directives. It's too early to say whether these measures will strengthen the mechanisms for effectively excluding such evidence in practice.

New Article 54 provides, among other things that:

“Confessions by a suspect or a defendant obtained through torture and extortion and other illegal means and witness testimonies and victim statements obtained through the use of violence, threats and other illegal means should be excluded...Where evidence that should be excluded is found during the investigation, prosecutor review or trial, such evidence should be excluded in accordance with the law and should not be used as a basis for recommendation on prosecution, prosecutor decisions, and adjudication.”

In an additional positive step, the amended CPL provides, for the first time in law, an explicit role for lawyers to challenge the admissibility of evidence on the basis that it was illegally obtained. New Article 56 grants a defendant and his or her lawyers the right to apply to the court to exclude evidence which they allege was gathered illegally, and new Article 55 requires the prosecutor's office to “investigate and verify the allegation” if it receives a report, an accusation, tips or discovers that investigators collected evidence illegally. Courts are also called on to conduct an investigation if they are “of the opinion that illegally obtained evidence” may exist [new Article 56].

The new CPL, also for the first time, requires, in amended Article 57, police investigators and others notified by the court to appear in court to “provide an explanation” of allegations of illegally obtained evidence. This hopefully will allow courts to call investigators to explain the legality of evidence, to call on prosecutors to provide evidence of the legality of evidence, and to require a witness statement to be examined and verified in court before it can be admitted. It further communicates to police the seriousness of engaging in illegal methods to gather evidence.

While these provisions considerably strengthen existing law in calling for a more pro-active approach to investigating allegations of coerced confessions or other illegally obtained “evidence”, their efficacy will depend on the implementation of these rules and the willingness of the courts to hear challenges to legality of evidence and ultimately to exclude such evidence from court proceedings in practice. The lack of judicial independence within the Chinese criminal justice system could in practice undermine the efficacy of these safeguards, especially in politically sensitive cases.

The new law, furthermore, falls short of full compliance with the requirement, according to international law and standards, that all forms of illegal evidence be excluded, including physical evidence. Article 54 of the new law allows illegally gathered physical and documentary evidence to be admitted if “justifications” can be provided, thereby weakening the exclusion. New Article 54 provides that:

“Where physical or documentary evidence is collected in ways violating legal procedures and severely affecting judicial justice, corrections should be made or justifications provided. Where no correction or justification is provided, such evidence should be excluded.”

So if, for instance, police “justifies” having obtained physical evidence through torture on the grounds that it provides critical evidence proving a suspect’s guilt, then that piece of evidence could, under the current law, be admitted.

This current formulation, furthermore, is not even as strong as the one in the first set of proposed amendments of 30 August 2011, which read, in part, that “(p)hysical and documentary evidence collected in violation of the provisions of the law and severely affecting judicial justice shall be excluded”, without exceptions being allowed in cases where “justifications” could be provided for such methods.

The new CPL should have provided that the collection of all “physical and documentary” material through torture or other cruel, inhuman or degrading treatment or punishment, including any form of coercion, as well as illegal searches, surveillance, arrest or detention, is prohibited by law. It could have gone further, to comply with international law which in essence requires the prosecution to prove that statements are obtained freely.<sup>54</sup>

## INCREASED POLICE POWERS OF SURVEILLANCE, WITHOUT MONITORING OR JUDICIAL OVERSIGHT

Concern over the legality of evidence is all the greater given that the amended CPL introduces a new section that would codify for the first time the police and security forces’ use of covert investigatory powers, including electronic surveillance and wire-tapping without, however, introducing adequate constraints on or oversight of these powers. New Article 148 stipulates:

“After the public security organ has registered a case, it may, insofar as required for investigating a crime and after passing strict approval requirements, take technical investigation measures for cases involving crimes endangering state security, crimes of terrorism, organized crime of the underworld, major drug-related crimes or other criminal crimes that pose a serious threat to society.”

Procurator’s offices are granted the authority to adopt “technical investigation” measures in “serious corruption and bribery” crimes, or crimes where the use of power seriously violates the personal rights of citizens. While approvals of the use of “technical investigation” provide for an initial three-month period, in new Article 149 an unlimited number of additional approvals of up to three months appears to be possible. The amended articles refer several times to a “strict approval procedure”, but the only detail of this procedure appears in Articles 254 through 264 of the 2012 Regulations. To ensure the necessary oversight required in international law, the CPL should include the requirement for independent judicial review of such approvals.

The provision in the original set of amendments issued on 30 August 2011 in proposed Article 150, which provided for public security organs at the county level or above to have the authority of approval, may have provided some degree of oversight, even though it still would not have conformed with international law and standards. The current law fails to guarantee that “enhanced technical investigative” powers are strictly regulated and subject to the approval of an independent judicial authority.

## DEATH PENALTY CASES

The new CPL offers some enhanced procedural protections for suspects and defendants in capital cases and together with the “Supreme People’s Court Explanation for Implementation of the CPL” which came into effect on 1 January 2013 provide some additional clarification with regard to the nature of the Supreme People’s Court (SPC) final review of death penalty sentences. However, the measures do not bring detainees’ rights or trial proceedings into full conformity with international human rights standards. They are particularly insufficient given that in China forced confessions are commonplace, and lead frequently to miscarriages of justice with particularly grievous consequences for people sentenced to death, and that strict implementation of legal protections should start at the outset, during investigation, and not wait until the trial proceedings and the final review stage.<sup>55</sup>

The new CPL Article 34 requires not only the courts but also the procuratorate and the police to inform legal aid organizations that they should assign a defence lawyer to all suspects or defendants who potentially face life imprisonment or the death penalty and have not themselves designated a defence lawyer. However, there is no concomitant responsibility of the legal aid organization or timeframe for their compliance stipulated in the amended law. Legal scholars within China have called for greater clarification to establish beyond doubt in the law that legally aided defence is available at all stages of the process in capital cases. They have also called for clearer delineation of the role and responsibility of defence lawyers in the appeal and final review process.<sup>56</sup>

In a positive step, the new CPL (Article 121) provides that interrogations of criminal suspects may be recorded or videotaped; however for suspects facing a potential death sentence or life imprisonment, it is mandatory for interrogations to be recorded in full. Regrettably, as noted above, suspects are still not guaranteed the right to have a lawyer in attendance during interrogations.

It is furthermore a positive step that Article 223 of the new CPL requires courts of second instance [appellate courts] to hold a court hearing, in which evidence is reviewed, in appeal cases where the defendant has been sentenced to death. This removes the discretion not to do so, which was possible under the old law.<sup>57</sup>

Previously, in January 2007, the power to “review and approve” all death sentences was returned to the SPC. New CPL Article 239 broadens the SPC’s authority and provides some additional detail regarding the process of review. In addition to remanding a case for retrial back to the courts of first or second instance, if the SPC does not approve a death sentence, it may now also change the sentence (*gaipan*). Article 240 of the new CPL further requires the SPC to “hear the opinion of the defence attorney” if the latter requests this and to “question the defendant” during the review process.

While these are positive steps, they are regrettably limited, and the amended CPL fails to provide clear guidelines regarding the final SPC review of death sentences. For instance, it remains unclear if the new law requires the SPC to question the defendant in person, or whether it would be adequate for this to be done by video relay through the intermediary of a lower level court, which was previous practice. In earlier proposed amendments of August 2011 the SPC’s obligation to listen to the opinion of the defence lawyer was not contingent

on the latter requesting this, but it is in the final amended law. The new law also does not make clear exactly how the court should “listen to the opinion” of the defence lawyer, for instance whether this should be done in person and what type of format is intended.

These amendments represent only limited enhancements to procedures in capital cases, which international standards demand must incorporate the most stringent fair trial safeguards. Furthermore, the amended CPL fails to provide a procedure for prisoners under sentence of death to seek pardon or commutation of their sentence, a right required in international human rights standards.

# RECOMMENDATIONS

In order to bring the Chinese Criminal Procedure Law into compliance with international human rights law and standards Amnesty International recommends the Chinese authorities to:

- Ratify International Covenant on Civil and Political Rights and the International Convention for the Protection of All Persons from Enforced Disappearance, and incorporate their provisions into Chinese law,
- Ensure the independence of the judiciary and remove all restrictions on the independence of lawyers and their ability to defend clients;
- Further amend the Criminal Procedure Law and specifically:
  - Include explicit recognition of the presumption of innocence and the right to silence of all suspects;
  - Revise amended Articles 33, 37, 73, 83, 91 and 117 to explicitly provide for the duty of arresting officers to inform all persons at the time of their arrest – formal or informal - of the reasons for their arrest and of their right to remain silent;
  - Amend Articles 33, 34, 37, 73, 83, 91 and 117 to provide all persons deprived of liberty, without exception, with access to legal counsel of their choice, and where necessary legal aid, from the beginning of custody and at all stages of criminal proceedings; and include provisions for legal counsel to be present during all questioning;
  - Provide for families of persons deprived of their liberty, or other designated individuals, without exception, to be promptly notified of their arrest and the place where they are held in detention;
  - Amend Article 73, 117 and all other articles relating to the deprivation of liberty, to insure that individuals in custody are only held in recognized places of detention;
  - Establish a procedure by which anyone deprived of his or her liberty can contest the detention before an independent judicial body, which can then order the individual's release if the detention is considered unlawful;
  - Amend Article 116 to ensure that individuals cannot be held under a form of summons or compelled summons without protection of their rights and repeal the extension to 24 hours of the allowed time for this form of detention;
  - Provide in clear and absolute terms that no statements made as a result of torture or other cruel, inhuman or degrading treatment or punishment may be admitted as evidence in any proceedings, except against a person accused of torture or other ill-treatment as evidence that the statement was made. All other evidence obtained by

torture and other ill-treatment, and all evidence obtained through other human rights violations should be similarly excluded;

- Ensure that any use of terms such as “endangering state security” and “terrorist activities” in the law be grounded in clear, strict and narrowly-constructed definitions of these crimes, and specifically exclude from their remit the peaceful exercise of human rights to freedom of expression, association and assembly, and to take part in cultural life;
- Establish a moratorium on the use of the death penalty as provided by UN General Assembly resolutions as a step towards the total abolition of the death penalty;

Pending such abolition: Clarify in greater detail in law and make public the procedures through which the SPC should conduct its final review of death penalty sentences; these procedures must be in line with international standards that require the most stringent procedural safeguards in such cases, including the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, first adopted by the UN Economic and Social Council in its resolution 1984/50; and including, among other aspects, that such final reviews would allow the defendant and his or her defence lawyer to make their case to the SPC in person.

- Include in law a procedure for defendants whose death sentence is confirmed to seek clemency or pardon in line with international standards.



# ENDNOTES

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<sup>1</sup> Proposed amendments to the law were first submitted on 30 August 2011. The NPC invited the public to submit comments on the Draft Revisions between 30 August and 30 September 2011, and reported receiving nearly 80,000 comments.

<sup>2</sup> Article 5(1) of the Constitution of the People's Republic of China. See also the White Paper "China's Efforts and Achievements in Promoting the Rule of Law," State Council Information Office, February 2008. Foreword at [http://www.china.org.cn/government/news/2008-02/28/content\\_11025486.htm](http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm), accessed 29 June 2012.

<sup>3</sup> See Amnesty International, *People's Republic of China: Establishing the Rule of Law and Respect for Human Rights: The Need for Institutional and Legal Reforms*, October 2002 (Index: ASA 17/052/2002); and Amnesty International, *China: Abolishing "Re-education through Labour" and other forms of punitive administrative detention: An opportunity to bring the law into line with the International Covenant on Civil and Political Rights*, May 2006 (Index: ASA 17/016/2006).

<sup>4</sup> That is, an international legal rule which has emerged from consistent state (legal) practice and consistent consideration by states of it as binding on them (*opinio juris*). See for instance, Human Rights Committee, General comment no. 29: States of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8; Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, para. 38, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement>; Restatement (Third) of Foreign Relations Law of the United States § 702(e) (stating that "prolonged arbitrary detention" practised, encouraged or condemned by a state is a violation of customary international law of human rights).

<sup>5</sup> See the International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), Rule 99 (Vol. I pp. 344-353, Vol. II Ch. 32, Sec. L, pp. 2328-2362). This study is updated periodically; see <http://www.icrc.org/customary-ihl/eng/docs/home>, accessed 20 February 2013.

<sup>6</sup> UN Working Group on Arbitrary Detention, Opinion No. 15/2011 (People's Republic of China), Communication addressed to the Government on 3 February 2011, para. 20; Opinion No. 16/2011 (People's Republic of China), Communication addressed to the Government on 8 February 2011, para. 12.

<sup>7</sup> See for instance Article 9(3) and 9(4) of the ICCPR and Principle 11(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988 (UN Body of Principles).

<sup>8</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China, UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, para. 73.

<sup>9</sup> See for instance Article 9(3) of the ICCPR.

<sup>10</sup> Universal Declaration of Human Rights, Article 11 (1).

<sup>11</sup> Universal Declaration of Human Rights, Article 11(2).

<sup>12</sup> See for instance Human Rights Committee, General comment no. 29: States of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; see note 4 above for definition.

<sup>13</sup> Article 3(1)(d) common to the four Geneva Conventions of 1949.

<sup>14</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China, UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, para. 82(j).

<sup>15</sup> ICCPR Article 14 (3)(g), Principle 21 of the Body of Principles.

<sup>16</sup> See ICCPR Art 6.; *Maryam Khalilova v. Tajikistan*, Human Rights Committee... Communication No. 973/2001, UN Doc. CCPR/C/83/D/973/2001, views adopted 13 April 2005, para. 7.6; and Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, UN Doc. E/CN.4/2001/9, 11 January 2001, para. 86.

<sup>17</sup> The term 'treaty bodies' refers to committees of independent experts established under respective UN human rights treaties to monitor states' compliance with their treaty obligations. They include the Human Rights Committee, which monitors implementation of the ICCPR and the Committee against Torture which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>18</sup> Resolution 1984/50, Resolution 1989/64, Resolution 1996/15.

<sup>19</sup> Human Rights Committee General Comment 6, para. 7.

<sup>20</sup> "Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty". Approved by ECOSOC resolution 1984/50 of 25 May 1984.

<sup>21</sup> Eighth quinquennial report of the Secretary-General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc. E/2010/10, December 2009, para 136.

<sup>22</sup> See UN Doc. ECOSOC 1989/64, para.1(a).

<sup>23</sup> 62/149 of 18 December 2007, 63/168 of 18 December 2008, 65/206 of 21 December 2010 and 67/176 of 20 December 2012.

<sup>24</sup> Article 6(4) of the ICCPR, ECOSOC resolution 1984/50, para. 7.

<sup>25</sup> The Inter-American Court of Human Rights in the Case of *Fermín Ramírez v. Guatemala*, Judgement of 20 June 2005 (Merits, Reparations and Costs), at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_126\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.doc), Para. 109 concluded that "the right to grace forms part of the international *corpus juris*."

<sup>26</sup> Human Rights Committee, *Kennedy v Trinidad and Tobago*, communication no. 845/1998, views adopted 26 March 2002, para. 7.4.

<sup>27</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/9/3, May 2008, paras. 59-67.

<sup>28</sup> UN Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>29</sup> Chinese law provides for a variety of types of deprivation of liberty, including notably “detention” (*juliu*), which could be viewed as a type of informal arrest, and formal “arrest” (*daibu*), the latter indicating that prosecutors have either sufficient evidence to pursue criminal charges or reason to believe criminal charges will be pursued. The language used in this briefing will refer to a criminal suspect being either “detained” or “arrested”, to differentiate between these two types of custody provided for in Chinese law. However, “detention” is also used in this report to refer to a deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of state authorities. See new CPL Articles 83 and 91 respectively for provisions on detention and arrest.

<sup>30</sup> ICCPR Article 14(3)(d), and see also Article 67(1)(d) of the Rome Statute of the International Criminal Court.

<sup>31</sup> Concluding Observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April, 1997, para. 28.

<sup>32</sup> UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 1.

<sup>33</sup> Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1990/17, 18 December 1989, para. 272; see also UN Doc. E/CN.4/1995/34, 12 January 1995, para. 926.

<sup>34</sup> Principle 7 of the UN Basic Principles on the Role of Lawyers; Principles 11(2) and 20 of the Body of Principles, Article 10 of the Declaration on Disappearances, and Rule 7(2) of the Standard Minimum Rules all refer to the right of a detainee and his counsel to receive prompt and full communication regarding any detention order.

<sup>35</sup> While compulsory measures are not fully defined in the law, they include arrest, detention, residential surveillance, bail and compelled summons; see CPL Chapter 6.

<sup>36</sup> Report of the Special Rapporteur on torture, UN Doc. E/CN.4/2003/68, 17 December 2002 para. 26(g).

<sup>37</sup> See Amnesty International, “*China: Against the Law: Crackdown on China’s Human Rights Lawyers Deepens*”, 30 June 2011 (Index 17/018/2011).

<sup>38</sup> Amnesty International interview with Chinese lawyers conducted in August 2012.

<sup>39</sup> For an analysis of the widespread nature of police torture and its causes, see Wu, W and Vander Beken, T. (2010), Police torture in China and its causes, *Australian & New Zealand Journal of Criminology*, December vol. 43 no. 3, pp. 557-579. For a discussion of the challenges of rooting out interrogational torture see Liu, A. (2007), Limitations of external forces in deterring interrogational torture and root causes [Xingxunbigong de waibu ezhililiang quexian jiqi genyuan]. *Journal of Beijing People’s Police College*, 120, pp. 25–28.

<sup>40</sup> The European Court of Human Rights has unequivocally stated that “there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally

recognized international standards which lie at the heart of the notion of a fair procedure... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice..." *Case of John Murray v. the UK*, judgment of 8 February 1996, *Reports* 1996-I, para. 45.

<sup>41</sup> Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9, as subsequently amended), entered into force 1 July 2002.

<sup>42</sup> See for instance Concluding Observations of the Human Rights Committee: Venezuela, Report of the Human Rights Committee UN Doc. A/56/40, Vol. I (2000-1), para. 77(9); Russian Federation, UN Doc. A/59/40, Vol. I (2003-4) para. 64(12); Republic of Korea, UN Doc. A/62/40, Vol. I (2006-7), para. 82(14). See also the Committee's views in individual cases, for instance *Grindin v. Russia*, Communication No 770/1997. Views adopted 20 July 2000, UN Doc. CCPR/C/69/D/770/1997, para. 8.5.; *Aliiev v. Ukraine*, Communication No. 781/1997. Views adopted 7 August 2003, UN Doc. CCPR/C/78/D/781/1997, para. 7.2.

<sup>43</sup> See for instance Conclusions and Recommendations of the Committee against Torture: Republic of Korea, UN UNGAOR Supp. A/52/44 (1997), para. 68; Australia, UNGAOR Supp. A/63/44 (2007-8), para. 39(10(a)); Austria, UNGAOR Supp. A/65/44 (2009-10), para. 57(9); Liechtenstein, *ibid.* para. 61(11).

<sup>44</sup> See UN Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, UN Doc. A/RES/47/133, 18 December 1992, Article 1.

<sup>45</sup> See for instance Report of the Committee against Torture, UN Doc. A/56/44 (2000-2001), para. 73(e); *Bazorkina v. Russia* (Application no. 69481/01), ECtHR Judgment of 27 July 2006, paras. 139-142; Human Right Committee, United States of America: Concluding observations, UN Doc. CCPR/C/USA/Q/3/CRP.4, 28 July 2006, para. 12. See USA: Human Rights Betrayed: 20 Years After US Ratification of ICCPR, Human Rights Principles Sideline by 'Global War' Theory, Amnesty International, June 2012, Index: AMR 51/041/2012; USA: One-Way Accountability: Guantanamo Detainee Pleads Guilty; Details of Government Crimes Against Him Remain Classified Top Secret, Amnesty International, July 2012, Index: AMR 51/063/2012.

<sup>46</sup> Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand in Johannesburg

<sup>47</sup> *Ibid.*, Principle 2(a).

<sup>48</sup> *Ibid.*, Principle 2(b).

<sup>49</sup> For instance Article 9(1) of the ICCPR provides that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

<sup>50</sup> UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the Commission on Human Rights, UN Doc E/CN.4/2006/98, 28 December 2005, para. 46.

<sup>51</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights, UN Doc E/CN.4/2004/3, 15 December 2003, paras. 64-65.

<sup>52</sup> Amnesty International, *China: Free Liu Xiaobo & Liu Xia*, December 2010 (Index: 17/047/2010); *Amnesty International condemns harsh sentence for activist Chen Wei*, December 2011 (Index: PRE01/641/2011); *China: 'Travesty' as prisoner of conscience Gao Zhisheng sent back to jail*, December 2011 (Index: PRE 01/629/2011)

<sup>53</sup> See for instance, Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN, NY and Geneva, 2003), p. 219, <http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>.

<sup>54</sup> For instance in *Singarasa v. Sri Lanka*, the Human Rights Committee found a violation of Article 14 of the ICCPR (fair trial rights), read in conjunction with Article 7 (prohibition of torture and other ill-treatment), as the complainant had been "forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary". *Nallaratnam Singarasa v. Sri Lanka*, No. 1033/2001, CCPR/C/81/D/1033/2001, 23 Aug. 2004, para. 7.4.

<sup>55</sup> "Experts advise improvements: lawyers should be present during questioning of suspects during investigation in cases that could result in the death penalty," *Legal Daily*, 26 November 2011, see [http://www.legaldaily.com.cn/rdf/content/2011-11/26/content\\_3127063.htm](http://www.legaldaily.com.cn/rdf/content/2011-11/26/content_3127063.htm).

<sup>56</sup> "Experts and academics recommend adding special chapter to amended criminal procedure law on "procedures for death penalty cases to bring together all death penalty provisions in order to strengthen the principle of "killing less, killing better." *Legal Daily*, 25 November 2011, see <http://epaper.legaldaily.com.cn/fzrb/content/20111125/Article03002GN.htm>.

<sup>57</sup> Amended Article 223 provides for three other circumstances where courts of second instance are required to hold a court hearing, including in appeal cases where the defendant or private prosecutor and his legal counsel object to the facts found or evidence admitted in the first instance trial and where the conviction might be changed by such facts and evidence; cases appealed by a people's procuratorate; and other cases for which a court hearing should be held.

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