

IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE  
AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR  
PUNISHMENT IN THE PEOPLE'S REPUBLIC OF CHINA

A PARALLEL REPORT BY  
HUMAN RIGHTS IN CHINA  
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*Submitted to the Committee Against Torture in advance of its review of the Fifth Periodic  
Report of the People's Republic of China on implementation of the Convention Against  
Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*



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## EXECUTIVE SUMMARY

Human Rights in China (HRIC) respectfully submits this report to the Committee Against Torture (“Committee”), in advance of the Committee’s review of the People’s Republic of China’s (“PRC”) fifth report on implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).

HRIC also notes with appreciation the detailed and comprehensive List of Issues issued by the Committee in June 2015. Pending the release of an official translation of the State Party’s responses, HRIC has prepared an English translation to facilitate a constructive review and interactive exchange. (Please see Annex A).

### Key Areas of Concern

China’s legal landscape has changed greatly since its last review by the Committee in 2008. The State Party Report identifies and discusses legislative and policy developments that are related to and impact effective measures to address torture. At the same time, however, the State Party has also introduced legislative reforms focusing on national security that may act to undermine existing procedural protections, especially highlighted by the ongoing crackdown on lawyers and the “incitement to subvert state power” charges brought against targeted lawyers. Taken together, these developments raise serious concerns regarding their impact on weakening structural and systemic safeguards against torture.

At a time when the State Party has made some legislative steps toward greater transparency, it is important to note that a trend in the State Party’s Fifth Periodic Report was its failure to provide, or its selective provision of, information in response to the Committee’s List of Issues of 15 June 2015.

HRIC’s Parallel Report focuses on three core structural challenges that still hamper effective implementation of the Convention by the State Party: **independent monitoring, access to information, and access to justice**. Specific issues related to these three core challenges are discussed below within the framework of each relevant article of the Convention and include:

- Independence of medical personnel and medical access to detainees (Article 2);
- Ongoing impact of the state secrets legal framework on access to information related to torture (Article 2);
- Limited scope of the Open Government Information Regulations (Article 2);
- Adequacy of data on complaints and investigations of torture and ill-treatment (Articles 12 & 13);
- Adequacy of compensation mechanisms (Article 14); and
- Application and impact of an exclusionary rule where torture is alleged (Article 15).

### Recommendations for Additional Information and Clarifications Needed

#### Article 2

##### *Independence of Medical Care for Detainees*

##### **Independence for medical professionals:**

- The supervisory, remunerative, and contractual arrangements for doctors in detention centers.

- Whether guidelines are in place to ensure that medical personnel operate independently of prison administration and are not subject to interference or intimidation.
- Safeguards in place to ensure that medical personnel are able to examine victims out of the hearing and sight of police officers.
- Whether there have been any complaints by medical personnel and, if so, the outcomes of such complaints.

**Reporting and investigation of torture:**

- Safeguards in place to ensure that doctors can report signs of torture confidentially and without fear of reprisal.
- The process for investigating allegations of torture in detention raised by medical personnel, including whether the investigating body is independent with no relation to the authority that is investigating or prosecuting the case against the alleged victim; the number of such investigations during the reporting period; and the percentage of such investigations that found torture occurred.

**Effectiveness of human rights and anti-torture training for prison and medical personnel in detention centers:**

- How impact of the trainings described in the State Party's responses were measured and monitored post-training, including the indicators used to measure understanding of the international standards and guidelines, or change in attitudes or practices.

*State Secrets System*

- Number of detainees currently registered nationwide.
- Annual statistical data from 2008 onwards on the number of deaths in custody.
- Total number of allegations received, from all sources and methods, that a confession was extracted through torture and total number of investigations into such allegations.
- Number of cases involving state secrets annually during the review period, including number in which suspects challenged the classification of information, and number of such challenges that were successful
- If the requested information is still not provided, the Committee may wish to clarify why the information is unavailable and whether the information is still classified as a state secret.

*Open Government Information Regulations*

- Whether the following information related to monitoring torture is subject to disclosure under the OGI Regulations:
  - matters that occur following the commencement of formal police or procuratorial investigations (*li'an*);
  - internal criminal investigations into police officer conduct;
  - detentions that are "criminal in nature," including residential surveillance; and
  - close-circuit television records of conduct within offices at detention centers.
- The number of requests for such information have been received during the review period and in how many cases the requested information was disclosed.
- Examples of information requested but not disclosed during the review period and the reason(s) for non-disclosure.
- Whether measures or guidelines exist to ensure that the determination by public security and state security organs that their actions are pursuant to clear authority under the *Criminal Procedure Law* are indeed so authorized and appropriately excluded from the OGI Regulations.

## Articles 1, 12 & 13

### *Data on Complaints and Investigation of Torture and Ill-treatment*

- the total annual number of torture-related complaints received, from all sources and methods, for each of the crimes that the State Party has indicated cover the various aspects of the Convention's definition of torture, as well as
- the number of investigations, indictments, convictions, and punishments meted out for each crime as a result.

## Article 14

### *State Compensation*

#### **Redress for psychological harm**

- statistical data on the number and amounts of such awards for psychological harm related to torture; and
- specific information on awards limited by the cap.

#### **Data on all compensation claims**

- Number of applications made on the basis of all provisions in Articles 3 and 17 of the *State Compensation Law* during the reporting period.
- Number of these complaints that resulted in compensation and the average as well as aggregate amount of compensation awarded for these cases.
- Criteria or guidelines used by the procuratorate to determine which compensations cases need to be brought before the courts.
- Number of these applications that were heard by courts and the outcomes of such cases.

## Article 15

### *Exclusionary Rule*

#### **Status and operation of the rule in courts**

- Guidelines for determining the amount or type of evidence that would be sufficient to rule out torture;
- Guidelines specifically for the interpretation of Article 56's requirement that "[a]n application for exclusion of illegally collected evidence shall include *relevant information or materials*" (emphasis added);
- Statistics on the use of audio-visual records of proceedings in interrogation rooms; and
- Statistics on cases lodged against law enforcement or other officials as a result of audio-visual recordings and the outcomes of such cases.

#### **Use of audio-visual records in interrogation**

- Crimes considered "serious" under Chinese law, including the *Criminal Procedure Law*;
- Definition of "the interrogation process" or the "record of the interrogation" for the purposes of the *Criminal Procedure Law*; and
- Clarification of the phrase "case handling area" as described in the State Party's response.

#### **Emphasis on external injuries in assessing medical evidence**

- Measures or steps taken to ensure judicial training and follow-up to training sessions to facilitate understanding and identification of the various activities which constitute torture under the Convention; and
- Guidelines regarding the use of medical evidence in exclusion cases, including any guidelines for how health checks of persons exiting and entering detention should be conducted.

## INTRODUCTION

1. Since its last review before the Committee against Torture (“the Committee”) in 2008, there have been significant domestic developments in the People’s Republic of China (“China” or “the State Party”) including a leadership transition in 2012, a destabilizing deterioration of the economic situation, and deepening restrictions and crackdowns on independent civil society.
2. Of particular significance to the upcoming review, the State Party has passed or amended legislation impacting the structures and systems that can enable or prevent torture; most notably its *Criminal Procedure Law*. These legislative efforts have yielded some formal improvements, such as the expanded use of videotaping during interrogations and a new rule excluding evidence obtained during torture. However, structural challenges within the State Party make it difficult to assess, monitor, and encourage the implementation of such improvements as well as their impact on preventing torture and other inhuman, cruel, or degrading treatment.
3. In addition, a suite of legislation<sup>1</sup> focused on national security and cutting against many existing procedural protections—combined with a continuing crackdown on rights defense lawyers—raises serious concerns that legal protections that help to prevent and combat torture in the State Party are weakening.
4. Three interrelated systemic challenges contribute to weakening both the Committee’s and Chinese citizens’ ability to ensure that preventative and remedial systems are working effectively, and that state actors engaging in or allowing torture are held accountable for their actions. Institutional actors (e.g., police, procuratorates, courts and lawyers) as well as detainees and citizens more broadly face:
  - limited **ability to monitor detention facilities and the treatment of detainees**;
  - limited **access to information** about the causes and scope of torture, as well as the implementation of protective measures; and
  - inadequate **access to justice for victims** of torture.
5. HRIC’s submission will examine reported improvements and discuss concerns raised by laws and policies as well as their implementation. Specific issues related to these three core challenges are discussed below within the framework of each relevant article of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”).

## CONCERNS UNDER SPECIFIC ARTICLES OF THE CONVENTION

### ARTICLE 2

#### Independent Medical Examinations

6. **A fundamental component of adequately monitoring the treatment of detainees is ensuring independent medical access** to identify, respond to, and help prevent instances of torture. In particular,

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<sup>1</sup> This includes the *State Security Law of the People's Republic of China* (2015); *People's Republic of China Cybersecurity Law (Draft)*; *Counter-Terrorism Law Of The People's Republic Of China (Draft)*; and *People's Republic of China Foreign Non-Governmental Organizations Management Law (Second Reviewed Draft)*, all available at: <<http://www.hrichina.org/en/chinese-law-resources>> [accessed October 26, 2015] .

access by independent doctors is necessary both to diagnose and treat the physical and psychological consequences of torture. In addition, independent medical access helps to establish a record that can be used to exclude wrongfully obtained evidence or as a basis for seeking justice against perpetrators of torture in the future (see further discussion of exclusionary rule in the section on Article 15).

7. In recognition of the importance of the independence of medical experts and personnel, the Committee has repeatedly requested information on: (1) measures taken to ensure independent and confidential medical examinations of detainees and (2) safeguards to identify torture and prevent reprisals for reporting signs of torture (2008 Concluding Observations (“COB”),<sup>2</sup> 11; 2015 List of Issues<sup>3</sup> (“LOI”), 3(c)).

8. In its response to the Committee’s questions, the State Party outlines a series of formal measures and implementation steps taken to improve medical care of detainees. However, several aspects of these measures raise concerns regarding independence of doctors and ethical conflicts including:

- An **overarching role for the public security supervision** departments under the 2014 Work Plan for Building the Professionalization of Medical Treatment and Health Care issued by the Ministry of Public and a national health department (“2014 Work Plan”) (2015 State Party response to the LOI<sup>4</sup> (“State Party Response”), 3(3))
- A **requirement that police officers (*minjing*) in detention centers verify the health examination form** recorded by doctors during initial medical screenings. (Id.)
- A requirement that, **where doctors discover possible signs of torture, they must report “to the supervisory department** of the public security organ or the department of the people’s procuratorate that is stationed in the detention center.” Investigation of possible torture is then to be carried out by “the relevant departments.” (Id.)

9. The above structures and procedures outlined by the State Party raise serious ethical concerns for medical practitioners in detention facilities and do not conform with international norms and standards on medical independence.

### *International standards on medical independence and ethics*

10. Chinese domestic regulations and standards applying to the medical profession do not appear to contain clear guidelines or provisions aimed at ensuring medical independence. In fact, the overlap of leadership of the Red Cross Society of China illustrates the blurring of the lines between independent medical experts and the Communist Party.<sup>5</sup> However, there is a significant body of relevant international standards that provide a useful framework for assessing the State Party’s existing laws, policies, and practices. The standards are also referenced in World Medical Association (“WMA”) documents passed by

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<sup>2</sup> Concluding Observations of the Committee against Torture, U.N. Doc. CAT/C/CHN/CO/4 (12 December 2008).

<sup>3</sup> Committee against Torture, List of issues in relation to the fifth periodic report of China, U.N. Doc. CAT/C/CHN/Q/5/Add.1 (51 June 2015).

<sup>4</sup> Reply to List of Issues, U.N. Doc. CAT/C/CHN/Q/5/Add.2 (1 October 2015).

<sup>5</sup> Senior members of the Red Cross Society of China continue to hold dual roles in the Communist Party of China and the Red Cross Society. For example, Honorary President, Li Yuanchao (李源潮), is also a member of the Politburo of the Communist Party of China, and the Executive Vice President, and former senior member of the Ministry of Health Xu Ke (徐科) is the Society’s current Communist Party Secretary.

<[http://www.redcross.org.cn/hhzh/zh/hsigk/ldjs/201505/t20150506\\_25972.html](http://www.redcross.org.cn/hhzh/zh/hsigk/ldjs/201505/t20150506_25972.html)> [accessed October 26, 2015].

the WMA General Assembly, of which the State Party (via the Chinese Medical Association) is a member. Moreover, the standards emanate from established multilateral bodies and represent a codification, refined and consolidated over time,<sup>6</sup> of norms and best practices among the international community. While not binding, these international standards are also promoted in United Nations human rights training materials for prison officials and were specifically referenced as part of the focus of trainings for public security supervisory staff conducted by the Ministry of Public Security in April 2015.<sup>7</sup> More generally, the State Party points to anti-torture trainings targeting prison/detention center medical and related personnel, as part of efforts to continuously strengthen “professional guidance in accordance with international standards” (State Party Response, 13(3)).<sup>8</sup>

**11.** These international standards were specifically developed to give physicians who provide medical care to detainees guidance on how to identify and respond to instances of torture. Two consistent principles emphasized are:

1. a doctor’s **first duty is to the patient**<sup>9</sup> for the purpose of protecting and improving physical and mental health; and
2. **full professional and moral independence** in discharging that duty is of critical importance.<sup>10</sup>

**12.** When assessed against these standards, the measures described by the State Party are problematic because in the aggregate they create structures and procedures that result in a conflict of duties for medical practitioners in detention centers and open the way for informal pressures to suppress evidence of torture when it has occurred.

### *Formal structural arrangements create conflicting duties*

**13.** Looking at the first principle—that a medical provider’s primary **duty is to the patient**—several elements of the State Party’s response and current practices raise concerns. **Structurally**, in at least one province, salaries of medical practitioners in detention centers appear to be paid through a process

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<sup>6</sup> See, for example, the WMA International Code of Medical Ethics which was initially adopted in 1949 and amended by subsequent World Medical Assemblies in 1968, 1983 and 2006.

<sup>7</sup> *Human Rights and Prisons: A Pocketbook of International Human Rights Standards for Prison Officials* (UN; 2005), available at <<http://www.ohchr.org/Documents/Publications/training11Add3en.pdf>>. [accessed October 26, 2015].

<sup>8</sup> The State Party notes that the Ministry of Public Security engaged the Guangzhou University Human Rights Institute to conduct human rights knowledge training classes for the public security supervision system nationwide, with a focus on training on various documents, including *Human Rights and Prisons – A Pocket Book of International Human Rights Standards for Prison Officials*, which explicitly references the UN Principles of Medical Ethics.

<sup>9</sup> See, for example, Principle 5 of The Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly resolution 37/194, A/RES/37/194 (18 December 1982) (UN Principles of Medical Ethics); Paragraph 5 of the WMA Declaration of Tokyo – Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, adopted by the 29th World Medical Assembly, 1975 (WMA Tokyo Guidelines); and WMA Declaration of Geneva adopted by 2nd General Assembly of the World Medical Association, September 1948.

<sup>10</sup> See, for example, WMA International Code of Medical Ethics, adopted by 3rd General Assembly of the WMA, 1949, WMA Tokyo Guidelines.



coordinated by the public security organs.<sup>11</sup> In addition, public security organs and the procuratorate have legal and organizational authority over detainee health care, which suggests that those organs exercise supervision and control over medical personnel.<sup>12</sup> Together, the employment and supervisions of medical personnel by the public security and the procuratorate make it difficult for medical personnel to exercise independence first and foremost on behalf of the patients' health and wellbeing.

14. The **procedures** described by the State Party when injuries or signs of torture are discovered also illustrate potential barriers to the independence of medical personnel, including:

- The requirement that **police officers sign off on the process of recording injuries** discovered during initial medical screenings carried out by doctors in detention centers, creating a pressure point for interference with a medical practitioner's independent judgement.
- The requirement that **doctors who discover signs of torture report it "to the supervisory department of the public security organ** or the department of the people's procuratorate that is stationed in the detention center." This establishes a process layered with conflicts of interest under which (1) a doctor must, in serving his/her duty to act in the interest of detainees, make reports of torture to his/her employer that may be adverse to that body; and (2) for which the body may itself be responsible.
- Finally, **investigation into allegations of torture is carried out by the "relevant departments."** It is unclear which are the relevant departments, but this arrangement potentially conflicts with international standards that require that torture investigation and documentation be undertaken by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim.<sup>13</sup>

15. These structural arrangements and procedures create formal duties owed by medical personnel to the prison administration, which have the potential to regularly conflict with duties under ethical codes to the detainee. The financial and supervisory structures additionally open the way for reprisals against medical personnel who report torture in the form of demotions, harassment, or financial penalization.

### *Risks of informal pressures compromising independence*

16. Where health departments are operating alongside prison administration, **culture and informal power relations** also threaten medical independence. Working closely with prison management has the potential to create pressure on medical personnel to maintain working harmony. They further may feel pressure to respond to prison administration expectations and allow institutional interest to influence medical decisions and reporting. These institutional pressures create the risks of perpetuating existing bad practices and culture.

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<sup>11</sup> This practice is evident in the following official article: Gansu Legal Daily, 《公安监管场所医疗卫生专业化建设工作实施方案》出台被监管人员将纳入社会医疗体系 “Local Work Plan for Building the Professionalization of Medical Treatment and Health Care in Places Supervised and Managed by Public Security” Launched: Persons Detained and Supervised To be Brought into Social Health System”, <<http://gsfzb.gansudaily.com.cn/system/2015/05/11/015515934.shtml>>, May 11, 2015 [accessed October 26, 2015].

<sup>12</sup> See, for example Art. 3. Detention Center Regulations (1990) 中华人民共和国看守所条例, which provide that detention centers are to manage the life and health of criminals.

<sup>13</sup> See Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/1995/34, 12 January 1995, paragraph (g).

17. In addition to institutional pressures and power dynamics, the **physical design** and lay-out of prison facilities may impact the ability of medical personnel to conduct independent medical examinations. The Committee has specifically inquired whether medical examinations occur out of the sight and hearing of police/administration officers. (LOI, 3(c)) The State Party has provided no response regarding this important physical safeguard to ensure the professional and independent exercise of medical personnel.

18. In light of these concerns, **HRIC urges the Committee** in its interactive exchange with the State Party **to request additional information and clarifications regarding:**

**Independence for medical professionals:**

- The supervisory, remunerative, and contractual arrangements for doctors in detention centers.
- Whether guidelines are in place to ensure that medical personnel operate independently of prison administration and are not subject to interference or intimidation.
- Safeguards in place to ensure that medical personnel are able to examine victims out of the hearing and sight of police officers.
- Whether there have been any complaints by medical personnel and, if so, the outcomes of such complaints.

**Reporting and investigation of torture:**

- Safeguards in place to ensure that doctors can report signs of torture confidentially and without fear of reprisal.
- The process for investigating allegations of torture in detention raised by medical personnel, including whether the investigating body is independent with no relation to the authority which is investigating or prosecuting the case against the alleged victim; the number of such investigations during the reporting period; and the percentage of such investigations that found torture occurred.

**Effectiveness of human rights and anti-torture training for prison and medical personnel in detention centers:**

- How impact of the trainings described in the State Party's responses were measured and monitored post-trainings, including the indicators used to measure understanding of the international standards and guidelines, or change in attitudes or practices.

## State Secrets System

19. In addition to independent medical personnel's ability to monitor the condition of detainees, **access to information on related laws, policies, implementation measures, and actual cases is needed to understand the scope, causes of, and obstacles to effectively addressing the problem of torture.**

20. Since its development in 1989, China's state secrets framework has presented one of the most significant challenges to accessing this information. This framework is comprised of a complex set of laws and provisions, including the *Law of the People's Republic of China on Guarding State Secrets (revised 2010)* ("State Secrets Law") and its implementing regulations and rules, as well as related provisions of the *National Security Law of the People's Republic of China*; the *Criminal Law of the People's Republic of China*, and the *Criminal Procedure Law of the People's Republic of China* ("Criminal Procedure Law") and associated interpretations.

21. Recognizing the significant barrier the state secrets framework poses to a full and constructive review of the State Party's implementation of the Convention, as well as the ability for Chinese citizens to seek information and monitor their government between reviews, the Committee has pressed the State Party to review this legislation in order to ensure that information and statistics relevant to assessing and

promoting compliance with the Convention are available, including the number of potential torture cases that fall within the purview of the state secrets system. (COB, 15(A)).

22. Most recently, the Committee asked the State Party how the 2010 amendment to the *State Secrets Law* and subsequent implementing regulations affected the classification of information related to torture (LOI, 5). The Committee specifically sought to understand “the current situation with regard to the availability of information, including statistics on detainees in all forms of detention and on unnatural deaths in detention.” (LOI, 5)

23. In response to these questions, the State Party stated that “[i]nformation regarding torture does not fall within the scope of state secrets prescribed by the *Law on Guarding State Secrets*.” (State Party Response, 5) Despite this assurance, the State party has still not provided a substantial amount of the information requested by the Committee, including information that was previously classified as a state secret under the 1989 State Secrets legal framework. The below chart maps illustrative examples :

Information requested by the Committee in List of issues	Related secrecy classification under the 1989 State Secrets legal framework
Number of <b>detainees currently registered [nationwide]</b> (LOI, 3(b))	<b>Secret</b> - Compiled annual and quarterly <b>statistics on prisoners currently in detention nationwide</b> <sup>14</sup>
Annual statistical data from 2008 onwards on the <b>number of deaths in custody</b> ... (LOI, 15)	<b>Highly Secret</b> – Statistics nationwide... on <b>unusual deaths in prisons</b> , juvenile detention facilities, and reeducation through labor facilities. <sup>15</sup>
Number of cases in which detainees have alleged that their <b>confessions were extracted through torture</b> (LOI, 32)	<b>Highly Secret</b> – Statistics and specific case details regarding the <b>use of torture to extract confessions</b> and corporal punishment abuse that led to serious consequences. <sup>16</sup>

24. In each of these cases, despite the assertion that information relating to torture does not fall within the scope of state secrets, the information requested by the Committee has not been provided.

- The State Party provided no information regarding the **total number of detainees** currently registered nationwide, despite stating that “[a]t present, all detention centers have established a registration system” (State Party Response, 3(2)), which would suggest that such information is readily available.
- Similarly, though the State Party’s response states that according to “a series of regulations issued separately or together by the Supreme People’s Procuratorate, Ministry of Public Security, and Ministry of Civil Affairs since 2010, procuratorial organs shall conduct an

<sup>14</sup> Regulation on State Secrets and the Specific Scope of Each Level of Secrets in Judicial Administration Work [*hereinafter* Regulation on Judicial Administration Work] (司法工作中国家秘密及其密级具体范围的规定), issued by the Ministry of Justice [司法部] and the National Administration for the Protection of State Secrets [国家保密局], promulgated on August 31, 1995, and effective on October 15, 1995, Art. 2C.2.

<sup>15</sup> Regulation on Judicial Administration Work, Art. 2B.1.

<sup>16</sup> Regulation on State Secrets and the Specific Scope of Each Level of Secrets in the Work of the People’s Procuratorates (检察工作中国家秘密及其密级具体范围的规定), issued by the Supreme People’s Procuratorate [最高人民法院] and the National Administration for the Protection of State Secrets [国家保密局], effective on January 15, 1996, Art. 3B.5.

independent and impartial investigation into all deaths in custody...,” no statistics are provided on **annual unusual deaths in prisons nationwide**.

- Finally, while the State Party does provide some statistical information on complaints and convictions for the use of torture to extract confessions, it does not provide the **total number of complaints received via all channels and sources**, nor the **total number of such cases investigated** by the procuratorate, both critical pieces of information for evaluating the overall scope of the problem and the efficacy of the existing oversight and accountability processes.

25. In light of the State Party's statement that information related to torture does not fall within the scope of state secrets, the **Committee may wish to reiterate its request for the following information:**

- **Number of detainees** currently registered nationwide.
- Annual statistical data from 2008 onwards on the **number of deaths in custody**.
- Total number of allegations received, from all sources and methods, that a **confession was extracted through torture** and total number of investigations into such allegations.
- Number of **cases involving state secrets** annually during the review period, including number in which suspects challenged the classification of information, and number of such challenges that were successful

26. If the requested information is still not provided, the Committee may wish to clarify **why the information is unavailable** and **whether the information is still classified as a state secret**.

## Open Government Information Regulations

27. In response to the Committee's concerns regarding restrictions placed on the availability of information related to torture by the state secrets framework, the State Party highlighted the *Regulations of the People's Republic of China on Open Government Information* ("OGI Regulations") as a practical measure to ensure citizens' right to know. (State Party Response, 5) In describing these regulations, the State Party stated "citizens, legal persons or other organizations who believe that their lawful rights and interests have been infringed in the course of specific administrative actions by an administrative organ in carrying out its open government information work, may according to law apply for administrative review or may commence administrative litigation." (Id.)

28. The passage of the OGI Regulations, which came into effect in May 2008, was an important step in enhancing transparency in the State Party. As the State Party describes, the OGI Regulations enable citizens to make requests for government information and require relevant bodies to indicate whether or not the information will be provided within 30 days.<sup>17</sup> However, the scope of and exceptions to these regulations significantly limit their usefulness in practice to obtaining torture related information.

### *State Secrets Exception*

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<sup>17</sup> *Regulations of the People's Republic of China on Open Government Information*. Adopted by the State Council on April 5, 2007; Effective May 1, 2008 (hereinafter "OGI Regulations"). Available in English at: <[http://www.law.yale.edu/documents/pdf/Intellectual\\_Life/Ch\\_OGI\\_Regualtions\\_Eng\\_Final\\_051607.pdf](http://www.law.yale.edu/documents/pdf/Intellectual_Life/Ch_OGI_Regualtions_Eng_Final_051607.pdf)> [accessed October 26, 2015] (Translation by China Law Center, Yale Law School).

29. The first limitation of the OGI Regulations in the context of torture is that state secrets are explicitly excluded by Article 14, which reads in relevant part:

“Administrative organs should **establish and perfect mechanisms to examine for secrecy** the government information to be released, and clarify the examination procedures and responsibilities.

Prior to disclosing government information, administrative organs should examine the government **information to be disclosed in accordance with the provisions of the Law of the People's Republic of China on Safeguarding State Secrets** and other laws, regulations and relevant state provisions...

**Administrative organs may not disclose government information that involves state secrets....”**

(Emphasis added by HRIC)<sup>18</sup>

30. Given the broad and vague nature of the *State Secrets Law* and the opacity of state secrets classifications, this exception is vulnerable to misuse and has the potential to sweep a vast amount of information outside the purview of the OGI Regulations.

#### *Limited Administrative Scope*

31. Even absent state secrets limitations, a substantial amount of information related to torture is not subject to disclosure under OGI Regulations because, as indicated by the State Party in its response, the scope of OGI Regulations is limited to information about *administrative actions* carried out by *administrative organs* (State Party Response, 5, emphasis added).

32. This is particularly limiting for torture-related information because torture often occurs in the course of criminal investigations and a substantial portion of the investigation process is not considered “administrative in nature” under the laws of the State Party. For instance, information related to the following issues would not fall within the scope of the Regulations because under Chinese law it would be considered criminal rather than administrative in nature:

- Matters that occur **following the commencement of formal police or procuratorial investigations** (*li'an*).<sup>19</sup>
- Internal criminal **investigations into police officer conduct**.<sup>20</sup>

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<sup>18</sup> Id., see Art. 14.

<sup>19</sup> This refers to the period from which the Procuratorate or the public security organs open a formal investigation into a crime. For in-depth discussion of this term, see, Kui Sin, King, Wagner, Anne and Cheng, Le, *The Ashgate Handbook of Legal Translation* (2014, Ashgate), 259-60.

<[https://books.google.com/books?id=jxGdBOAAQBAJ&printsec=frontcover&source=gbs\\_atb#v=onepage&q&f=false](https://books.google.com/books?id=jxGdBOAAQBAJ&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false)> [accessed October 26, 2015]. 白文平诉漯河市公安局郾城区分局信息公开案, Bai Wenping v Luohe City, Yancheng District Public Security Bureau, An Open Government Information Case (Plaintiff sought disclosure of reports and other information relating to deceased husband's cause of death), and 郑敏杰与厦门市公安局思明分局二审判决书 (2015) Zheng Minjie v. Xiamen City Public Security Bureau Si Ming Sub-Division, Second Instance Ruling (2015).

- **Detentions which are “criminal in nature,”** as defined by the *Criminal Procedure Law*, including residential surveillance.<sup>21</sup>

33. A further means by which information may be excluded is where it falls outside the “official duties” of those administrative organs. In one case, in which close-circuit television records of public security offices at a detention center were sought, the information request was denied on the basis that it was not within the ‘official duties’ of public security officers.<sup>22</sup>

#### *Limited Ability to Seek Court Review of Denied OGI Requests*

34. The limited scope of information subject to disclosure under the OGI Regulations is exacerbated by a Supreme People’s Court interpretation limiting court review in cases involving actions arising from the *Criminal Procedure Law*.<sup>23</sup> Under the OGI Regulations, the government body to which a request for information is submitted is tasked with determining whether that information falls within or outside the scope of the OGI Regulations.<sup>24</sup> If the individual requesting the information is not satisfied with the determination in his/her case, s/he is entitled to seek review of the determination by a court. However, a review of publicly available court decisions reveals that courts are denying such lawsuits citing the Supreme People’s Court’s interpretation of the *Administrative Litigation Law of the People Republic of China*.<sup>25</sup>

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<sup>20</sup> Source: People’s Daily, 冀中星状告广东公安厅案续：终审驳回其上诉, Ji Zhongxing v. Guangdong Public Security Department Case Continues: In the Final Ruling, His Appeal is Rejected (Plaintiff sought disclosure of information concerning an internal investigation into an incident in which he was beaten and left crippled), <<http://politics.people.com.cn/n/2014/0102/c1001-23999076.html>> [accessed October 26, 2015].

<sup>21</sup> See, e.g. the coercive measures listed in Chapter VI of the *Criminal Procedure Law*, viz. criminal detention, release upon guarantee pending further investigation and residential surveillance. *Criminal Procedure Law of The People’s Republic of China*, translated by Jianfu Chen, in Chen, Jianfu & Ke, *Suiwa Criminal Law and Criminal Procedure Law in the People’s Republic of China: Commentary and Legislation* (2013, Martinus Nijhoff), at 276-87.

<sup>22</sup> 韩晓鹏与北京市公安局朝阳分局政府信息公开一审行政判决书, Han Xiaopeng v. Beijing City Public Security Bureau, Chaoyang Division, An Open Government Information Case, First Instance Administrative Ruling (2014) No. 374, <[http://www.court.gov.cn/zgcpwsb/bj/bjdszjrmfy/bjscyqrmfy/xz/201509/t20150918\\_11105790.htm](http://www.court.gov.cn/zgcpwsb/bj/bjdszjrmfy/bjscyqrmfy/xz/201509/t20150918_11105790.htm)> [accessed October 26, 2015].

<sup>23</sup> *Interpretation of the Supreme People’s Court Regarding Certain Questions Concerning the Enforcement of the <Administrative Litigation Law of the People’s Republic of China>* (2000) (‘Supreme People’s Court Interpretation of 2000’), 最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释. The relevant passage states: 不属于人民法院行政诉讼的受案范围：……(二)公安、国家安全等机关依照刑事訴訟法的明确授权实施的行为。” [Matters] not falling within the scope of cases accepted by people’s courts in administrative litigation [are as follows]: ….. (B) Actions of organs such as State Security, Public Security etc. which give effect to their clear authority under the Criminal Procedure Law. ” at Art.1(2).

<sup>24</sup> OGI Regulations, Article 33.

<sup>25</sup> See, e.g. 原告王立新诉被告金华市江南分局公安信息公开案 (2015); Plaintiff Wang Lixin v. Defendant Jinhua City Public Security Bureau Jiangnan Division, an Open Government Information Case (2015) (Plaintiff was requesting disclosure of two expert reports which he argued had been falsified by police); 余尚法与绍兴市柯桥区公安局信息公开上诉案 (2014); Yu Shangfa v. Shaoxing City Keqiao District Public Security Bureau, An Open Government Case (On Appeal) (2014) (Plaintiff was requesting legally prescribed procedures

35. The interpretation states that administrative lawsuits regarding actions by public security and state security organs that are clearly within their authority under the *Criminal Procedure Law* cannot be reviewed by a court. This limitation potentially adds an additional barrier to accessing information about actions by public security and state security organs by insulating decisions about related information requests from court review

36. Though the State Party has emphasized its efforts to create a system of public supervision in which “case handling rules, regulations and procedures” are made public (2009 Follow-up Report of the State Party (“Follow-up Report”),<sup>26</sup> 1(e)), it is unclear whether requests for such procedures and guidelines would be excluded from court review under the interpretation.<sup>27</sup> Courts have already denied cases for similar information, such as police handling of emergency calls,<sup>28</sup> or expert reports.<sup>29</sup>

37. To better understand and assess the applicability and impact of the OGI Regulations on addressing the problem of torture, **HRIC urges the Committee to request additional information and clarifications on the following:**

- Whether the following information relevant to monitoring torture is subject to disclosure under the OGI Regulations:
  - matters that occur **following the commencement of formal police or procuratorial investigations** (*li'an*);
  - internal criminal **investigations into police officer conduct**;
  - **detentions which are “criminal in nature,”** including residential surveillance; and
  - **close-circuit television records** of conduct within offices at detention centers.
- The number of requests for such information received during the review period and in how many cases the requested information was disclosed.
- Examples of information requested but not disclosed during the review period and the reason(s) for non-disclosure.
- Whether measures or guidelines exist to ensure that the determination by public security and state security organs that their actions are pursuant to clear authority under the *Criminal Procedure Law* are indeed so authorized and appropriately excluded from the OGI Regulations.

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for handling 110 (emergency assistance) calls and identifying economic disputes at a particular police station); 陈爱民与南通市公安局崇川分局政府信息公开答复上诉案 (2014) disclosure of ; Chen Aimin v. Nantong City Public Security Bureau Chongchuan Division, A Case on Appeal from a Response Regarding Open Government Information (2014) (00291). (Plaintiff was requesting disclosure of information and results relating to police handling of a particular matter at a particular address).

<sup>26</sup> Comments by the Government of the People's Republic of China concerning the concluding observations and recommendations of the Committee against Torture, U.N. Doc. CAT/C/CHN/CO/4/Add.2 (18 December 2009)

<sup>27</sup> See, 国家赔偿案件 ‘State Compensation Cases’, China Legal Publishing House, (2005), at 2-68. Available at <[https://books.google.com/books?id=t3W\\_\\_9xJbOsC&lpg=PP1&pg=PA4#v=onepage&q&f=false](https://books.google.com/books?id=t3W__9xJbOsC&lpg=PP1&pg=PA4#v=onepage&q&f=false)> [accessed October 26, 2015].

<sup>28</sup> 余尚法与绍兴市柯桥区公安局信息公开上诉案 (2014); Yu Shangfa v. Shaoxing City Keqiao District Public Security Bureau, An Open Government Case (On Appeal) (2014).

<sup>29</sup> 原告王立新诉被告金华市市公安局江南分局公安信息公开案 (2015); Plaintiff Wang Lixin v. Defendant Jinhua City Public Security Bureau Jiangnan Division, an Open Government Information Case (2015).

## ARTICLES 1, 12 and 13

### Data on Complaints and Investigation of Torture and Ill-treatment

**38.** In addition to independent access to detainees, and access to information about laws, policies and measures relevant to torture, **access to justice when violations occur is a critical component of addressing the problem of torture.** The ability to effectively hold perpetrators accountable is fundamental both to addressing impunity for past instances of torture and to creating the disincentives necessary to prevent torture in the future. Statistical data on the number of complaints, investigations, indictments, convictions and punishments in cases related to torture are of paramount importance to assessing whether sufficient access to justice exists.

**39.** In response to questions and concerns raised by the Committee, including the lack of a definition of torture that is compatible with Article 1 of the Convention, the State Party asserts that, though it lacks a single definition of torture, torture is effectively punished by a suite of crimes. The crimes listed are:

- unlawful detention,
- extracting a confession under torture by justice system personnel,
- obtaining evidence by violence,
- abuse of prisoners by prison personnel or other persons at the direction of prison personnel,
- intentional infliction of bodily harm,
- humiliation,
- unlawful searches,
- unlawful entry into residences,
- unlawful deprivation of citizens' freedom of religious belief,
- infringement upon the customs of minorities. (State Party Response, 1)

**40.** However, in response to the Committee's repeated requests for data on the number, handling and outcome of complaints and investigations into torture (COB, 17; LOI, 22), the **State Party has consistently provided information on the indictments and convictions for only three crimes:** "torture and corporeal punishment to extort confession," "violence in collecting evidence," and "maltreatment of detainees." (Fifth Periodic Report of the State Party<sup>30</sup> ("Periodic Report"), 74; State Party Response, 22) By the State Party's own account of the crimes which punish actions amounting to torture, these three crimes fall far short of the complete data necessary to assess whether the full range of cases involving torture are punished in practice and whether this record of enforcement is in compliance with the Convention's definition of torture.

**41.** In addition, the State Party only provides information on **complaints received via a special online hotline set up by the procuratorate.** While this is an important resource and source of information, there are many other avenues through which victims of torture may raise a torture-related issue or in which instances of torture may be identified, including most notably:

- where a criminal suspect requests exclusion of evidence on the grounds of torture;

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<sup>30</sup> Fifth periodic report due in 2012, China, U.N. Doc. CAT/C/CHN/5 (20 June 2013).



- through the State Party's petitioning system;<sup>31</sup> and
- through reports by doctors following medical examinations of detainees.

**42.** To better understand whether victims of torture are able to regularly obtain access to justice, **HRIC urges the Committee to request information and clarifications regarding:**

- the total annual **number of torture-related complaints received**, from **all sources and methods**, for **each of the crimes** that the State Party has indicated cover the various aspects of the Convention's definition of torture, as well as
- the number of **investigations, indictments, convictions and punishments** meted out for each crime as a result.

## ARTICLE 14

**43.** In addition to the ability to successfully bring a complaint of torture to court, the **ability to seek and obtain adequate remedy when torture has occurred is central to ensuring full access to justice for victims**. The Committee's List of Issues requested information regarding (1) the scope of state compensation in the State Party, specifically whether it covers material and moral damages, and (2) statistical data on compensation for all categories of torture-related harm that were granted during the review period. (LOI, 29 and 30 respectively)

### *Scope of Compensation: redress for psychological harm*

**44.** Since January 1995, the Supreme People's Court has published standards for determining compensation amounts in cases of deprivation of personal liberty, providing a fixed rate for each day in which liberty was deprived.<sup>32</sup> Currently, these standards stipulate a daily rate of 219.72 *yuan* per/day.<sup>33</sup> However, there was a lack of clarity and guidelines regarding compensation for psychological harm.

**45.** Since its last review, and in line with the Committee's recommendation that it ensure adequate redress for victims including for psychological harms (2008 COB, 30), the State Party has expanded the scope of the *Law of the People's Republic of China on State Compensation (1994, Amended 2013)* ("*State Compensation Law*") to expressly include awards for psychological harm. (Periodic Report, 84; State Party Response, 29(2)). The new provision, Article 35, states:

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<sup>31</sup> China's petitioning system is an administrative system in which individuals may submit suggestions, complaints, and grievances related to official action or inaction. Petitioning is also a means by which higher level governments may be made aware of abuses by lower-level government officials, including torture. See, "'We Could Disappear At Any Time': Retaliation and Abuse Against Chinese Petitioners' (December 2005), Human Rights Watch. < <https://www.hrw.org/sites/default/files/reports/china1205wcover.pdf> > [accessed October 26, 2015].

<sup>32</sup> See, e.g. 国家赔偿标准提升 侵犯人身自由日赔近 220 元, 'State Compensation Standard is raised: Violations of personal freedom compensated at almost 220 yuan per day' (People's Daily, May 28, 2015), <<http://politics.people.com.cn/n/2015/0528/c1001-27069093.html>> [accessed October 26, 2015]; see *State Compensation Law*, at <[http://www.spp.gov.cn/sscx/201404/t20140424\\_71280.shtml](http://www.spp.gov.cn/sscx/201404/t20140424_71280.shtml)> [accessed October 26, 2015].

<sup>33</sup> 国家赔偿标准提升 侵犯人身自由日赔近 220 元, 'State Compensation Standard is raised: Violations of personal freedom compensated at almost 220 yuan per day' People's Daily, May 28, 2015 <<http://politics.people.com.cn/n/2015/0528/c1001-27069093.html>> [accessed October 26, 2015].

“Psychological harm in persons caused by acts violating the stipulations of Art. 3 or Art. 17 should be compensated for, within the extent of the effects of the violation, by means of **eliminating the impact on the victims, restoring their reputation, a formal apology**; where the consequences [of the violation] are serious, consolation **money corresponding to the psychological harm should [also] be paid** [to the victims].”<sup>34</sup>

46. This legislative amendment in 2010 was a positive step towards responding to Committee concerns that arose in the State Party’s last review regarding the inadequacy of psychological care and compensation for victims of torture. However, subsequent guidelines for psychological harm awards issued by the Supreme People’s Court raise concerns regarding the implementation of this provision for compensation for psychological harm.

47. In 2014, the Supreme People’s Court further issued an interpretation on compensation for psychological harm, emphasizing that psychological harm was now compensable under the law and should be awarded when appropriate, either through formal acts, such as apologies or retractions, or by way of monetary payment.<sup>35</sup> However, the interpretation also **set a cap on the amount of psychological compensation**, stating that it should not exceed 35 percent of the sum of compensation for deprivation of liberty, life, and health.<sup>36</sup> This approach has been echoed, in some cases providing an even more restrictive cap, by guiding cases and provincial standards as well.<sup>37</sup>

48. The impact of these guidelines may be inadequate redress for the psychological harm suffered by victims of torture. This is especially likely given the State Party’s inclusion of reputational harm, which often results in demonstrable financial losses, within the definition of psychological harm. For example, in

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<sup>34</sup> *Law of the People's Republic of China on State Compensation* 中华人民共和国国家赔偿法. Article 35, translation by Human Rights in China. Article 35 was added at the 14<sup>th</sup> Session of the Standing Committee of the 11<sup>th</sup> National People’s Congress on April 29, 2010.

<sup>35</sup> *Opinions of the Supreme People's Court on Issues concerning the Application of Mental Distress Compensation in the State Compensation Cases Heard by the Compensation Committees of the People's Courts* 最高人民法院于人民法院赔偿委员会审理国家赔偿案件适用精神损害赔偿若干问题的意见, July 31, 2014.

<<http://www.bjcourt.gov.cn/article/newsDetail.htm;jsessionid=84EC3AE1E8B111B898F99E68E36EF4DF?NIId=55000262&channel=100001011>> [accessed October 26, 2015].

<sup>36</sup> *Id.*

<sup>37</sup> The relevant standard was promulgated by the Guangdong Provincial People’s Courts, Procuratorates and Public Security Departments and was given widespread publicity: See, 广东率先明确精神赔偿细则 错捕错拘最高赔 30 万 (December 30, 2011), 'Guangdong Rates Are First Clear Detailed Rules for Compensation for Psychological Harm, Highest Rates for Wrongful Arrest and Wrongful Detention are 300,000 RMB' <<http://news.hebei.com.cn/system/2011/12/30/011638443.shtml>> [accessed October 26, 2015].

为国家赔偿进入精神领域铺平道路 (January 6, 2012), 'Paving the way for State Compensation to enter the psychological domain' <<http://epaper.legaldaily.com.cn/fzrb/content/20120106/Article07007GN.htm>> [accessed October 26, 2015]. The standards were also applied by the Supreme People’s Court’s Compensation Committee in Guiding Case No. 42 In the Case of Zhu Rongyu’s Application for State Compensation in Respect of a Wrongful Arrest 指导案例 4 2 号朱红蔚申请无罪逮捕赔偿案, <<http://tjfy.chinacourt.org/public/detail.php?id=21218>> [accessed October 26, 2015].

one case of unlawful imprisonment, **recovery fell far short of the calculated losses** for, among other things, reputational damage due to an imposed cap of 35 percent.<sup>38</sup>

49. To understand the impact of these guidelines and the imposed 35 percent cap on the amount of psychological compensation, the **Committee may wish to repeat its request for:**

- Statistical data on the number and amounts of awards for psychological harm related to torture; and
- Specific information on awards limited by the cap.

*Inadequate data provided to understand compensation in torture cases*

50. As with the information regarding complaints and investigations of torture, the **information provided by the State Party regarding state compensation cases related to torture is incomplete and inadequate** to assess whether victims of torture have proper redress and access to justice.

51. In its List of Issues, the Committee asked the State Party to provide “the number of applications lodged for State compensation for torture and abuse in places of detention,” as well as the “range of awards for successful cases (LOI, 30).

52. In its reply, the State Party stated that there were **12 cases “accepted by courts** in which criminal compensation was sought for death or injury resulting from torture” (State Party Response, 30). However, this figure is limited in two significant ways. First, it **relates only to the number of cases accepted by courts** and fails to address the overall number of applications lodged for state compensation for torture as requested by the Committee. Second, it **covers only one of ten compensable categories** of official action relevant to torture, cruel, inhuman, and degrading treatment. The remaining categories, described in Articles 3 and 17 of the *State Compensation Law*, relate to both administrative and criminal functions, and cover issues constituting torture such as unlawful detention, unlawfully using weapons or police restraint implements, and causing bodily injury or death by battery or maltreatment. An English translation of the full text of Articles 3 and 17 is provided in Annex B.

53. To understand and evaluate the scope, adequacy, and effectiveness of redress afforded through compensation claims and awards, the **Committee may wish to request additional information and clarifications regarding:**

- Number of applications made on the basis of all provisions in Articles 3 and 17 of the *State Compensation Law* during the reporting period.
- Number of these complaints that resulted in compensation and the average as well as aggregate amount of compensation awarded for these cases.
- Criteria or guidelines used by the procuratorate to determine which compensations cases need to be brought before the courts.

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<sup>38</sup> See: 颜栋云再审无罪赔偿一案国家赔偿决定书, 江苏省泰州市中级人民法院 国家赔偿决定书 (2015), <[http://www.court.gov.cn/zgcpwsw/jiangsu/jsstzsjrmfy/xz/201506/t20150602\\_8372011.htm](http://www.court.gov.cn/zgcpwsw/jiangsu/jsstzsjrmfy/xz/201506/t20150602_8372011.htm)> [accessed October 26, 2015]; State Compensation Decision for the Retrial of the Case of Yan Dongyun, Jiangsu Province, Taizhou City Intermediate People's Court State Compensation Decision (2015); see also 男子坐牢 11 年无罪释放获赔 82 万国家赔偿 (2011) Innocent Man Imprisoned for 11 Years Gets 820,000 in State Compensation (2012), Hebei News Online, November 1, 2012. <[http://news.hbfzb.com/2012/daanyaoran\\_1101/25072.html](http://news.hbfzb.com/2012/daanyaoran_1101/25072.html)> [accessed October 26, 2015].

- Number of these applications that were heard by courts and the outcomes of such cases.

## ARTICLE 15

### **Exclusion of Evidence and Confessions Extracted through Torture (“the Exclusionary Rule”)**

54. In addition to providing compensation to the victims of torture, **another important penalty that helps ensure access to justice is the exclusionary rule.** In its 2008 Concluding Observations (COB, 11(d)), the Committee requested that the State Party enact such a rule. The State Party has made progress in this respect introducing a form of the exclusionary rule in 2010.<sup>39</sup> As its 2014 report further indicates (Periodic Report, 16), the State Party conducted significant legislative revisions in 2012 which codified the exclusionary rule into Articles 54-58 of the *Criminal Procedure Law*.<sup>40</sup>

55. To better understand the implementation of this new rule, the Committee further asked the State Party to identify steps taken to ensure that in practice (LOI, 31):

- Criminal convictions are based on evidence other than the confession of the detainee; and
- Procurators and judges are not unjustifiably refusing requests to exclude illegally obtained evidence.

56. The Committee also asked for information regarding specific cases, disaggregated statistical data and legal or other guidelines on audio-visual recording and use of medical personnel in respect of the above aims (LOI, 31-33).

57. In its response, the State Party did not provide the majority of the requested information, providing instead a list of **five “representative” cases**, all of which resulted in the exclusion of evidence (State Party Response, 31). HRIC has compared these cases to a random sample of other publicly available cases involving the exclusionary rule.<sup>41</sup> Our analysis raises concerns that, when viewed in a broader context of cases, the five **cases provided in State Party’s response do not appear representative of:**

- the **status and operation of the exclusionary rule** in courts; and
- the actual **use of audio-visual records** by public security organs.

58. Furthermore, HRIC’s sample cases included **concerning instances in which medical evidence was used to deny exclusion** of evidence on the grounds that no external wounds were apparent.

59. These issues and concerns are discussed in greater detail below.

#### *The Status and Operation of the Exclusionary Rule in Courts*

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<sup>39</sup> See, e.g., the *Rules Concerning Questions about Exclusion of Illegal Evidence in Handling Criminal Cases* Translation by Chinalawinfo Co., Ltd., Peking University Center for Legal Information.

<sup>40</sup> See both the Committee’s List of Issues and reports of the State Party, (at Q. 31).

<sup>41</sup> Cases were pulled from the following database: <<http://www.court.gov.cn/wenshu.html>> [accessed October 26, 2015].

60. The establishment of a nationwide online database of court decisions initiated by the Supreme People's Court in 2013 provides useful data to examine aspects of the representative cases described in the State Party's report. A search of this online database for the specific phrase for torture (*xingxun bigong*) articulated in Article 54, which contains the exclusionary rule, yields close to **6,000 results** for the period January 1, 2014 to October 21, 2015. In early 2015, HRIC examined the first 124 search results for cases containing this phrase for torture in the database.

61. In contrast to the representative cases provided by the State Party, in the sample collected by HRIC there were only **three cases out of 124** in which a confession or evidence was excluded or withdrawn on the basis that torture had been used.

62. In the HRIC sample, courts rarely discussed the exclusionary rule in detail. Where they did so, courts concluded that torture had not occurred because:

- Investigators' use of interrogation while **depriving a detainee of sleep was not unlawful** under the *Criminal Procedure Law* and was not torture.<sup>42</sup>
- Interrogation records showed that **defendants had been asked during interrogation whether they had been tortured** and had responded that they had not been.<sup>43</sup>
- **Defendants had failed to provide sufficient evidence** proving the place and time (and in some cases, "the manner") that they had been tortured.<sup>44</sup>
- Investigators had produced a "**Case Handling Statement**" (*ban'an shuoming*), which **showed that torture had not occurred**.<sup>45</sup>

63. These examples reveal systemic problems in courts' application of the exclusionary rule, including lack of a legal definition in Chinese law and inappropriate allocation of procedural burdens of

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<sup>42</sup> 朱云方受贿罪，朱云方玩忽职守罪一审刑事判决书，台州市黄岩区人民法院 (2014); First Instance Decision in the Criminal Case of Zhu Yunfang for the Crime of Bribery and the Crime of Dereliction of Duty in Office, Taizhou City, Huangyan District People's Court (2014).

<sup>43</sup> 被告人肖某甲、游某甲、肖某乙犯非法采矿罪、被告人肖振城犯非法储存爆炸物罪一审刑事判决书，福建省尤溪县人民法院 (2014). First Instance Decision in the Criminal Case of Defendants Xiao X1, You X1 and Xiao X2 for the Crime of Illegal Mining, and Defendant Xiao Zhencheng for the Crime of Illegally Storing Explosives, Fujian Province Youxi County People's Court (2014); 蒋伟良与李丹赠与合同纠纷民事判决书，湖南省岳阳市岳阳楼区人民法院 (2014); Civil Judgment in a Contract Dispute between Jiang Weiliang and Li Danzeng, Yueyang City, Hunan Province Yueyang Tower District People's Court (2014) [Although a civil case, the court was nonetheless interested in determining whether a piece of evidence was obtained under torture by public security authorities].

<sup>44</sup> 高某、许某抢夺罪、熊某掩饰隐瞒犯罪所得罪一审刑事判决书，江西省德兴市人民法院 (2015); First Instance Decision in the Criminal Cases of Gao X and Xu X for the Crime of Robbery and Xiong X for the Crime of Disguising and Concealing the Proceeds of a Crime, Jiangxi Province Dexing City People's Court (2015) 杨木山、张正伟等盗窃罪二审刑事裁定书，江苏省淮安市中级人民法院 (2015); Second Instance Ruling in the Criminal Case of Yang Mushan and Zhang Zhengwei et al for the Crime of Theft, Jiangsu Province, Huai'an City Intermediate People's Court (2015). *Criminal Procedure Law of The People's Republic of China*, translated by Jianfu Chen, in Chen, Jianfu & Ke, Suiwa *Criminal Law and Criminal Procedure Law in the People's Republic of China: Commentary and Legislation* (2013, Martinus Nijhoff), at 275, see art. 56 which states '[a]n application for exclusion of illegally collected evidence shall include relevant information or materials'.

<sup>45</sup> 张某犯盗窃罪一审刑事判决书，四川省苍溪县人民法院 (2015); First Instance Decision in the Criminal Case of Zhang X for the Crime of Theft, Sichuan Province, Cangxi County People's Court (2015).

proof. The impact of these problems was seen in the cases HRIC examined from its random dataset, including that:

- Courts may at times **misunderstand the definition of torture** as set forth in Article 1 of the Convention;
- Courts place a **high evidentiary burden on defendants** who argue for the exclusion of evidence based on torture (i.e. requirements to show place, time and sometimes manner of the torture) and a correspondingly **low burden for state organs to deny that it has occurred** (i.e. accepting a 'statement' or unspecified 'information' from public security organs or detention centers); and
- Courts are **relying upon "statements" by state organs** to find that torture has not occurred, despite the conflicts of interest inherent in this evidence.

64. Taken together, the cases demonstrated a clear need for more effective guidelines and judicial training for application of the exclusionary rule in conformity with Article 1 of the Convention.

65. In light of the above, the **Committee may wish to ask for additional information and clarifications regarding:**

- Guidelines for determining the amount or type of evidence that would be sufficient to rule out torture;
- Guidelines specifically for the interpretation of Article 56's requirement that "[a]n application for exclusion of illegally collected evidence shall include *relevant information or materials*" (emphasis added);
- Statistics on the use of audio-visual records of proceedings in interrogation rooms; and
- Statistics on cases lodged against law enforcement or other officials as a result of audio-visual recordings and the outcomes of such cases.

### *Selective Use of Audio-Visual Records in Interrogation*

66. In response to the Committee's questions on the use of audio-visual records in interrogation rooms, the State Party further highlights its comprehensive implementation of a system of contemporaneous audio-visual records of interrogations. Specifically, the State Party emphasizes that it has created a uniform requirement for video surveillance in all "areas where cases are handled" (*ban'an qu*) and that it has carried out renovations to achieve this in the "vast majority of regions," resulting in an "electronic eye" overseeing police conduct (State Party Response, 32).

67. However, audio-visual records of interrogations are not mandatory. Article 121 of the *Criminal Procedure Law* states:

"[w]hen interrogating a criminal suspect, the investigatory personnel *may* (*keyi*) make an audio-visual record of the interrogation process." (emphasis added)

68. Audio-visual records are only required for crimes punishable by life imprisonment, or death, or which are "serious."<sup>46</sup>

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<sup>46</sup> *Criminal Procedure Law of The People's Republic of China*, translated by Jianfu Chen, in Chen, Jianfu & Ke, Suiwa *Criminal Law and Criminal Procedure Law in the People's Republic of China: Commentary and Legislation* (2013, Martinus Nijhoff), at 295.

69. This opens the way for audio-visual records to be used selectively, weakening its use as an effective measure to document or prevent torture. For example, in one particularly egregious instance (the case of *Z and 4 others versus Xichuan County Public Security Bureau – A Notification of Dismissal of Appeal in Relation to A State Compensation Case* (2015))<sup>47</sup> the audio-visual materials relied upon to find that no torture had occurred were highly misleading. These materials were recorded beginning at the time in which the deceased had already lost consciousness and ended at the point at which he was transferred to the hospital. In another case, the defendant stated that the recording of the interrogation was created after he had been beaten up by police, and yet the court relied upon the recording as part of its reasoning to deny that torture had occurred.<sup>48</sup>

70. As noted above, the cases in HRIC's sample dataset suggest that audio-visual records of interrogations are heavily relied upon by courts to *exclude* the possibility of torture, often with little more than a cursory reference to their existence or content, followed by a conclusory statement that they negate claims by the defendant that evidence was obtained unlawfully.<sup>49</sup> Given the centrality of video evidence to

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<sup>47</sup> Z 等四人与浙川县公安局违法拘 Z 等四人与浙川县公安局违法拘 留赔偿案驳回申诉通知书 (2015); *Z and 4 others versus Xichuan County Public Security Bureau Notification of Dismissal of Appeal in Relation to State Compensation Case* available at: [http://www.hrichina.org/sites/default/files/un\\_international\\_day\\_in\\_support\\_of\\_victims\\_of\\_torture\\_-\\_hric\\_case\\_highlight\\_-\\_z\\_and\\_4\\_others\\_v.\\_xichuan\\_county\\_public\\_security\\_bureau.pdf](http://www.hrichina.org/sites/default/files/un_international_day_in_support_of_victims_of_torture_-_hric_case_highlight_-_z_and_4_others_v._xichuan_county_public_security_bureau.pdf) [accessed October 26, 2015].

<sup>48</sup> 尹某某破坏生产经营一审刑事判决书, 福建省闽清县人民法院 (2015). First Instance Decision in the Criminal Case of Yin XX for the Crime of Sabotaging Production and Business Operations, Fujian Province, Mingqing County People's Court (2015).

<sup>49</sup> See, e.g. 张某某盗窃案刑事判决书, 湖南省辰溪县人民法院 (2015); Decision in the Criminal Case of Zhang XX for the Crime of Theft, Hunan Province Chenxi County People's Court (2015); 秦贤海抢劫刑事判决书, 湖南省辰溪县人民法院 (2014); Decision in the Criminal Case of Qin Xianhai for the Crime of Robbery, Hunan Province Chenxi County People's Court (2014); 谢某某犯受贿罪一审刑事判决书, 湖南省宁乡县人民法院 (2014); First Instance Decision in the Criminal Case of Xie XX for the Crime of Bribery, Hunan Province Ningxiang County People's Court (2014); 李某某盗窃一审刑事判决书内蒙古鄂尔多斯市东胜区人民法院 (2014); First Instance Decision in the Criminal Case of Li XX for Theft, Inner Mongolia, Ordos City, Dongsheng District People's Court (2014); 东刑二初字第 384 号, 内蒙古鄂尔多斯市东胜区人民法院 (2014); Decision No. 384, Inner Mongolia, Ordos City, Dongsheng District People's Court (2014); 李某甲、陈某某、李某、吴某抢劫罪一案一审刑事判决书, 陕西省洛川县人民法院 (2015); First Instance Decision in the First Criminal Case of Li X1, Chen XX, Li X and Wu X for the Crime of Robbery, Shaanxi Province Luochuan County People's Court (2015); 被告人李某甲、李某乙犯盗窃罪一审刑事判决书, 湖南省永顺县人民法院 (2015); First Instance Decision in the Criminal Case of Li X1 and Li X2, Hunan Province Yongshun County People's Court (2015); 被告人刘祥兵、吕有宝、朱存立、张宝国合同诈骗罪一审刑事判决书, 南京市雨花台区人民法院 (2015); First Instance Decision in the Criminal Case of Liu Xiangbing, Lü Youbao, Zhu Cunli, Zhang Baoguo, for the Crime of Contract Fraud, Nanjing City, Yuhuatai District People's Court (2015); 张某某诈骗一案一审刑事判决书, 陕西省洛川县人民法院 (2015); First Instance Decision in the Criminal Case of Zhang XX for the Crime of Fraud, Shaanxi Province, Luochuan County People's Court (2015); 被告人李小龙故意杀人一案一审刑事判决书, 湖南省永州市中级人民法院 (2014); First Instance Decision in the Criminal Case of Li Xiaohu for the Crime of Intentional Homicide, Hunan Province, Yongzhou City Intermediate People's Court (2014); 朱王江故意杀人罪一审刑事判决书, 浙江省诸暨市人民法院 (2014); First Instance Decision in the Criminal Case of Zhu Wangjiang for the Crime of Intentional Homicide, Zhejiang Province, Zhuji City People's Court (2014); 温州市 XX 啤酒有限公司、孙建新非法吸收公众存款罪一审刑事判决书, 徐某犯敲诈勒索罪一审刑事判决书, 杭州市余杭区人民法院 (2015). First Instance Decision in the Criminal Case of

judicial discussion of torture claims, its non-mandatory nature, and the concerning reliance on its selective use to deny torture claims, **HRIC urges the Committee to request additional information and clarifications regarding:**

- Crimes considered “serious” under Chinese law, including the *Criminal Procedure Law*;
- Definition of “the interrogation process” or the “record of the interrogation” for the purposes of the *Criminal Procedure Law*; and
- Clarification of the phrase “case handling area” as described in the State Party’s response.<sup>50</sup>

### *Emphasis on External Injuries in Assessing Medical Evidence*

71. Lastly, in its response, the State Party pointed out that, in cases where the exclusionary rule is invoked, either party may proffer the evidence of a medical expert (State Party Response, 31). In HRIC’s sample, courts repeatedly relied upon medical evidence, amongst other things, to *dismiss* the possibility that torture had been used in obtaining a confession.<sup>51</sup> Court reasoning in these cases regularly invoked the use of “physicals” or physical exams upon entry into/exit from detention centers (*rusuo/chusuo tijian*), but did not elaborate on how these records disproved torture.<sup>52</sup> Court judgments among HRIC’s sample that did

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Wenzhou XX Beer Co. and Sun Jianxin for the Crime of Illegal Fund Raising from the Public and First Instance Decision in the Criminal Case of Xu X for the Crime of Extortion and Blackmail, Hangzhou City, Yuhang District People's Court (2015).

<sup>50</sup> 最高人民检察院关于印发《人民检察院讯问职务犯罪嫌疑人实行全程同步录音录像的规定》的通知 (2014). People's Procuratorates Regulations Concerning Audio-Visual Recording of the Entire Interrogation Process of Persons Suspected of Committing Crimes of Abuse of Public Office (2014).

<sup>51</sup> See, e.g. 原审被告人刘东星犯行贿罪一案二审刑事裁定书, 河南省安阳市中级人民法院 (2015); Criminal Ruling in the Second Instance Trial of Defendant from the Original Trial Liu Dongxing for the Crime of Bribery, Henan Province, Anyang City Intermediate People's Court (2015); 徐克强等人贩卖毒品、非法持有枪支、容留他人吸毒案二审裁定书, 黑龙江省高级人民法院 (2015); Second Instance Ruling in the Case of Xu Keqiang et al for the Crimes of Drug Trafficking, Unlawful Possession of Firearms, and Harboring Drug Users, Heilongjiang Province Higher Level People's Court (2015); 潘志波掩饰、隐瞒犯罪所得、犯罪所得收益罪一审刑事判决书, 广东省江门市新会区人民法院 (2015); First Instance Decision in the Criminal Case of Pan Zhibo for the Crime of Disguising or Concealing the Proceeds of Crime, Guangdong Province, Jiangmen City Xinhui District People's Court (2015); 李某甲、唐遥走私、贩卖、运输、制造毒品罪二审刑事裁定书, 浙江省温州市中级人民法院 (2015); Second Instance Ruling in the Criminal Case of Li XX and Tang Yao for the Crimes of Smuggling, Trafficking, Transporting and Manufacturing of Drugs, Wenzhou City Intermediate People's Court, Zhejiang Province (2015); 黄蒙、管某盗窃罪一审刑事判决书, 台州市黄岩区人民法院 (2015); First Instance Decision in the Criminal Case of Huang Meng and Guan X for the Crime of Theft, Taizhou City, Huangyan District People's Court (2015); 被告人周柳安犯贩卖毒品罪一审刑事判决书, 广西壮族自治区上林县人民法院 (2014); First Instance Decision in the Criminal Case of Zhou Liu'an, Guangxi Zhuang Autonomous Region, Shanglin County People's Court (2014); 何善坪、凌建辉、吴海静、蓝冬明、吴志明故意伤害罪一审刑事判决书, 广东省佛山市三水区人民法院 (2014). First Instance Decision in the Criminal Case of He Shanping, Ling Jianhui, Wu Haijing, Lan Dongming, Wu Zhiming for the Crime of Intentional Infliction of Bodily Harm, Foshan City, Guangdong Province Sanshui District People's Court (2014).

<sup>52</sup> In one case, the court combined physical examination evidence, with selective interrogation records, and selective information from public security to rule out torture:

1. A physical examination record for the defendant at the time of entry into custody at the detention center found no signs of external injury or obvious abnormalities;
2. a particular video of the interrogation process and information provided by public security investigators make it clear that during the process of interrogating defendant no torture was engaged in



provide a more detailed discussion included troubling statements relying on **external physical injury as a key indicator that torture had occurred**. For example:

- In one case, a “Statement of Work” produced by the public security organs and a “Detainee Health Record” showing “no external injuries” were sufficient to prove no torture had occurred.<sup>53</sup>
- In another case, in which defendants alleged torture, an absence of “external physical injuries” in detainee health records made during entry and exit from the detention center were sufficient.<sup>54</sup>

**72.** The emphasis on an absence of “external physical injuries” raises concerns that judges may not be properly trained in understanding the full scope of activities which constitute torture under the Convention. Medical checks may also not be sufficiently detailed or may for other reasons fail to capture forms of torture that occur by means other than through direct physical injuries (e.g., use of implements such as phone books to inflict internal physical harm without external manifestations and the use of psychological abuse to extract information).

**73.** In light of the issues revealed in these sample cases, the **Committee may wish to ask for additional information and clarifications regarding:**

- Measures or steps taken to ensure judicial training and follow-up to training sessions to facilitate understanding and identification of the various activities which constitute torture under the Convention; and
- Guidelines regarding the use of medical evidence in exclusion cases, including any guidelines for how health checks of persons exiting and entering detention should be conducted.

## CONCLUSION

**74.** The Committee’s review of China’s implementation of its obligations under the Convention comes at an important time of both broadening police power and expanding laws and policies related to the criminal justice system. With rights defenders and lawyers under intensified repression, improving the independent monitoring of detainees, access to information regarding the criminal justice process, and access to justice when torture occurs is more important than ever. HRIC looks forward to a rigorous and constructive review.

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3. a Certificate from the public security bureau proved that among the police, civilian and auxiliary personnel it employed, there was no person with the name whom the defendant said had been his torturer.

See: 董小明等人故意杀人、聚众斗殴一审刑事判决书, 广西壮族自治区贺州市中级人民法院 (2014); First Instance Decision in the Criminal Case of Dong Xiaoming et al for the Crimes of Intentional Homicide and Gathering A Crowd for An Affray, Guangxi Zhuang Autonomous Region, Hezhou City Intermediate People’s Court (2014).

<sup>53</sup>徐克强等人贩卖毒品、非法持有枪支、容留他人吸毒案二审裁定书, 黑龙江省高级人民法院 (2015); Second Instance Ruling in the Case of Xu Keqiang et al for the Crimes of Drug Trafficking, Unlawful Possession of Firearms, and Harboring Drug Users, Heilongjiang Province Higher Level People’s Court (2015).

<sup>54</sup>被告人吕某元、李某、卢某月抢劫案一审刑事判决书, 广西壮族自治区桂林市七星区人民法院 (2014); First Instance Decision in the Criminal Case of Defendant Lü Xyuan and Li X, Lu Xyue for the Crime of Robbery, Guangxi Zhuang Autonomous Region, Guilin City Qixing District People’s Court (2014). The Court also made the curious observation that ‘[t]he [Crime] Squad did not engage in torture of the defendants, the staircase in the building for this Squad has persons frequently coming and going within it, and moreover does not possess the facilities for hanging somebody up and beating them.’