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Denmark

Draft resolution

Torture and other cruel, inhuman or degrading treatment or punishment: The role and responsibility of physicians and other health personnel

The Human Rights Council,

Recalling all resolutions on torture and other cruel, inhuman or degrading treatment or punishment and on forensic science adopted by the General Assembly, the Commission on Human Rights and the Human Rights Council as well as 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
(UN GA resolution 37/194 of 18 December 1982)

Reaffirming that no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment,
(UN GA res 63/166.1 PP1)

Recalling that freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance, and that the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment is affirmed in relevant international instruments,
(UN GA res 63/166 PP2)

Recalling the obligation to practice for the good of the patients and never do harm pursuant to the Hippocratic Oath;
(New)

- ***Comment 1**: The Hippocratic Oath is an oath traditionally taken by physicians pertaining to the ethical practice of medicine. Although mostly of historical and traditional value, the oath is considered a rite of passage for practitioners of medicine, although it is not obligatory and no longer taken up by all physicians.*

- ***Comment 2****: The Hippocratic Oath has been updated by the Declaration of Geneva (International Code of Medical Ethics) adopted by the General Assembly of the World Medical Association (WMA) in 1948 and amended in 1968, 1984, 1994, 2005 and 2006, available at:* [*http://www.wma.net/e/policy/c8.htm*](http://www.wma.net/e/policy/c8.htm)

  The Declaration of Geneva is an affirmation of ethical medicine agreed at the second general assembly of the World Medical Association in 1948. It was drawn up in the aftermath of the Nuremberg trials of Nazi war criminals in 1947, which included the prosecution of several physicians. The declaration was fashioned in conscious opposition to such abuses, as a reaffirmation of the intrinsic ethic of the medical profession. It was 'a revision of the ancient Hippocratic Oath', which sought to restate the moral truths of the ancient oath in a form that could be understood and accepted in the twentieth century. In context and approach it was thus similar to the Universal Declaration of Human Rights, also adopted in 1948.

- ***Comment 3****: Please note that other health professions have similar codes, such as "The ICN Code of Ethics for Nurses", adopted by the International Council of Nurses in 1953 and revised at various times since, most recently in 2005, available at:* [*http://www.icn.ch/ethics.htm*](http://www.icn.ch/ethics.htm)

- ***Comment 4:*** *The current wording of PP4 seeks to capture all health personnel by not making specific reference to "physicians". However, it may rightly be argued that only physicians are bound by the Hippocratic Oath (and its updated versions). The Danish Nurses Organization (Dansk Sygeplejeråd) has pointed out that by referring exclusively to the Hippocratic Oath one provides a too narrow focus on physicians, missing out on other health profession's ethical codes. Apart from the nurses, this would also go for the psychologists.*

  An alternative formulation could be: "Recalling the obligation of physicians and other health personnel to practice for the good of their patients and never do harm pursuant to the respective International Codes of Ethics".

1.*Condemns* all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
(UN GA res. 63/166 OP1)

2. *Emphasizes* that it is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment;
(a) (A/RES/37/194 – Annex 1 ("Principle of Medical Ethics"), Principle 2)

- ***Comment 1***: *This provision is based on the recognition that health personnel, particularly physicians, charged with the medical care of prisoners and detainees, have a duty to provide them with protection of their physical and mental health, cf. the Principles of Medical Ethics, Principle 1.*

- ***Comment 2***: *To illustrate the magnitude of physicians' participation in torture one may refer to Steven H. Miles, author of "Oath Betrayed"(Random House 2006:24) according to whom between 20% and 50% of torture survivors report "… seeing physicians serving as active accomplices during the abuse".*

- ***Comment 3***:*Reasons why doctors become involved in torture (cf. Amnesty International in "Doctors and Torture",2002):*

  - *Bureaucratic necessity/dual loyalty: Some doctors work within a bureaucratic structure in which their loyalty to their employer is both assumed and expected. Doctors may not feel comfortable with their involvement in torture, but at the same time they may find it difficult to oppose their employers.*

  - *Persuasion: Some doctors are persuaded to get involved in torture. The persuasion can take various forms, but is often made effective by linking torture with grandiose objectives, such as preserving national security.*

  - *Pressure and threats: Doctors may come under pressure to assist in torture procedures. The pressure may involve interference in their work, persistent intimidation and threats of dismissal or intimidation of family members*

  - *Workplace pressures: Doctors working in prisons and detention centres appear more susceptible and vulnerable to persuasion, pressure and threat, and are thus more likely to slide into participating in torture.*

  - *Lack of awareness of medical ethics: In some cases, the involvement of doctors in torture is simply the result of their inadequate awareness of medical ethics.*

- ***Comment 4***: *A major factor for the medical professional to comply with passive participation in torture is dual loyalty, which can be defined as "a clinical role conflict between professional duties to a patient and perceived or real obligations to the interest of a third party, and focuses on instances where the human rights are in jeopardy", cf. Physicians for Human Rights, 2002.*

- ***Comment 5***:*Examples of physicians and other health personnel's involvement in torture:*

  - *Before torture*

- *Examination of a detainee or prisoner's capacity to withstand torture(the form of torture and the degree of torture)*
- *Treatment of a detainee or prisoner, which results in the prisoner being ready for torture or more cooperative in torture.*

- *During torture:*
    - *Examination of a detainee or prisoner's capacity to withstand further torture (i.e. to continue the torture session)*
    - *Treatment of a detainee or prisoner with the intention of preparing the prisoner for more torture.*
    - *Direct participation: Being present at, supervising or inflicting maltreatment.*
    - *Indirect participation: Where the knowledge physicians have of anatomy and physiology is used to create painful torture methods that leave no physical signs or which minimizes the mortality rate*

- *After torture:*
    - *Failure by the physician to report torture in cases where he suspects that the detainee or prisoner has been subjected to torture*
    - *Falsification of medical journals, autopsy reports or death certificates (e.g. stating that the person died of natural causes or purposely omitting information on the cause of death).*

3.*Stresses* that physicians and other health personnel have a duty and professional responsibility to provide competent medical service in full professional and moral independence, with compassion and respect for human dignity, and they shall always bear in mind the obligation to respect human life and act in the patient's best interest; *(Inspired by WMA, International Code of Medical Ethics, 2006, paras 4, 13 and 14)*

- ***Comment 1**: It follows from the WMA International Code of Medical Ethics that a physician shall always exercise his/her independent professional judgment and maintain the highest standards of professional conduct (cf. principle 1).*

- ***Comment 2**: It is a contravention of medical ethics for health personnel, particularly physicians, to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees […], cf. Principles of Medical Ethics, principle 4.*

- ***Comment 3**: The issue of independence is crucial. The dilemma of dual loyalty is often present in a prison/detention setting, where the prison doctor experiences a conflict between the professional duties to a patient and perceived or real obligations to the director of the prison/detention centre. However, the doctor must insist on being free to act in the patient's interest, regardless of other considerations, including instructions of employers, prison authorities, etc.*

A way of decreasing the dual loyalty dilemma is to ensure the institutional independence of the prison doctor, i.e. ensuring that the prison doctor is accountable to the Ministry of Health and not to the Prison Governor/MOI. This could be enhanced by independent oversight and supervision by the MOH.

4. *Emphasizes* that States must take persistent, determined and effective measures to prevent and combat torture and other cruel, inhuman or degrading treatment or punishment, and stresses that all acts of torture must be made offences under domestic criminal law;

(UN GA res. 63/166 OP2)
5. *Affirms* that all physicians and other health personnel shall report or denounce acts of torture or cruel, inhuman or degrading treatment of which they are aware to relevant medical, judicial, national or international authorities as appropriate;
(Inspired by WMA Resolution on the Responsibility of Physicians in the Documentation and Denunciation of Acts of Torture or Cruel, Inhuman or Degrading treatment, 2007)

- Comment 1: If possible, the physician or other health personnel should report acts of torture, etc. to the relevant national authorities for a prompt and impartial investigation. However, in countries with widespread torture there may not be any recourse to an independent investigation and/or prosecution. Therefore, the present provision puts an obligation on physicians, etc. to report acts of torture to alternative national or international authorities. These may be the National Medical Association, the UN Committee against Torture, the UN Human Rights Committee, etc.

- Comment 2: Please be informed that in some cases, two ethical obligations are in conflict. International codes and ethical principles require the reporting of acts of torture to a responsible body. In some jurisdictions, this is also a legal requirement. In some cases, however, patients may refuse to give consent to being examined for such purposes or to having the information gained from examination disclosed to others. They may be fearful of the risk of reprisals for themselves or their families. In such situations, health professionals have dual responsibilities: to the patient and to society at large, which have an interest in ensuring that justice is done and perpetrators are brought to justice. The fundamental principle of avoiding harm must feature prominently in consideration of such dilemma. Health professionals should seek solutions that promote justice without breaching the individual's right to confidentiality. Cf. the Istanbul Protocol, 2001, pt. 68, page 15.

6.*Stresses* that all allegations of torture and other cruel, inhuman or degrading treatment or punishment must be promptly and impartially examined by the competent domestic authority, including forensic experts and other relevant medical personnel, that those who encourage, order, tolerate or perpetrate such acts must be held responsible, brought to justice and punished commensurate with the severity of the offence, calls upon states to establish investigation and documentation procedures accordingly, and takes note of

the Principles of Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) as a useful tool in this respect;
(UN GA res 63/166.1 OP6 and 7 amended)

7. *Emphasizes* that an order or instruction from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment;
(Inspired by article 2(3) of the Convention)

8.*Stresses* that States must not punish or otherwise intimidate physicians and other health personnel for not obeying orders or instructions to commit or conceal acts amounting to torture or other cruel, inhuman or degrading treatment or punishment or for speaking out against it;
(UN GA A/RES/61/153 OP 8 amended)

9. *Calls upon* all states to ensure that all persons deprived of their liberty have

a. access to professional medical examination at their admission or transfer from another institution and thereafter regularly and upon request;

b. professional medical treatment of any disease of the same quality and standard as is afforded to persons not deprived of their liberty
(Ref. ECOSOC res 663 C (XXIV) and 2076 (LXII) principle 24 GA res 43/173principle 24 amended)

- **Comment 1**: Access to a professional medical examination upon the detainee or prisoner's admission to prison is absolutely crucial in order to detect whether or not s/he has been subjected to torture in his previous place of custody. Quite often detainees and prisoners, who have been subjected to torture or CIDT, are "shifted around" between different place of detention so as to shield the whereabouts and the evidence of torture from the detainee's lawyer, family and the outside world. A prompt medical examination upon transfer from one places of detention to another is therefore also instrumental in detecting acts of torture. By providing a medical examination in the above-mentioned instances, one increases the likelihood of detecting acts of torture and CIDT and this may, in turn, have a preventive effect.

- **Comment 2**: It is a basic principle that detainees and prisoners should have access to treatment of disease of the same quality and standard as is afforded to those who are not imprisoned, cf. UN Principles of Medical Ethics, principle 1.

10. *Recognizes* that forensic investigation can play an important role in combating impunity by providing the evidentiary basis on which prosecutions can successfully be brought against persons responsible for violations of human rights and international humanitarian law and encourages further coordination concerning, *inter alia,* the

planning and realization of such investigations, as well as the protection of forensic and related experts, between Governments, intergovernmental organizations and non-governmental organizations;
(HRC res 2005/26 PP 4 merged with CHR res /2003/33 OP 1);

11. *Calls upon* all States to ensure that education and information regarding the prohibition against torture are fully included in the training of medical and other health personnel, particularly personnel who is involved in the custody, interrogation and treatment of any individual subjected to any form of arrest, detention or imprisonment;
(UN GA A/RES/56/143 OP 9)

12. *Welcomes* the establishment of independent national preventive mechanisms to prevent torture, with the participation of relevant physicians and other professional personnel, encourages all States that have not yet done so to establish such mechanisms and calls upon States parties to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to fulfil their obligation to designate or establish a truly independent and effective preventive mechanism;
(UNGA res 63/163 OP3 amended)

- **Comment 1**: The OPCAT states that the National Preventive Mechanisms should have "the required capabilities and professional knowledge", cf. article 18 (2). The UN Subcommittee on the Prevention of Torture has not yet provided an interpretation of what this entails, cf. SPT Annual Report, 2008 (CAT/C/40/2 of 14 May 2008).

  The UN Special Rapporteur on Torture has stated that it is "of the utmost importance that States Parties … ensure membership from different professions" cf. UNSRT report 2006 to the UNGA, A/61/259, para. 70.

  The European Committee for the Prevention of Torture (CPT) has stated that:

  > *"The experience of the CPT's first year of activity has shown that although lawyers and experts in human rights constitute an indispensable component of the CPT, persons coming from other professions, and in particular medical doctors and experts in penitentiary systems, play a decisive role in the Committee's operation, especially in the course of visits."* [1]

  According to the APT guide on National Preventive Mechanisms (NPM) a mix of capabilities and professional backgrounds should be included, notably: doctors, including forensic specialists, psychologists and psychiatrists, cf. APT guide on establishment and designation of national preventive mechanisms (2006) p. 50

- **Comment 2**: The role of physicians and other health personnel in the National Preventive Mechanism (NPM) is to assess the treatment of the detainees and the

[1] 1st General Report on the CPT's activities covering the period November 1989 to December 1990. paras 87-88.

conditions of detention in order provide a basis for dialogue aimed at preventing future acts of ill treatment and at improving the conditions of detention. More specifically the specific role of the physicians and other health personnel is:

- Analysis of all conditions of detention with a “health” component
- Identification and documentation of cases of torture and CIDT
- Evaluation of the general health care services in the places of detention

13. *Requests* the Special Rapporteur on Torture and other relevant Special Procedures and invites relevant treaty bodies:

a. To remain vigilant with regard to physicians and other health personnel’s active or passive participation in torture and other cruel, inhuman or degrading treatment or punishment and to their functional independence of the institution in which they serve;
b. To respond effectively to credible and reliable information submitted to their attention regarding alleged cases of the – active or passive - participation of physicians and other health personnel in torture and other cruel, inhuman or degrading treatment or punishment
c. To consider including in their reports to the Human Rights Council information on the problem of physicians and other health personnel’s participation in torture and other cruel, inhuman or degrading treatment or punishment

and States to cooperate fully and in good faith with the Special Procedures

14. *Welcomes* the report of the Special Rapporteur (A/HRC 10/44)) and the recommendations contained therein and requests the Special Rapporteur to look further into the human rights aspects of drug policies.