

**ADVOCATES' GUIDE:
RIGHTS VIOLATIONS IN THE CRIMINAL PROSECUTIONS
OF KOSOVAR ALBANIANS IN SERBIA**

October 2000

Lawyers Committee for Human Rights

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Lawyers Committee for Human Rights

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This guide was prepared by Lisa J. Laplante, Furman Fellow with the Lawyers Committee, in collaboration with attorneys Marko C. Maglich and Peter H.F. Bekker of White & Case LLP. The Committee gratefully acknowledges the particular contributions of Jelena Sevo, Esq. and Ivan Loncar, Esq. who provided invaluable assistance with the development and translation of this guide. We greatly appreciate the help of Rebecca Thornton and Daniel Holt, summer interns with the Lawyers Committee, and Valeria Garcia-Tufro and Maciej Nowicki, summer associates with White & Case LLP. Finally, we thank the Humanitarian Law Center, Belgrade, for its assistance in collecting information used in preparing this Guide.

Copies of this guide, including Serbian translations, are available from:

Lawyers Committee for Human Rights
333 Seventh Avenue, 13th floor
New York, NY 10001 USA
tel: (212) 845-5200
fax:(212) 845-5299
e-mail: comm@lchr.org

100 Maryland Avenue, NE
Suite 500
Washington, DC 20002 USA
tel: (202) 547-5692
fax:(202) 543-5999
e-mail: wdc@lchr.org

<http://www.lchr.org>
<http://www.witness.org>

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SECTION 1: INTRODUCTION ON PURPOSE AND USE OF THE ATTACHED GUIDE

I. Background

In June 1999, in the wake of the NATO air campaign against the Federal Republic of Yugoslavia (FRY), the Serbian Ministry of Justice shuttled approximately 2,000 Kosovar Albanians across the border from Kosovo into Serbia, delivering them to Serb jails. Most of the accused had been arrested by Serb forces during the air campaign and charged with terrorism and sedition for allegedly having assisted the Kosovo Liberation Army (KLA). Currently, a majority of these detainees, whose status was not addressed by the international peace agreement that ended the conflict, await their criminal trials or the appeal of their conviction.¹

In November 1999, the Lawyers Committee for Human Rights joined advocacy efforts on behalf of one of these prisoners, Dr. Flora Brovina, a pediatrician, human rights activist and poet, whose arrest, detention, interrogation, and trial gave rise to serious human rights violations.² On December 12, 1999, Dr. Brovina was convicted of terrorism and sedition and sentenced to twelve years in prison. Observers of Dr. Brovina's criminal trial raised international alarm by reporting on how the State failed to corroborate the charges against Dr. Brovina and instead relied on a coerced confession obtained during her pre-trial interrogation.³ Moreover, even though Dr. Brovina alleged during her trial that she made her statement under duress due to conditions of mistreatment during her detention, the trial court never investigated her claim and the

¹ According to reports by the International Committee of the Red Cross (ICRC), approximately 2,000 Kosovar Albanians were arrested during the 1999 NATO air campaign which started on March 24, 1999 and then transferred by Serb forces from Kosovo to Serbia after the peace accord was brokered in June 9, 1999. In July 1999, the ICRC registered 1,922 such detainees. ICRC reports that as of June 5, 2000, 1,185 Kosovar Albanians remained in detention in Serbian prisons, with 914 having been released since June 1999. The detained include 30 people over 65, nine who are 18 years old or younger and seven women. See UNMIK 1st Anniversary Backgrounder - Missing and Detained Persons - 5 June 2000, *U.N.* (visited Sept. 21, 2000) <<http://www.un.org/peace/kosovo/pages/twelvemonths/missing.html>>.

² See LCHR Advocacy Alert, <<http://www.lchr.org/121/Brovina1299.htm>> and LCHR letter to Serbian judicial council <<http://www.lchr.org/media/brovinaltr0300.htm>>.

³ For more background on Dr. Brovina's case, please visit LCHR website at <<http://www.lchr.org/ngo/121main.htm>> and <<http://www.lchr.org/media/kosovo62300.htm>>.

prosecution provided no proof that Dr. Brovina made her confession voluntarily. The use of this confession, along with other procedural errors, amounted to a clear violation of Dr. Brovina's right to a fair trial, as guaranteed by international law. Many international critics, including the Lawyers Committee, found the criminal charges against her to be unfounded and suspected that Dr. Brovina was targeted because of her ethnicity and human rights activism.⁴

In tandem with its work related to the case of Dr. Brovina, the Lawyers Committee collected information relating to the cases of the approximately 2,000 other similarly situated Kosovar Albanian prisoners. With the assistance of lawyers from the New York office of the international law firm, White & Case LLP, our staff attorneys analyzed various independent reports issued by international and national legal experts, as well as journalists, that documented detailed information about the arrest, detention, interrogation and criminal trials of many of these detainees. Through this process, we confirmed that the procedural and substantive legal issues raised by Dr. Brovina's case also arise in a significant portion of the cases of these other Kosovar Albanian prisoners. We shared our research with defense lawyers based in Serbia and representing a majority of these prisoners. These advocates confirmed our findings, verifying that this group of detainees have shared remarkably similar experiences. In particular, they indicated that a significant portion of these detainees were:

- taken into custody by Serb forces while engaged in civilian activities or while under official orders to remain in their homes because of the NATO air campaign;
- considered to have an affiliation with the KLA, although they were non-combatants and not in any way involved in the conflict, except that they lived in the middle of it;
- rounded up and arrested in groups, often targeted because of their ethnicity and gender (male);

⁴ See, human rights group joint letter for Dr. Brovina's retrial, <<http://www.lchr.org/media/serbiabrovinaltr62300.htm>>.

- charged with terrorism and sedition based on alleged criminal acts during the conflict in Kosovo;
- held incommunicado and moved frequently between unknown locations;
- denied access to legal counsel and family;
- subjected to ill-treatment, even torture, during interrogations;
- convicted based on coerced confessions which were never investigated by official authorities as required by law.

In view of these common experiences, it is apparent that Dr. Brovina's case is part of an overall pattern, characterized by the denial of fair trial guarantees, suggesting that Serbia is perpetuating or permitting human rights violations against this specific population of detainees. The facts reveal that the Serbian courts have generally not provided minimum protections under international and national law. Since governments are responsible for the acts of their various branches, the courts' failure to uphold international standards is a breach of international law by the FRY government.⁵

The Lawyers Committee recognizes the important work of representatives of the United Nations (UN) and international advocacy groups who have sought a political solution to address the fate of these prisoners. We also acknowledge the views of legal experts who argue that the status of these prisoners should have been addressed in the final peace accord that concluded the NATO air campaign, but was omitted for political reasons.⁶ However, until such a solution is achieved, hundreds of prisoners have no recourse other than dependence on Serbian courts to protect their rights.

Although the trial courts in Serbia generally have not demonstrated an ability or willingness to comply with international obligations, the decision of the Serbian Supreme Court, vacating the conviction of Dr. Flora Brovina on June 6, 2000 was a welcome development. The Court remanded Dr. Brovina's case to the trial court in Nis, which

⁵ As the International Court of Justice has held: "[T]he international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be." *LaGrand Case (Germany v. United States)*, Provisional Measures, *I.C.J. Reports 1999*, p. 9, at 16, para. 28 (Order of 3 March 1999).

⁶ See, International Crisis Group, *Albanians in Serbian Prisons: Kosovo's Unfinished Business*, Balkans Report No. 85 (January 2000) <<http://www.crisisweb.org/projects/sbalkans/reports/kos32main.htm>> [hereinafter, ICG, *Albanians in Serbian Prisons*].

ordered a retrial, pending at the time of writing. This decision set an important precedent and signaled that the higher court will not automatically affirm a trial court's decision. The Lawyers Committee hopes that this outcome indicates an institutional commitment to comply with legal standards. We publish this legal guide in the hopes of fostering further positive developments by supporting local lawyers as they work on behalf of their clients.

II. Purpose of this Legal Guide

The following brief presents legal arguments that demonstrate how the facts common to these cases trigger violations of international and national law. The body of this analysis addresses three rights universally recognized as fundamental to a fair trial and which are relevant to the fact patterns that appear most frequently in this class of cases:

- The right to be presumed innocent.
- The right to prepare a defense.
- The right not to be compelled to testify or to confess guilt.

The Lawyers Committee has chosen to focus on these particular human rights after verifying that they have figured most frequently in the violations which characterize the prosecutions of Kosovar Albanians in Serbia. The process for selecting these issues consisted of:

- digesting and analyzing information from numerous sources, including local legal advocates and investigators, UN agencies, and national and international NGOs;
- compiling a database of allegations detailing the arrest, detention, interrogation and trials of many of these prisoners, which revealed common factual patterns. (See Section 2, parts II(A), III(A), IV(A) below for examples of factual allegations made by Kosovar Albanian detainees);

- identifying the legal issues raised by these factual patterns and highlighting a legal analysis that would follow under national and international law.

We hope that this guide provides a useful reference that will support the work of advocates.

A. How to Use this Legal Guide

Although many existing guides already provide detailed discussions of fair trial standards,⁷ this legal brief is intended to facilitate the work of local defense lawyers by identifying and applying only those international legal standards that are likely to be the most persuasive and relevant to the facts that arise in this specific class of cases. Although we recognize that each case presents its own particular facts, this brief seeks to anticipate likely issues on the basis of patterns observed in other similar cases. The factual checklist that precedes each substantive section of law can be used to determine whether the legal issue is relevant to the case of a particular prisoner. (See Section 2, parts II(A), III(A), IV(A) below for examples of factual allegations made by Kosovar Albanian detainees). We assume that each case will present, at a minimum, variations on the basic fact pattern. We do not explicitly analyze each specific fact in the checklists. Rather, we set forth a general legal analysis applicable to the rights violations to which any one or more the limited facts give rise. Since the issues included herein were chosen because they appeared frequently among the cases reviewed, the list describes the contours of the overall pattern of violations.

The format of the guide follows the same basic layout, raising the following questions for each legal issue:

- **What is the legal right?**

The internationally recognized legal right applicable to a set of alleged facts.

⁷ See, e.g., Lawyers Committee for Human Rights, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000) <<http://www.lchr.org/pubs/fairtrialcontents.htm>>; Amnesty International, *Fair Trial Manual* (1998) <<http://www.amnesty.org/ailib/themes/fairtrial.htm>>.

- **What are examples of how this right was actually violated?**

The factual checklist for identifying whether a right may have been violated is intended as a guide and not as an exhaustive list of all possible factual scenarios that would constitute a violation. Since the facts in the checklist were alleged by other Kosovar Albanian prisoners, advocates can check the list to identify whether the facts of his/her client's case resemble those alleged by similarly situated prisoners, and consequently implicate to the same legal right.

- **What is the applicable national and international law and remedy?**

A chart lists basic internationally recognized rights and their relevant international legal provisions, as well as their counterparts under Yugoslav or Serbian law that also protect this right. FRY and Serbian codes often parallel international law; therefore domestic law violations are often good indicators of an issue under international law which can be used to reinforce legal arguments grounded in domestic law. A lawyer who cites to a specific Serbian code provision in defense of her client may also raise the corresponding international law that supports her argument. In addition, this section references the domestic remedy, as demanded under national law, implicated by a violation of these rights. However, this legal guide merely cross-references and does not analyze or discuss national law.

- **What are the international legal provisions that support the international right?**

This section provides the applicable international law relevant to the defense of individual prisoners.

B. Use in a Civil Law System

This legal guide does not challenge Yugoslav law on its face (which would necessarily have to be done before the Constitutional Court) because the Serbian and

FRY Constitutions and the national criminal and procedural codes already provide many of the same legal protections found in international law. Instead, the motivating premise of this guide is that individual judges in Serbian courts must, in every case, *interpret* and *apply* the law consistent with both national, in particular constitutional, and international legal standards. In fact, as noted earlier, the pattern in the Kosovar Albanian cases is one of judicial action that conflicts with both the FRY Constitution and international law. As will be discussed below in part III.A of this Section, applications and interpretations alleged to be unlawful may be challenged on the grounds that any court of law must apply its national codes of criminal law and procedure in a manner that is consistent with other binding legal standards, whether international or domestic.⁸ Such challenges can be raised on appeal, and in many instances, during the initial prosecution as well.

III. Basis for Subject-Matter Jurisdiction

A. Obligations under International Law

Just as they are bound by national law, Serbian courts must also adhere to standards of international law. This obligation arises from three major sources: international conventions and treaties, customary international law, and general principles of international law.⁹

1. International Conventions and Treaties

Like its predecessor state, FRY is a party to the International Covenant on Civil and Political Rights (ICCPR),¹⁰ the Convention against Torture and Other Cruel,

⁸ The use of international standards in domestic jurisprudence is encouraged and recommended by the UN Human Rights Committee, according to which “it is very important that individuals should know what their rights under the Covenant are and also that *all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant.*” (emphasis added). Human Rights Committee, General Comment 3, CCPR article 2, 13th session, 1981; *See also infra* note 19 and accompanying text.

⁹ *See* Statute of the International Court of Justice, art. 38, *International Court of Justice* (visited Sept. 21, 2000) <<http://www.icj.law.gla.ac.uk/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>>.

¹⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *United*

Inhuman or Degrading Treatment or Punishment (Convention against Torture),¹¹ the four Geneva Conventions of 1949, and the two Additional Protocols to those conventions of 1977.¹² Yugoslavia's ratification of these treaties signals that the State has agreed to be bound by these norms.¹³ Formal adherence to the treaties marks FRY's obligation to ensure respect for internationally recognized rights.

The International Court of Justice (ICJ), as the principal judicial organ of the United Nations, and the bodies created by the UN to monitor compliance with these treaties provide authoritative interpretations of the treaty provisions. For example, the United Nations Human Rights Committee [hereinafter, Human Rights Committee], created under Article 28 of the ICCPR, establishes authoritative jurisprudence when it interprets the rights set forth in the Covenant, which are published in its "General Comments" and other pronouncements. Accordingly, we have, where appropriate, explained the ICJ's and the Human Rights Committee's applications of the treaty provisions in situations analogous to facts observed in the detention and trials of the Kosovar Albanian detainees.

Nations High Commissioner for Human Rights (visited Sept. 21, 2000). <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> [hereinafter, ICCPR]. Yugoslavia ratified the ICCPR in 1971.

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, *United Nations High Commissioner for Human Rights* (visited Sept. 21, 2000) <http://www.unhchr.ch/html/menu3/b/h_cat39.htm>. Yugoslavia ratified the Convention against Torture in 1991.

¹² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* 21 October 1950, Art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *entered into force* 7 December 1978, art. 6, para. 2, 1125 U.N.T.S. 609, *United Nations High Commissioner for Human Rights* (visited Sept. 19, 2000) <<http://www.unhchr.ch/html/menu3/b/94.htm>> [hereinafter Protocol II]. The four Geneva Conventions were ratified 21 April 1950 and the two Protocols were ratified 11 June 1979.

¹³ According to Article 26 of the Vienna Convention on the Law of Treaties (the "treaty on treaties"), "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Done at Vienna, 23 May 1969, *entry into force* 27 January 1980 (ratified by Yugoslavia on August 27, 1970), U.N. Doc. A/Conf39/28, UKTS 58 (1980), 8 ILM 679, *Greenpeace/International Law* (visited Sept. 20, 2000) <<http://www.greenpeace.org/~intlaw/vien-tr.html>> [hereinafter Vienna Convention]. It is a settled principle of international law that states must act in good faith in fulfilling international obligations assumed under treaties with other states. See e.g., *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, 1988 I.C.J. 69, 105. The good faith principle is also embodied in Article 2, paragraph 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945, (visited October 2, 2000) <<http://www1.umn.edu/humanrts/instree/aunchart.htm>>, and in "Declaration on Principles of International

2. *Incorporation of Non-Treaty Standards and Customary International Law*

The legal guide also refers to non-treaty standards, including declarations and resolutions adopted by the U.N. General Assembly, the voting record of which evidences the consensus of the international community on good principles and practice.¹⁴ Likewise, reference is made to decisions by other international courts that provide an authoritative interpretation of particular international standards.

Where relevant, we also refer to *jus cogens* norms, which are peremptory rules of international law that prevail over any conflicting rule or agreement.¹⁵ A *jus cogens* norm permits no derogation¹⁶ and can be modified only by a subsequent international law norm of the same character. Regardless of the FRY's acceptance of any treaty, it is still bound by treaty provisions which derive from customary international law, including certain *jus cogens* norms.

Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations," G.A. Res. 2625 (XXV) (1970).

¹⁴ See Amnesty International, *Fair Trial Manual*, supra note 7, at 31.4.2. See especially the Universal Declaration of Human Rights, adopted and proclaimed by U.N. General Assembly Resolution 217A (III) of 10 December 1948, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948) <<http://www.unhchr.ch/udhr/index.htm>>.

¹⁵ Norms become part of customary law, binding upon all states that do not object consistently to its formation, when State practice with regard to such norms evidences that states accept such practice as binding. Unanimous approval of a practice is not required for a norm to be considered part of the body of customary law. If the acceptance of the norm is widespread, that is sufficient. General principles emanate from the principles of international and national law administered in domestic courts. In addition, judicial decisions of domestic courts and the teachings of the most highly qualified commentators of the various nations provide subsidiary sources of international law, i.e., they provide evidence of international law but they do not qualify as freestanding sources of such law and may, therefore, not be relied upon independently. See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 27–30 (1996).

¹⁶ See part III(B) of this Section below for discussion of the principle of derogation. Useful guidance from a Serb source accepted by the Yugoslav Government may be found in: Milenko Kreca, *Absolutely Binding Norms (Ius Cogens) in International Public Law* (1989); Milenko Kreca, *Some General Reflections on Main Features of Ius Cogens as a notion of International Public Law*, in *New Directions in International Law*, in *ESSAYS IN HONOUR OF W. ABENDROTH* (1982); Milenko Kreca, *Quelques observations sur le problème de la hiérarchie des règles de droit dans le droit international public*, No. 1 *YUGOSLAV REVIEW OF INTERNATIONAL LAW* (1980). Professor Kreca's views are especially useful and authoritative in Serb courts, given that he has served as a judge *ad hoc* appointed by Yugoslavia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* before the International Court of Justice.

3. *Incorporation of Treaties into Yugoslav Law*

Several legal provisions of the FRY integrate and reinforce international standards into national law. In the “Declaration of the New Yugoslavia” adopted on April 27, 1992, the FRY explicitly expressed its readiness to accept all the international treaties that had been in force for the old federation. This declaration signifies that the FRY succeeded to the treaties originally signed and ratified by Yugoslavia.¹⁷

Moreover, the supreme law of the FRY--its Federal Constitution--expressly incorporates customary international law and the international treaties to which the FRY is a party into national law.¹⁸ Article 10 of the FRY Constitution states that “the Federal Republic of Yugoslavia shall recognize and guarantee the rights and freedoms of man and the citizen recognized under international law.” More significantly, Article 16 of the Constitution incorporates international law into domestic law:

the Federal Republic of Yugoslavia shall fulfill in good faith the obligations contained in international treaties to which it is a contracting party. International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order.

By this language, international law becomes part of the domestic legal system of the FRY.

In addition, international law requires that every court of the FRY interpret and apply its national codes of criminal law and procedure in a manner consistent with international standards.¹⁹ Article 2(2) of the ICCPR requires that State Parties conform

¹⁷ According to the ICJ, “[t]his intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General.” Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), Preliminary Objections, Judgment, 1996 I.C.J. 595, 610, para. 17 (July 11).

¹⁸ For an authoritative Serb source of international law accepted by the Yugoslav Government, see Milenko Kreca, *Constitutional Provisions Regulating Activity of Federal Units in International Relations*, No. 1 YUGOSLAV REVIEW OF INTERNATIONAL LAW (1992); MILENKO KRECA, TREATY-MAKING POWER OF THE STATE IN INTERNATIONAL LAW, WITH A SPECIAL REVIEW OF FEDERAL STATES (1988); MILENKO KRECA, TREATY-MAKING POWER OF THE STATE IN INTERNATIONAL LAW (1991).

¹⁹ Any conduct to the contrary by the domestic courts will entail the international responsibility of the state in whose territory such courts sit. As the International Court of Justice has held, “the international

their own procedural law to international norms, and in Article 2(1), that they apply that law equally and in a non-discriminatory manner. At the national level, Article 9(2) of the FRY Constitution requires its courts to apply its laws in accordance with international obligations since it mandates that judges apply law consistent with the national constitution, which incorporates international law. Moreover, Article 115 of the FRY Constitution makes the constitution in its entirety supreme over all other laws, including executive decrees and constitutions of the FRY's constituent republics.

B. Limits to the State's Right to Derogation During State of Emergency

Article 4 of the ICCPR establishes that when it encounters a state of emergency, a state has a limited right to derogate from certain treaty provisions.²⁰ A state may not derogate at all unless it has notified the Secretary General of the United Nations.²¹ Since the FRY never gave notice of an emergency and has had no derogations in effect on any

responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be." *LaGrand Case* (Germany v. United States), Provisional Measures, 1999 I.C.J. 9, 16, para. 28 (Order of 3 March 1999). *See also* International Law Commission, *Draft articles on state responsibility*, art. 5 (1996), text available at <<http://www.un.org/law/ilc/reports/1996/chap03.htm>>; Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part. I at 144 (1983) ("[t]he judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials").

²⁰ Article 4 of the ICCPR reads as follows:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

supra note 10.

²¹ When a State Party avails itself of the right of derogation, Article 4(3) requires that it must immediately inform the other States Parties through the intermediary of the Secretary-General of the United Nations and itemize the provisions from which it has derogated and include the reasons for the derogation. Human Rights Committee, General Comment 5, CCPR article 4, 13th session, 1981.

provision since 1990, its prosecutors and its courts cannot rely on derogation as a defense for state action.²²

The rights presented in this legal guide would be protected even if Serbia argues against a claim of derogation, as evidenced by Serbia's executive decree,²³ which was implemented during the conflict to give state security forces more latitude in their operations. To the extent that the language of this decree might imply authorization of torture or other violation of any other non-derogable guaranties, international law would deprive it of any effect on non-derogable protections. Article 4(2) of the ICCPR clarifies that there are certain rights that are considered to rise to the level of peremptory norms that are non-derogable and specific, such as Article 7 which prohibits torture and other cruel, inhuman or degrading treatment.²⁴ (See Section 2, part IV(C)(1)(a) for more discussion on torture).

Article 4(2) of the ICCPR does not enumerate as non-derogable the fair trial guarantees established in Article 14 of the ICCPR. However, Article 14 guarantees are considered to be so important that they are often treated as non-derogable, especially since they are necessary for protecting non-derogable rights, such as freedom from torture under Article 7.²⁵ In fact, the Convention against Torture recognizes the relationship between these procedural guarantees and an accused's ability to exercise his or her right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing and punishment. In other words, procedural

²² See Declarations and Reservations under the ICCPR, *supra* note 10.

²³ DECREE OF THE FEDERAL GOVERNMENT RELATING TO THE ENFORCEMENT OF THE CRIMINAL PROCEDURE ACT DURING THE STATE OF WAR, *Official Gazette of the Federal Republic of Yugoslavia*, April 4, 1999.

²⁴ See ICCPR, *supra* note 10, at art. 4(2).

²⁵ At a minimum, the Human Rights Committee has held that the ICCPR requires that derogation from fair trial guarantees must not "exceed those strictly required by the exigencies of the actual situation, and respect of the other conditions in paragraph 1 of article 14." U.N. Doc. A/39/40, p. 144, para. 4, *quoted in* U.N. Economic and Social Council, "The right to a fair trial: Current recognition and measures necessary for its strengthening, Final report prepared by Mr. Stanislav Chernichenko and Mr. William Treat," U.N. Doc. E/CN.4/Sub.2/1994/24 (1994). The U.N. Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities have called on states "to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency." Commission Resolution 1992/35; Sub-Commission Resolution 1991/15.

protections minimize the likelihood of impermissible treatment and are thus indispensable.²⁶

Humanitarian law likewise permits no derogation from fair trial rights.²⁷ The UN Special Rapporteur on States of Siege or Emergency has pointed out that the right to a fair trial may not be suspended under humanitarian law, extending this conclusion to all times, since it would be “paradoxical if the guarantees in peace-time were weaker than those in war-time.”²⁸ Moreover, it is a maxim of international law that a state cannot justify departure from international treaties on the basis of national law that contradicts the treaties.²⁹

C. The Availability of an Effective Remedy

Article 8 of the Universal Declaration of Human Rights states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Further, as a party to the ICCPR, The FRY is obligated under Article 2, paragraph 3(b) to “develop the possibilities of judicial remedy.” While international law generally requires that

²⁶ The Human Rights Committee underlines that the importance of these rights also limits a State’s right to make reservations when ratifying the ICCPR, which may also raise the inference that these same rights are non-derogable. According to the Committee: “a State may not reserve the right . . . to arbitrarily arrest and detain persons, . . . to presume a person guilty unless he proves his innocence, . . . and while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.” Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), *University of Minnesota Human Rights Library* (visited Sept. 21, 2000) <<http://www1.umn.edu/humanrts/gencomm/hrcom24.htm>>.

²⁷ Article 3 Common to the Four Geneva Conventions and Additional Protocol II provide indispensable judicial guarantees for individuals taking no active part in non-international hostilities. These protections rise to the level of customary law. As the International Court of Justice has stated: “It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case [1949 I.C.J. 22], that the Hague and Geneva Conventions have enjoyed a broad accession. Further *these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.*” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257, para. 79 (8 July 1996) (emphasis added).

²⁸ U.N. Special Rapporteur on States of Siege or Emergency, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as State[s] of Siege or Emergency*, U.N. Doc. E/CN.4/Sub.2/1982/15, at 20.

²⁹ See Vienna Convention on the Law of Treaties, *supra* note 13, at art. 27.

remedies be provided, specific forms of remedies come from a state's own criminal procedure code.³⁰

The basic assumption of this legal guide is that the Serbian courts should right the wrongs of the police and prosecutors involved in the cases addressed herein. Since the relief likely to be sought in the cases of these prisoners is in the context of ongoing criminal proceedings, either at the trial stage or on appeal, the Lawyers Committee has identified three internationally recognized rights which give rise to procedural remedies and not just compensatory ones (although violation of these rights could also support a compensatory remedy, which would follow a civil suit). In the present cases, the violations of international law discussed in the legal guide also constitute violations of domestic law, which themselves demand specific remedies as provided by the Criminal Procedure Act (CPA). These domestic remedies are generally discussed and summarized here for the convenience of the reader, but are also cross-referenced in each substantive legal section of this legal guide.

The first step in obtaining a remedy for breach of procedural due process norms is often to lodge an appeal. As discussed below, the CPA provides a variety of grounds for an appeal against a first instance judgment. For instance, the unjustified rejection of motions related to the presentation of evidence can be used as a basis for appealing the judgment under CPA, Article 366, on the grounds that it leads to an "incomplete or incorrect establishment of factual conditions." Some of the other grounds particularly relevant to the violations discussed in the legal guide include:

³⁰ Article 2(3)(a) of the ICCPR states that each party to the Covenant undertakes to ensure that any person whose rights or freedoms under the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. Article 2(3)(c) states that each party to the Covenant undertakes to ensure that the competent authorities shall enforce such remedies when granted. Thus, in cases involving judicial or administrative remedies, such an enforcement should take place by the execution of an enforceable judgment, which rescinds a decision by an inferior instance that violated the Covenant. ICCPR, *supra*, note 10. Article 3 Common to the Four Geneva Conventions and Additional Protocol II provides that a State has a clear obligation to adopt and apply measures implementing standards set forth in the Geneva Conventions and Additional Protocols. *Supra* note 12.

1. Absolutely Essential Violations Requiring a Serbian Court to Vacate a Judgment

In the instance of “absolutely essential violations,” such as in the case of denial of a language interpreter or basing a court decision on a coerced confession or statement,³¹ a Serbian court is required to vacate a judgment and remand the case to the trial court.³²

2. Relatively Essential Violations Requiring a Serbian Court to Vacate a Judgment

“Relatively essential violations” require a court to vacate the judgment,³³ and arise when:

- a court, during preparation for the hearing or during deliberation of the hearing, does not apply or applies incorrectly a provision of the CPA; or
- a court violates the right to prepare a defense during the main hearing that did or could have influenced the legality and correctness of the decision.³⁴

In response to an appeal, the Court of Second Instance may (1) refuse the appeal (as late or not admissible); (2) reject the appeal and confirm the judgment; (3) vacate the judgment; or (4) modify the judgment.³⁵

³¹ See, CPA, Art. 364(3) and 364(8). See *infra* Section 2, part III(C)(4) for discussion on translators and Section 2, part IV for discussion on coerced confessions.

³² See, CPA, Art. 385, para. 1.

³³ *Id.*

³⁴ See, CPA, Art. 365 (2).

³⁵ See, CPA, Art. 381.

SECTION 2: FAIR TRIAL LEGAL GUIDE RELATING TO THE CASES OF KOSOVAR ALBANIAN PRISONERS DETAINED IN SERBIA

I. Principles of Applicable International Law Violated, for which Yugoslav Law Compels a Legal Remedy

International law recognizes the right to a fair trial as a fundamental human right. Article 14 of the ICCPR affords this protection to all criminal defendants.³⁶ Article 3 Common to the Four Geneva Conventions and Additional Protocol II, applicable during times of armed conflict, provide for the right to a fair trial during conflict.³⁷ Both treaties reflect customary law which recognizes that in order to be fair, a hearing must, at a minimum, observe certain basic due process guarantees. State parties to these treaties must conform national procedural and evidentiary rules to reflect the right to a fair trial. The overall fairness of a trial can be evaluated based on whether these safeguards are available from the moment the person is accused of a crime until issuance of the final verdict. To be fair and impartial, the court must afford all parties these basic protections, and allow the prosecutor and defendant a sufficient opportunity to present evidence and legal arguments. However, the United Nations Human Rights Committee maintains that the fairness of a trial depends on the entire conduct of the trial and not just on the observance of the individual guarantees.³⁸

As discussed in Section 1 of this legal guide, the facts surrounding the arrest, detention, interrogation and trial of this particular class of Kosovar Albanian prisoners shows that many of these rights have been compromised, in particular:

³⁶ See ICCPR, *supra*, note 10.

³⁷ Article 6, paragraph 2 of the Additional Protocol II provides that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.” Subparagraphs (a) through (f) provide a list of such essential guarantees. Protocol II, *supra* note 12.

³⁸ General Comment 13, art. 14, 21st Sess., para.5, U.N. Doc. HRI\GEN\I\Rev.1 at 14 (1994), *United Nations High Commissioner for Human Rights/Treaty Bodies Database/Documents/By Treaty/Human Rights Committee* (visited Sept. 19, 2000) <<http://www.unhchr.ch/tbs/doc.nsf>> [hereinafter General Comment 13].

- the right to be presumed innocent;
- the right to prepare a defense;
- the right not to be compelled to testify or to confess guilt.

Where a court has failed to protect any of these rights, the defense lawyer may argue that the accused was denied fundamental guarantees necessary for preserving his or her right to a fair trial. This violation undermines the legitimacy of the final verdict and the court must provide an effective domestic remedy to correct the error, such as reversal of a conviction or retrial.

II. First Major Fundamental Right Violated by Serbian Courts: The Right to be Presumed Innocent

A. Factual Allegations Made by Similarly Situated Kosovar Albanian Prisoners that Exemplify a Violation of the Right to be Presumed Innocent.

This section provides a general checklist to see if the facts of an individual prisoner's case might support a claim that he/she was denied the right to be presumed innocent. The list is not exhaustive and other factual variations might signal a violation of this right.

1. Prosecution Failed to Carry its Burden of Proof.

[See section II C(1) below]

- The burden is on defendants to show they were innocent.
- Ordinarily inadmissible evidence is permitted. Example: paraffin glove tests.
- Trials last only a few minutes.
- Defendants are convicted of charges for which prosecutors did not present evidence.
- Defendants are convicted on the basis of little or no evidence.
- Defendants are convicted without any specific acts being alleged or proved.
- Coerced confessions are admitted into evidence. (See also section IV below, for further discussion on coerced confessions.)
- Defendants are held collectively responsible for charges against the group.
- Defendants are tried in a group, without specific charges against each defendant.

2. The Defendant Was Denied the Right to Present Exculpatory Evidence.

[See section II C(2) below]

- Appointed counsel does not consult with his or her clients.
- Trials last only a few minutes.
- Exculpatory evidence is ignored.
- Pretrial irregularities (e.g., police practices) are discounted and their implication for admissibility or credibility of evidence ignored or never evaluated.
- Defendants' allegations of beatings or other deliberate infliction of pain that go toward undermining the credibility of a confession are ignored or inadequately investigated. (See also section IV, below, for further discussion on coerced confessions.)
- Exculpatory testimony by Serbian police is ignored.

B. FRY Code Provisions that Parallel the International Law that Protects the Right to be Presumed Innocent.

International Law	FRY Code
Right to be Presumed Innocent: (ICCPR, Article 14(2))	No one shall be considered guilty of a criminal offense, until this is determined by a final judgment (FRY Constitution, Art. 27 (3); Constitution of Serbia, Art. 23 (3); CPA, Art. 3).
1. Prosecution bears the burden of proof [See section II (C)(1) below]	<i>In dubio pro reo</i> (CPA, Art. 350 (1) (3)); The prosecution has to indicate the evidence on which the accusation is based (CPA, Art. 158 (3), 262 (1) (5)).
2. The right to present exculpatory evidence [See section II (C)(2) below]	Art. 29 FRY Constitution right to defense (everyone has a right to be heard and present his or her defense).
Legal Remedy	Relatively Essential Violation requiring the court to vacate the judgment (<i>See Section I, part II(C) above</i>).

C. International Law that Establishes the Right to Be Presumed Innocent and the Procedural Guarantees that Must be Observed to Protect this Right.

Article 14(2) of the ICCPR provides that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” This rule applies from the moment of arrest until the conclusion of the trial, as reflected in various pre-trial safeguards for people in custody. (See section IV(C)(1)(b)(i–vii) below for examples of pre-trial safeguards.) The presumption of innocence is “fundamental to the protection of human rights,” and the fairness of a trial depends on observation of this guarantee.³⁹ An accused should always be treated as if innocent and

³⁹ General Comment 13, *supra* note 38, para. 7.

the Human Rights Committee has stated that “the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.”⁴⁰

According to the Human Rights Committee, the requirement of impartiality “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interest of one of the parties.”⁴¹ An opinion or judgment of the accused should be made only when all evidence has been presented,⁴² and at that point the judge should make decisions based solely on the evidence as applied to relevant laws, dictated by the original charges.⁴³

The court must insure compliance with two procedural guarantees, discussed below, that protect the defendant’s right to be presumed innocent.

1. Prosecution Bears the Burden of Proof

The principle that all defendants are innocent until proven guilty implicitly requires the prosecution to carry the burden of proof and provide sufficient evidence that proves, beyond a reasonable doubt, that the accused is guilty of every element of the criminal charge.⁴⁴ It follows that the rules of evidence and the conduct of the trial must reflect the fact that the prosecution bears this burden and the accused has the

⁴⁰ *Id.*

⁴¹ Communication No. 387/1989, *Karttunen v. Finland*, U.N. Human Rights Committee, 46th Sess., para. 7.2, U.N. Doc. CCPR/C/46/D/387/1989 (1992), *United Nations High Commissioner for Human Rights/Treaty Bodies Database*/[search “karttunen”] (visited Sept. 19, 2000) <<http://www.unhchr.ch/search.htm>>.

⁴² *Id.*, at 7.2. (“ ‘Impartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”); Communication No. 240/1987, *Collins v. Jamaica*, U.N. Human Rights Committee, 43d Sess., para. 8.4, U.N. Doc. CCPR/C/43/D/240/1987 (1991), *University of Minnesota Human Rights Library* (visited Sept. 19, 2000) <<http://www1.umn.edu/humanrts/undocs/html/dec240.htm>> (requiring jurors to be impartial). The European Court of Human Rights has held that judges must not have a “preconceived view on the merits of a case.” *Fey v. Austria*, (case No. 93/1991/345/418) 24 February 1993, 255 Eur. Ct. H.R. (ser. A) at 13, para. 34, *Eur. Ct. H.R.* (visited Sept. 19, 2000) <<http://www.echr.coe.int/eng/Judgments.htm>>.

⁴³ Basic Principles on the Independence of the Judiciary, 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, Principle 2, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), *University of Minnesota Human Rights Library/International Human Rights Instruments* (visited Sept. 19, 2000) <<http://www1.umn.edu/humanrts/instree/i5bpj.htm>>.

⁴⁴ See General Comment 13, *supra* note 38, at para.7.

benefit of doubt. Mere suspicion or association should be avoided, particularly where an accused is believed to belong to a specific group suspected of illegal conduct.⁴⁵

2. Defendant Has the Right to Present Exculpatory Evidence

International law recognizes the defendant's right to rebut evidence brought against him or her. This rule is particularly important in cases where there is a risk that the court will form an assumption of guilt contrary to its obligation to presume the defendant's innocence.⁴⁶ The right to defend oneself, as codified in Article 14(3)(d) of the ICCPR, also mandates that courts allow defendants to present exculpatory evidence. Thus, if an accused attempts to show his confession was coerced, or to rebut the state's proof that it was not, and the state interferes with the accused's access to evidence, that interference is a violation of article 14(3)(g) of the ICCPR. (See section IV(C)(2)(a–c) below for further discussion.)

Although the Yugoslav system is inquisitorial rather than adversarial, the judge must remain unbiased in allowing both the prosecutor and defendant equal opportunity to propose evidence to support their legal arguments. The facts cannot be correctly determined unless the judge allows the presentation of all relevant evidence, that is, all evidence that goes to the truth of the matter.

⁴⁵ Annual Report of the Inter-American Commission (1996): Peru, 81st Sess., chap. V, sec. VIII, para. 4, at p. 745, OEA/Ser.L/V/II.95, doc. 7, *Organization of American States/Human Rights/Inter-American Commission on Human Rights* (visited Sept. 19, 2000) <<http://www.oas.org/>>; Report on the Situation of Human Rights in Nicaragua, at 91, OEA/Ser.L/V/II.53, doc. 25 (1981).

⁴⁶ *Pham Hoang v. France*, (case No. 66/1991/318/390), 25 September 1992, *Eur. Ct. H.R.* (visited Sept. 19, 2000) <<http://www.echr.coe.int/eng/Judgments.htm>>.

III. Second Major Fundamental Right Violated by Serbian Courts: The Right to Prepare a Defense

A. Factual Allegations Made by Similarly Situated Kosovar Albanian Prisoners that Exemplify a Violation of the Right to Prepare a Defense.

This section provides a general check-list to see if the facts of an individual prisoner's case might support a claim that he or she was denied the right to be presumed innocent. The list is not exhaustive and other factual variations might signal a violation of this right.

1. Not Given Adequate Notice and Time to Prepare a Defense.

[See section III(C)(1) below]

- Charges and/or indictments are changed during trial, especially at the last moment.
- Defense counsel are not permitted sufficient time to prepare an adequate defense to the charges.
- Defense counsel are denied access to evidence/information in preparation of the defense.
- Judges' rulings seem to favor prosecution over defendants:
 - in allowing prosecution to go forward with normally inadmissible evidence;
 - in obstructing defendants' ability to procure and present evidence;
 - in verbally cutting off defendants, and refusing to allow them be heard or to enter their defense into the record.
- Defense counsel are not given access to prosecution's evidence or notice of what evidence prosecution intended to introduce.

2. Denied the Right to Communicate with Counsel of One's Own Choosing.

[See section III(C)(2) below]

- Appointed counsel are not competent.
- Appointed counsel do not consult with their clients.
- Appointed counsel meet with judges behind closed doors.
- Defendants are appointed counsel against defendants' will, and denied counsel of their own choosing.
- Lawyers are not permitted to meet with their clients, and are often not allowed into the country.
- Confidential communications between lawyers and clients are not allowed.
- Private lawyers are threatened and harassed, or otherwise prevented from freely communicating with client.

3. Denied the Right to Call and Examine Witnesses.

[See section III(C)(3) below]

- Defense counsel are not permitted to cross-examine some or all state witnesses.
- Testimony that ordinarily would be inadmissible is permitted because defense counsel is not allowed to challenge its veracity or the credibility of the witness.
- Testimony of some state witnesses is taken outside the courtroom without presence of defense counsel.

4. Denied Translation

[See section III (C)(4) below]

- Trials take place in Serbian with no translation or inadequate translation into defendants' language.

B. FRY Code Provisions that Parallel the International Law that Protects the Right to Prepare a Defense.

International Law	FRY Code
Right to prepare a defense (ICCPR, Article 14(3))	Right to defense (everyone has a right to be heard and present his or her defense) (FRY Constitution, Art. 29).
<p>Right to prompt notice, and adequate time and facilities to prepare a defense. (ICCPR, Article 14(3)(a–b))</p> <p><i>[See section III(C)(1) below]</i></p> <p>Right to access evidence/information in preparation of defense</p>	<p>An accused must be informed, when interrogated for the first time, of the offence with which he/she is charged and the factual grounds for the charge (CPA, Art. 4 (1)); During interrogation an accused must be notified why he/she is accused and on what grounds (CPA, Art. 218(2)), same provision applicable in cases prescribed by Articles 156(3), 159(2)(4), and Art. 160(2); The indictment must be served without delay and to a detainee within 24 hours (CPA, Art. 266(1)); An accused must be given sufficient time to prepare defense; minimum deadlines CPA, Art. 11 (3); (CPA, Art. 281 (3) applies this rule to regular proceedings, CPA Art. 439 (3) applies this rule to summary proceedings); For modification of the indictment during the main hearing, the court may adjourn the hearing for the preparation of defense (CPA, Art. 337 (2)).</p> <p>Counsel has a right to examine documents or objects which may serve as evidence, under certain conditions (CPA, Art. 73 (1)); Defense may be present during the performance of most investigative actions (CPA, Art. 168); If the court finds that it is in the interest of the proceedings, it may call the defense to examine evidence gathered during the investigation upon its completion (CPA, Art. 173).</p>
Right to communicate with counsel of one's own	Everyone has a right to retain counsel before the court (FRY Constitution, Art. 29 (1)); An accused has a right to defend

<p>with counsel of one's own choosing (ICCPR, Article 14(3)(b))</p> <p>[See section III(C)(2) below]</p>	<p>him/herself or with professional assistance of counsel of his or her own choosing (CPA, Art. 11(1)); An accused has a right to have counsel during entire proceedings (CPA, Art. 67 (1)); An accused has to be told that he has a right to counsel of his or her own choosing (CPA, Art. 67 (2)); An accused can choose his or her own counsel instead of appointed counsel (CPA, Art. 72 (1)); The president of the court may on the request or upon the consent of an accused remove counsel who is not diligent in the performance of his or her duties (CPA, Art. 72 (4)). On communication between the accused and counsel (CPA, Art. 74).</p>
<p>Right to call and examine witnesses (ICCPR, Article 14(3)(e))</p> <p>[See section III (C)(3)]</p>	<p>During the entire procedure the defendant may request that new witnesses or experts be called, or new evidence presented (See CPA, Arts. 322–336; see also CPA Articles 281, 282, 322(4), 336 for provisions relating to different phases of the proceedings where the defendant may request new witnesses); The defendant has a right to examine witnesses directly at the main hearing (CPA, Art. 327); For the use of testimonial records taken outside the main hearing, see Rules of Evidence, Art. 333.</p>
<p>Access to a court provided translator (ICCPR, Article 14(3)(f))</p> <p>[See section III(C)(4)]</p>	<p>Everyone has a right to use his own language in proceedings before a court (FRY Constitution, Art. 49); Parties have a right to use their own language, and have a right to interpretation of both oral and written materials (CPA, 7 (2)); Violation of CPA Article 7 is an absolutely essential violation of CPA (CPA, 364 (3)).</p>
<p>Legal Remedy</p>	<p>Relatively essential violation requiring the court to vacate the judgment [See Section 2 above, part II(C)].</p>

C. International Law that Establishes the Right to Prepare a Defense and the Procedural Guarantees that Must Be Observed to Protect this Right.

1. Right to Prompt Notice and Adequate Time and Facilities to Prepare a Defense.

Article 14(3)(b) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence . . . ⁴⁷

The purpose of prompt notice is to allow a defendant to prepare a defense. The Human Rights Committee defines “prompt” as requiring that “information is given in the manner described as soon as the charge is first made by a competent authority.”⁴⁸ The charges must include information about “both the law and the alleged facts on which [the charges] are based.” The accused must be informed of the “substance of the complaint against him.”⁴⁹

The Human Rights Committee observes that the amount and quality of evidence determine how much time is needed to insure that the defendant had adequate time for preparation.⁵⁰ For instance, difficulty in locating an alibi witness would require more time regardless of the amount and quality of the prosecution’s evidence.

While commenting on Article 14(3)(b), the Human Rights Committee pointed out that an implicit precondition of a fair trial under Article 14 of the ICCPR is the defendant’s access to all information and evidence necessary for preparing a defense.⁵¹ This requirement extends to information and evidence under the control of the prosecution. A defense attorney’s ability to prepare a defense is highly dependent on obtaining access to all documents, information, and other evidence so that he or she can help the accused prepare his or her case, exonerate him or herself, or, if necessary, mitigate a penalty.

⁴⁷ Article 6, paragraph 2 of the Additional Protocol II provides that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.” Subparagraph (a) states that “the procedure shall provide for an accused to be informed without delay of the particulars of the offense alleged against him and shall afford the accused before and during his or her trial all necessary rights and means of defense.” Protocol II, *supra* note 12, art. 6, para. 2.

⁴⁸ General Comment 13, *supra* note 38, para. 8.

⁴⁹ Communication No. 43/1979, *Drescher Caldas v. Uruguay*, U.N. Human Rights Committee, 2 Sel. Dec. 80, U.N. Doc. Supp. No. 40 (A/38/40) at 192 (1983), *University of Minnesota Human Rights Library* (visited Sept. 19, 2000) <<http://www1.umn.edu/humanrts/undocs/session38/43-1979.htm>>.

⁵⁰ General Comment 13, *supra* note 38, para. 9.

⁵¹ *Id.*

2. *Right to Communicate with Counsel of One's Own Choosing*

Article 14(3)(b) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .

(b) . . . to communicate with counsel of his own choosing[.]

Article 14(3)(d) further states that every detainee has the right “to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” The Human Rights Committee has stated that all persons arrested must have immediate access to counsel.⁵² Prompt access to a lawyer for a detainee has been recognized as an important safeguard against abuses while in detention, such as torture, ill-treatment, and coerced confessions.⁵³

Moreover, the Human Rights Committee has emphasized that lawyers should be able to advise and represent their clients in accordance with “professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.”⁵⁴ Similarly, this right requires counsel to communicate privately with the accused in conditions that guarantee full respect for the confidentiality of their communications.⁵⁵ The Human Rights Committee has also clarified that the ICCPR requires that the “accused or his lawyer must have the right to act diligently and

⁵² *Concluding Observations of the HRC: Georgia*, U.N. Doc. CCPR/C/79/Add.74 (1997).

⁵³ Human Rights Committee, CCPR General Comment 20, Article 7, 44th Sess., para.11, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), *United Nations High Commissioner for Human Rights/Treaty Bodies Database/Documents/By Treaty/Human Rights Committee* (visited Sept. 19, 2000) <<http://www.unhcr.ch/tbs/doc.nsf>> [hereinafter General Comment 20].

⁵⁴ General Comment 13, *supra* note 38, para. 9.

⁵⁵ See Body of Principles, for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 15 & 18, G.A. Res. 43/173, annex, 43 U.N. GAOR, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988), *University of Minnesota Human Rights Library* <<http://www1.umn.edu/humanrts/instr/g3bppdi.htm>>. (visited Sept. 19, 2000); See also, Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, principle 8 & 22, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990). <http://www.unhcr.ch/html/menu3/b/h_comp44.htm> (visited Sept. 20, 2000).

fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair.”⁵⁶

3. Right to Call and Examine Witnesses.

Article 14(3)(e) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him[.]

The Human Rights Committee recognizes this right as “designed to guarantee to the accused the same legal powers of compelling the attendance of the witnesses and of examining or cross examining any witnesses as are available to the prosecution.”⁵⁷ The defense must have equal opportunity to question any witness who will give evidence on behalf of the accused and similarly to challenge any evidence given against the accused. To preserve this guarantee, the court must admit testimony of only those witnesses available for a court appearance. The Human Rights Committee has pointed out that there may be no anonymous or unavailable witnesses during a trial.⁵⁸

The purpose behind this right is to allow each party the opportunity to challenge any court testimony, either by presenting rebuttal witnesses or by testing the reliability and credibility of a witness through cross examination. This right serves an important judicial function, since it allows the presiding judge(s) to hear and fully evaluate all relevant evidence for the determination of innocence or guilt.

⁵⁶ General Comment 13, *supra* note 38, para. 11.

⁵⁷ *Id.*, para. 12.

⁵⁸ Concluding observations by the Human Rights Committee, UN Doc. CCPR/C/79/Add.75, 9 April 1997, paras 21, 40.

4. Right to a Court-Provided Translator

Article 14(3)(f) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court[.]

A defendant cannot participate fully in his or her defense if he or she does not read or speak the language used at trial or in court documents, and is entitled to competent and accurate translation.⁵⁹

⁵⁹ General Comment 13, *supra* note 38, para. 13.

IV. Third Major Fundamental Right Violated by Serbian Courts: The Right Not to Be Compelled to Testify or to Confess Guilt

A. Factual Allegations Made by Similarly Situated Kosovar Albanian Prisoners that Exemplify a Violation of the Right Not to Be Compelled to Testify or to Confess Guilt.

This section provides a general checklist to see if the facts of an individual prisoner's case might support a claim that he or she was denied the right to be presumed innocent. The list is not exhaustive and other factual variations might signal a violation of this right.

1. Compelled to Testify or Confess Guilt, which Was Admitted into Evidence a Trial.

- The court allows the use of coerced confessions in trial to convict.
- Detainees were forced to sign confessions under threat or duress.
- Detainees were forced to sign documents without having a chance to read them.
- Detainees were forced to confess to charges against them, whether or not the charges were true.
- Detainees were forced to confess to violations of terrorism (Criminal Code sections 125 and/or 136).

2. Indicia of Coercion:

[See section IV(C)(1) below]

a. Coercion per se:

[See section IV(C)(1)(a) below]

i. Torture.

[See section IV(C)(1)(a)(i) below]

- Detainees were subject to all-night interrogations.
- Detainees suffered prolonged sleep deprivation.
- Detainees were beaten or deliberately subjected to pain and other physical violence at any point during their detention, sometimes evidenced by lasting, permanent injuries.
- Detainees were told that they would be killed the following day.
- Detainees were not given any food or water.
- Interrogations went on for many hours without interruption.
- Physical violence was used to force detainees to sign confessions.
- Detainees were forced to observe or hear the beating or other infliction of pain on others, including their family members.
- Detainees were drugged as part of process of forcing them to sign confessions.
- Detainees who requested medical attention were beaten.

ii. Ill-treatment.

[See section IV (C)(1)(a)(ii) below]

- Detainees had to withstand bad prison conditions.
- Detainees could not sleep because of screams of torture victims.
- Detainees heard constant screams.
- Detainees were injured during transportation from place to place. (Injuries caused by beatings, bombing, etc.)
- Detainees had to stand throughout the night of 9–10 June in cells holding 40–50 detainees.
- Detainees were denied food and water.
- When leaving Kosovo, detainees were beaten before being loaded onto buses.
- Detainees were beaten en route to Serbia.
- On arrival in Serbia after leaving Kosovo, detainees were forced to run a gauntlet, being beaten by guards, police, military, and/or other prisoners.
- Detainees were not given enough food or water.
- Detainees were kept in crowded, unsanitary conditions.
- Detainees had no shoes, soap, towels, or toothbrushes.
- Detainees were cold due to lack of heat, blankets, or adequate clothing.
- Detainees were denied medical care, including medication.
- Detainees were beaten if they requested any medical attention.

b. Combination of factors amounting to coercion: Interrogation coupled with unlawful procedures and conditions of arrest and detention.

[See section IV(C)(1)(b) below]

i. Arbitrary arrest and detention

[See section IV(C)(1)(b)(i) below]

- Detainees were not notified of the reasons for their arrest.
- Detainees were arrested by paramilitaries working with the explicit or implied consent of government officials.
- Detainees were arrested en masse with no real predictability.

ii. Denied information about reasons for arrest and detention.

[See section IV(C)(1)(b)(ii) below]

- Detainees were not told why they were being held, what laws they allegedly violated, or what the charges against them were, for periods of several months.
- 530 of 600 detainees who were transferred from Kosovo to Pozarevac arrived with no legal documentation, so they could not be traced or identified, facilitating incommunicado detention.

- Detainees were forced to confess to charges against them, whether or not the charges were true.
- Detainees were forced to confess to violations of Criminal Code sections 125 and/or 136 without knowing charges or alleged facts underlying the charge.

iii. Denied access to counsel.

[See section IV(C)(1)(b)(iii) below]

- Interrogations took place without the presence of detainees' counsel.
- Detainees were not permitted to see their attorneys.
- Detainees endured prolonged detention without access to counsel.
- Detainees were not allowed to speak with counsel.
- Detainees were subjected to long delays (days or more) without being allowed to speak with counsel.
- Prison guards attended meetings between detainees and lawyers.

iv. Failure to bring the accused promptly before a judge and denying him/her the opportunity to challenge the lawfulness of detention.

[See section IV(C)(1)(b)(iv) below]

- Detainees were held without judicial process for a minimum of 4 months, from arrest between April and June, to first judicial process in October or even much later (even beyond period allowed by decree).
- Detainees were held for more than 72 hours when there was no declared state of emergency, without any legal proceedings taking place.

v. Detained in an unknown location.

[See section IV(C)(1)(b)(v) below]

- Police and military denied having the person in custody.
- Police and military would not say where detainees were being held.
- Police and military permitted long delays (days, weeks, or months) before providing specific information or any information at all to family members.
- Detainees were moved from place to place within Kosovo.
- Detainees were held in places other than prisons or jails.
- Detained arrived at prisons in Serbia proper with no record of arrest, detention, or whereabouts.

vi. Denied communication with the outside world.

[See section IV(C)(1)(b)(vi) below]

- Family members who were trying to locate their relatives were given no information or false information by police and military.
- Detainees were not permitted to see their relatives.
- Relatives of detainees were denied entry at border between Serbia and Kosovo.

- State officials permitted long delays (days, weeks, or months) in providing specific information or any information at all to family members.

vii. Denied access to medicine and medical treatment.

[See section IV(C)(1)(b)(vii) below]

- Detainees were not provided with any medical attention.
- Detainees were denied any medical attention and were beaten if they requested any medical attention.

3. Additional Procedural Flaws Related to Coerced Confessions.

[See section IV(C)(2) below]

a. Failure to Investigate Allegations of Coerced Confessions.

[See section IV(C)(2)(a) below]

- Defendants' allegations of beatings or other deliberate infliction of pain are not investigated or are inadequately investigated.
- Trials proceed without inquiry after defendants allege having been beaten or subjected to deliberate infliction of pain.
- Defendants complain that confessions were coerced, to no avail.
- Judges do not enter into the record the defendants' in-court allegations that confessions were coerced (they say only that the defendant disavowed his or her previous confession).

b. Prosecution Not Required to Demonstrate that Confessions Were Voluntarily Made and Accused Not Allowed to Rebut Claim that Confession Was Voluntarily Made.

[See section IV(C)(2)(b) below]

c. Coerced Confessions Are Admitted into Evidence.

[See section IV(C)(2)(d) below]

- The courts allow coerced confession to be admitted into evidence without inquiry into allegations of duress or coercion.

B. FRY Code Provisions that Parallel the International Law that Protects the Right Not to Be Compelled to Testify or Confess Guilt.

International law	FRY Code
<p>Right not to be compelled to testify or confess guilt</p> <p>ICCPR, Art. 14(3)(g) Convention Against Torture , Art. 15</p>	<p>Prohibition of extortion of confessions or statements (FRY Constitution, Art. 25(2)); Prohibition of the use of force, threat or other similar means to extort a confession or statement from an accused during interrogation (CPA, Art. 218 (8)); The court cannot base its decision on the statement of an accused obtained in an improper way (CPA, Art. 218 (10)); Prohibition of medical interventions or use of means that could influence the will of an accused while giving his statement (CPA, Art. 259(3)).</p>
<p>1. Indicia of coercion [See section IV(C)(1)(a) below]</p> <p>a. Coercion per se:</p> <p>i. Torture (ICCPR, Art. 7) [See section IV(C)(1)(a)(i) below]</p> <p>ii. Ill-treatment (ICCPR, Art. 10) [See section IV(C)(1)(a)(ii) below]</p>	<p>Prohibition of torture (FRY Constitution, Art. 25(3) and Serbian Constitution, Art. 26); Prohibition of extortion of testimonies and other statements (FRY Constitution, Art. 25 (2) and CPA, Art. 218 (8)).</p> <p>Respect for person and dignity of detainees (FRY Constitution, Art. 25(1)) and Serbian Constitution, Art. 26(1)). Prohibition of every form of violence against detainees (FRY Constitution, Art. 25(2)); Treatment of detainees (<i>e.g.</i> respect for person and dignity, right to rest, access of relatives and doctor) (CPA, Arts. 201–205).</p>
<p>b. Combination of factors amounting to coercion: Interrogation coupled with unlawful procedures and conditions of arrest and detention: (ICCPR, Art. 10) [See section IV(C)(1)(b) below]</p> <p>i. Right to be free from arbitrary arrest and detention: (ICCPR, Art. 9(1)) [See section IV(C)(1)(b)(i) below]</p>	<p>i. Right to personal liberty and prohibition of arbitrary arrest (FRY Constitution, Art. 23 and Serbian Constitution, Art. 15); Cases of lawful detention (FRY Constitution, Art. 24); Rules of detention (CPA, Arts. 190–200).</p>

<p>ii. Right to know reasons for arrest and detention: (ICCPR, Art. 9(2)) [See section IV(C)(1)(b)(ii) below]</p>	<p>ii. Everyone who is arrested must be informed of the reasons for his or her arrest (FRY Constitution, Art. 23 (3)); Written decision on detention has to be delivered upon arrest or within 24 hours of the arrest (CPA, Art. 192); The same provision is applicable in cases of “police detention” (CPA, Art. 196 (3)).</p>
<p>iii. Right to access to counsel: (ICCPR, Art. 14(3)(d)) [See section IV(C)(1)(b)(iii) below]</p>	<p>iii. Everyone is entitled to have counsel, chosen by him/her present during interrogation (FRY Constitution, Art. 29 (3)); Counsel may be present during interrogation of an accused (CPA, Art. 169); Right of a detainee to have counsel who can be present during his or her interrogation (CPA, Art. 193 (1)); Access of counsel to an accused (CPA, Art. 74).</p>
<p>iv. Right to be brought promptly before a judge and not given an opportunity to challenge the lawfulness of detention: (ICCPR, Art. 9(3)) [See section IV(C)(1)(b)(iv) below]</p>	<p>iv. A person arrested by the police must be handed over without delay to the competent judge (CPA, Art. 195 (1)); Appeal against the decision on detention (192 (4));</p>
<p>v. Detained in an unknown location. [See section IV(C)(1)(b)(v) below]</p>	<p>v. Everyone arrested has a right to demand that his family is informed (FRY Constitution, Art. 23 (3)); Competent organ has to inform the family of an arrested about the arrest within 24 hours (CPA, Art. 200); Visits of family members to detainees (CPA, Art. 203 (1)).</p>
<p>vi. Denied Communication with the outside world: [See section IV(C)(1)(b)(vi) below]</p>	
<p>vii. Denied access to medicine and medical treatment: [See section IV(C)(1)(b)(vii) below]</p>	<p>vii. A medical physician may visit a detainee (CPA, Art. 203(1)).</p>

<p>3. Procedural requirements related to a coerced confession.</p> <p>a. Obligation to investigate [See section IV(C)(2)(a) below]</p> <p>b. State must prove the confession was made voluntarily [See section IV(C)(2)(b) below]</p> <p>c. Right to present exculpatory evidence [See section IV(C)(2)(c) below]</p> <p>d. State must exclude confession from evidence [See section IV(C)(2)(d) below]</p>	<p>a. All statements on which the court's decision cannot be based have to be separated from the records of the proceedings ex officio or upon the request of the parties (CPA, Art. 83); Basing a court's decision on such evidence is an absolutely essential violation of the provisions of criminal procedure (CPA, Art. 364(8)) and the Appellate court has a duty to investigate ex officio (CPA, Art. 376 (1) (1)).</p> <p>b. The competent body has a duty to collect further evidence regardless of the confession (CPA, Art. 223); Confession of an accused at the main hearing does not relieve the court from the duty to hear other evidence (commentary: confession given at the main hearing that is not corroborated with other evidence has no probative value) (CPA, Art. 323).</p> <p>c. Art. 29 FRY Constitution right to defense (everyone has a right to be heard and present his or her defense).</p> <p>d. All statements on which the court's decision have been based have to be separated from the records of the proceedings ex officio or upon the request of the parties (CPA, Art. 83).</p>
<p>Legal Remedy [See Section 2 above, part II(C)]</p>	<p>Basing court's decision on such evidence is an absolutely essential violation of the CPA which the Appellate court has a duty to investigate ex officio (CPA, Art. 364 (8) or (CPA, Art. 376 (1) (1)).</p>

C. International Law that Establishes the Right Not to Be Compelled to Testify or to Confess Guilt and the Procedural Guarantees that Must Be Observed to Protect this Right.

Under Article 14(3)(g) of the ICCPR, in the determination of any criminal charge everyone is entitled “[n]ot to be compelled to testify against himself or to confess guilt.”⁶⁰ This provision prohibits any form of coercion, whether direct or indirect, physical or mental, and whether before or during the trial, that could be used to force the accused to testify against him or herself or to confess guilt.⁶¹ Article 15 of the Convention against Torture also prohibits the extraction of confessions through torture. The right not to be compelled to testify or to confess guilt protects an implicit right to remain silent both during police questioning and trial.⁶²

1. *Indicia of Coercion.*

A defense lawyer’s careful review of the conditions under which a defendant made a confession enables him or her to bring a claim that the defendant’s statement was not voluntarily made and is therefore inadmissible. The lawyer may conduct this analysis by examining the same criteria a judge must reference to assess, during trial, the admissibility of a confession. This process requires looking at whether the statement was made in connection with the violation of other already-established standards for the treatment of criminal suspects and prisoners, such as those in Article 7 of the ICCPR, which prohibits torture, cruel, inhuman or degrading treatment, and Article 10 of the ICCPR, which requires the humane treatment of all detainees. Violations of both articles 7 and 10 trigger the general protection provided under Article 14(3)(g) not to be

⁶⁰ The same protections can be found in Article 6 (2)(f) of Protocol Additional II of the Geneva Convention, which states that “no one shall be compelled to testify against himself or to confess guilt.” *See* Protocol II, *supra* note 12.

⁶¹ General Comment 13, *supra* note 38, para. 14; Communication No. 253/1987, *Kelly v. Jamaica*, U.N. Human Rights Committee, in Report of the Human Rights Committee, at 246, U.N. Doc. No. A/46/40 (1991).

⁶² *Murray v. United Kingdom*, (case No. 41/1994/488/570), 8 February 1996, at para. 45. The right to be presumed innocent also protects the right to remain silent [See Section 1 part II for discussion on presumption of innocence].

compelled to testify against oneself⁶³ and a defense lawyer may argue that violation of these standards in conjunction with interrogation indicates that a confession was coerced as prohibited by Article 14(3)(g).

While some conditions of arrest, detention, and interrogation indicate *per se* that a confession has not been voluntarily given (for example, when there is evidence of blatant torture), the presence of other stressful conditions when viewed in their totality can also invalidate a confession by raising an inference that it was not freely given during interrogation. In the latter case, the defense lawyer may argue that a combination of factors, such as unlawful procedures and conditions coupled with interrogation, placed the accused under duress or created a coercive environment that compelled him or her to involuntarily confess.

a. *Per se coercion: Torture, Cruel, Inhuman and Degrading Treatment (Ill-Treatment).*

i. Torture.

Article 7 of the ICCPR prohibits any person from being subjected to “torture or to cruel, inhuman or degrading treatment or punishment.” The Human Rights Committee has said that “[a] fortiori, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession.”⁶⁴ Article 1 of the Convention against Torture defines torture as any official’s, or his or her proxy’s, intentional infliction of severe pain or suffering, whether physical or mental, “for such purposes as obtaining from him or a third person information or a confession.” The prohibition applies whether “inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”⁶⁵

The Human Rights Committee has stated that there are “no justifications or extenuating circumstances that may be invoked to excuse a violation of article 7 [of the

⁶³ General Comment 13, *supra* note 38 para. 14. The Human Rights Committee recognizes that “[i]n order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used.” *Id.*

⁶⁴ *Kelly v. Jamaica*, *supra* note 61; Communication No. 139/1983, *Conteris v. Uruguay*, U.N. Human Rights Committee, 2 Sel. Dec. 168 (1985); Communication No. 74/1980, *Estrella v. Uruguay*, U.N. Human Rights Committee, 2 Sel. Dec. 93 (1983).

⁶⁵ General Comment 20, *supra* note 53, para. 2.

ICCPR].”⁶⁶ Similarly, Article 2(2) of the Convention against Torture declares that there are no circumstances that justify torture or other cruel, inhumane, or degrading treatment or punishment.

The Human Rights Committee specifically resists defining concepts or “sharp distinctions” covered by Article 7 of the ICCPR and instead states that “distinctions depend on the nature, purpose and severity of the treatment applied.”⁶⁷ The Committee offers some guidelines, stating that the prohibition under Article 7 applies *not only* to acts that cause physical pain, but also to those that cause mental suffering.⁶⁸ Some methods which have been found to amount to torture include:

- Physical pressure. The Committee against Torture has stated that it is “completely unacceptable” to apply “moderate physical pressure” as an authorized mode of interrogation.⁶⁹ It has ruled that this standard applies even if a suspect is believed to have information about imminent attacks against the state, which may result in loss of civilian life.⁷⁰
- Presence or use of equipment intended to inflict torture.⁷¹
- Use of force. Force may only be used when strictly necessary for the maintenance of security and order within the institution, in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened; and even then, only when non-violent means have proved ineffective.⁷²

⁶⁶ *Id.*, para. 3

⁶⁷ *Id.*

⁶⁸ *Id.*, para. 5. They include “excessive chastisement.” *Id.*

⁶⁹ Committee against Torture, Summary record of the public part of the 297th meeting: Israel. 04/09/97, UN Doc. CAT/C/SR.297/Add.1 at 3, para 8 (Calling for these methods used by Israeli security officers to “cease immediately”) *United Nations High Commissioner for Human Rights* (visited Sept. 19, 2000)

<<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/b51bae20771d616a80256513005275ab?Opendocument>>.

⁷⁰ *Id.*

⁷¹ General Comment 20, *supra* note 53, para 11.

⁷² Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, rule 54, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) *University of Minnesota Human Rights Library* (visited Sept. 19, 2000)

<<http://www1.umn.edu/humanrts/instrtree/g1smr.htm>> [hereinafter Standard Minimum Rules].

- Use of restraints. Handcuffs, chains, irons, and strait-jackets must not be used as punishment and must be used no longer than necessary; and chains and irons cannot be used as restraints.⁷³ A person must not be restrained in a very painful manner.⁷⁴
- Hooding.⁷⁵
- Prolonged playing of loud music.⁷⁶
- Prolonged sleep deprivation.⁷⁷ According to the United Nations Committee against Torture, “sleep deprivation practised on suspects, which may in some cases constitute torture and which seems to be routinely used to extract confessions, is unacceptable.”⁷⁸
- Threats, including death threats.⁷⁹ Principle 21(2) of the Body of Principles prohibits using violence, threats, or methods of interrogation which impair a detainee’s capacity of decision or judgment.⁸⁰
- Violent shaking.⁸¹
- Using cold air to chill the detainee.⁸²
- Prolonged solitary confinement.⁸³
- Deprivation of essential needs. Deprivation of basic essential needs of the detainee, which can include food,⁸⁴ washing and sanitary facilities, bedding, clothing, medical care, access to natural light, recreation, physical exercise, and facilities to allow religious practice could also constitute torture.

⁷³ Standard Minimum Rules, *supra* note 72, rules 33 & 34.

⁷⁴ Committee against Torture, Summary record, *supra* note 69, at 3, para. 8 (calling for these methods used by Israeli security officers to “cease immediately”).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Committee against Torture, Summary record, *supra* note 69, at 3, para 8 (calling for these methods used by Israeli security officers to “cease immediately”).

⁷⁹ *Id.*

⁸⁰ See Body of Principles, *supra* note 55.

⁸¹ *Id.*

⁸² *Id.*

⁸³ General Comment 20, *supra* note 53, para. 6.

⁸⁴ U.N. Standard Minimum Rules for the Treatment of Prisoners, *supra* note 72, rules 20 and 87.

ii. Ill-treatment under Article 10 of the ICCPR.

Article 10 has been found to cover conditions of detention that do not necessarily rise to the level of torture, as defined in Article 7, but which still constitute inhuman treatment within the meaning of Article 10 and “evidence a lower intensity of disregard for human dignity.”⁸⁵ The Human Rights Committee has found a violation of Article 10(1) of the ICCPR to exist in the following cases:

- Where detainee claimed to be held in a 500-year old prison infested with rats, lice, and cockroaches;⁸⁶
- Where men, women and children were held 30 people to a cell;⁸⁷
- Where detainees were exposed to the wind and cold;⁸⁸
- Where facilities had excrement on the floor and detainees had to use sea water for drinking and bathing;⁸⁹
- Where mattresses and blankets were urine-soaked;⁹⁰
- Where there was a high incidence of suicide, self-mutilation, fights, and beatings;⁹¹
- Where there was failure to provide adequate food and recreational facilities, unless there are exceptional circumstances;⁹²

b. Combination of Factors Amounting to Coercion: Interrogation Coupled with Unlawful Procedures and Conditions of Arrest and Detention.

Certain conditions of arrest and detention taken together may add up to create a coercive environment that influence whether an accused person acts under duress when making a confession during interrogation. A defense lawyer may point to the presence of

⁸⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* 186 (1993).

⁸⁶ Communication No. 493/1992, *Griffin v. Spain*, U.N. Human Rights Committee, p. 52, paras. 3.1 and 9.2, UN Doc. CCPR/C/57/1 (1996).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

conditions that also independently violate Article 10 (1) of the ICCPR to apply Article 14(3)(g) and discredit a confession made during interrogation. Article 10(1) of the ICCPR imposes on State parties “a positive obligation towards person[s] who are particularly vulnerable because of their status as persons deprived of liberty.”⁹³ Pursuant to this duty, a State cannot subject a detainee to “any hardship or constraint other than that resulting from the deprivation of liberty” and a detainee should enjoy “all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment.”⁹⁴ A State must also provide detainees with services that will satisfy their essential needs.⁹⁵

In evaluating whether the treatment of prisoners complies with Article 10 of the ICCPR, the judge should reference other authoritative sources of international law, besides the ICCPR. In its commentary on Article 10, the Human Rights Committee enumerates relevant United Nations standards applicable to the treatment of prisoners which may serve as guidelines for generally respecting the principle contained in Article 10,⁹⁶ including: the Standard Minimum Rules for the Treatment of Prisoners (1957) (hereinafter “Standard Minimum Rules”);⁹⁷ the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988) (hereinafter “Body of Principles”);⁹⁸ the Code of Conduct for Law Enforcement Officials (1988) (hereinafter “Code of Conduct”);⁹⁹ 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 (1982) (hereinafter “Protection of Prisoners”).¹⁰⁰ If violations of these standards amount to a

⁹² *Kelly v. Jamaica*, *supra* note 61, para. 5.

⁹³ Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para. 3, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), *University of Minnesota Human Rights Library* (visited Sept. 25, 2000) <<http://www1.umn.edu/humanrts/gencomm/hrcom21.htm>>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at para. 5.

⁹⁷ Standard Minimum Rules, *supra* note 72.

⁹⁸ Body of Principles, *supra* note 55.

⁹⁹ Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979), *University of Minnesota Human Rights Library* (visited Sept. 19, 2000) <<http://www1.umn.edu/humanrts/instree/i1ccleo.htm>>.

¹⁰⁰ 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

violation of Article 10 of the ICCPR, a confession elicited during interrogation in connection with these violations may be found to be coerced in violation of Article 14(3)(g) (see IV(C)(1) above for further explanation).

The presence of any of the conditions discussed in (i) through (vi) below can arguably amount to an environment which would place a detainee under duress or lessen his or her capacity for reasoned judgment, which in turn would compel him or her to make a confession involuntarily. For example, a detainee not treated in conformity with universal standards may seek to escape unbearable circumstances; likewise, a detainee denied basic pre-trial procedural rights may not understand the nature of questioning or the consequences of statements made during interrogation. Some of the standards listed in (i) through (vi) are even considered to be procedural safeguards necessary to prevent against torture or mistreatment. Thus, the presence of one or more of these conditions can raise an inference that the detainee's rights under Article 10, and possibly Article 7, of the ICCPR, were violated and thus any connected confessions could be determined to have been coerced.

i. Arbitrarily Arrested and Detained.

Article 9(1) of the ICCPR and Article 9 of the Universal Declaration of Human Rights (1948) prohibit arbitrary arrest and detention which deprives a person of liberty. The Human Rights Committee interprets "arbitrary" more broadly than just being "against the law" and instead includes elements of inappropriateness, injustice, and lack of predictability.¹⁰¹ This violation can also occur when paramilitary or unauthorized officials arbitrarily arrest a person with the consent or acquiescence of security forces because the action takes on the authority of the state.¹⁰² The Committee has also expressed concern about arrests being made under the seal of the interests of "national security." The Committee has suggested that the concept of national security be defined

Treatment or Punishment, G.A. Res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982), *University of Minnesota Human Rights Library* (visited Sept. 19, 2000) <<http://www1.umn.edu/humanrts/instree/h3pmerhp.htm>>.

¹⁰¹ Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, U.N. Human Rights Committee, p. 12, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

¹⁰² Body of Principles, *supra* note 55, principle 2.

by law and that police and security officials provide written reasons for a person's arrest, which written notification should be made public.¹⁰³

ii. *Denied Information about Reasons for Arrest and Detention.*

Article 9(2) of the ICCPR requires that every person deprived of their liberty must be informed immediately of the reasons for their arrest and detention and charges against them, including a clear explanation of the legal and factual basis for detention.¹⁰⁴ The Human Rights Committee has found a violation of this right in two cases without detailed information of the reasons for his arrest and the crime which formed the basis of the arrest: one where an accused was held for several weeks;¹⁰⁵ another, for 50 hours.¹⁰⁶ The purpose of receiving a simple, non-technical explanation of the essential legal and factual grounds for an arrest is to allow the detainee to challenge the lawfulness of his or her detention in court and prepare for his or her defense.¹⁰⁷ In *Drescher Caldas v. Uruguay*, the Human Rights Committee stated that it was not sufficient to inform the detainee that he was being arrested without providing substantive information as to the reason for his arrest.¹⁰⁸

iii. *Denied Access to Counsel.*

[See also Section 1 part III(C)(2) above]

Article 14(3)(d) of the ICCPR entitles a person detained by the state to legal assistance at all stages of criminal proceedings, including interrogations.¹⁰⁹ Access to counsel must be immediate.¹¹⁰ Access to counsel is important for preserving the right to

¹⁰³ Concluding Observations: Sudan, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.85 (1997).

¹⁰⁴ Body of Principles, *supra* note 55, principle 10.

¹⁰⁵ *Kelly v. Jamaica*, *supra* note 61, para. 5.

¹⁰⁶ Communication No. 188/1984, *Portorreal v. Dominican Republic*, U.N. Human Rights Committee, 2 Sel. Dec. 214, U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988) *University of Minnesota Human Rights Library* (visited Sept. 19, 2000) <<http://www1.umn.edu/humanrts/undocs/session43/188-1984.htm>>.

¹⁰⁷ *Fox, Campbell and Hartley*, (18/1989/178/234-236), 30 August 1990, paras. 40 & 41. See also, ICCPR, *supra* note 10, at art. 9, para. 4.

¹⁰⁸ *Drescher Caldas v. Uruguay*, *supra* note 49.

¹⁰⁹ Body of Principles, *supra* note 55, principle 10.

¹¹⁰ Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

silence and is a necessary safeguard against torture, ill-treatment, coerced confessions, and other abuses.¹¹¹

iv. Failed to Bring Defendant Promptly before a Judge and Denied an Opportunity to Challenge the Lawfulness of Detention.

Under Article 9(3) of the ICCPR, anyone arrested or detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power. This requirement serves various purposes: It allows the court to assess whether sufficient legal reason exists for the arrest; it helps safeguard the well-being of a detainee and protect his or her rights; it provides the detainee with an opportunity to exercise his or her right to challenge his or her detention;¹¹² and it provides the means for determining the whereabouts and state of health of people held in unidentified places.¹¹³ The Human Rights Committee has stated that the delay in providing this protection should “not exceed a few days.”¹¹⁴

v. Detained in an Unknown Location.

A detained person should be able to notify his or her family and friends of his or her arrest and whereabouts.¹¹⁵ The detainee should be able to exercise this right immediately, with the assistance of the authorities if necessary.¹¹⁶ Only in exceptional cases can notification be delayed in the interest of the administration of justice, but even

¹¹¹ General Comment 20, *supra* note 53, para. 11; Report of the UN Special Rapporteur on Torture, (U.N. Doc. E/CN.4/1992/17), 17 December 1991, para. 284. Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc. E/CN.4/1998/39/add.4, para. 47, 5 March 1998.

¹¹² See, Article 9(4) of the ICCPR, which provides: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” ICCPR, *supra* note 10.

¹¹³ Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, Art. 9(1), U.N. Doc. A/RES/47/133 (1992), available at Yale University ACUNS Document Collection (visited Sept. 25, 2000) <http://www.yale.edu/acuns/NEW_documents/index.html> [hereinafter Declaration on Disappearance].

¹¹⁴ Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), para. 2, in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994) *University of Minnesota Human Rights Library* (visited Sept. 25, 2000) <<http://www1.umn.edu/humanrts/gencomm/hrcom8.htm>> [hereinafter General Comment 8].

¹¹⁵ Principle 16(1) of the Body of Principles, *supra* note 55; Rule 92 of the Standard Minimum Rules, *supra* note 72; Article 10(2) of the Declaration on Disappearance, *supra* note 113.

¹¹⁶ Standard Minimum Rules, *supra* note 72, rule 92.

then it may not exceed a matter of days.¹¹⁷ The information must include the fact of arrest and detention and the place where the detainee is being kept in custody, which should be an officially recognized place of detention located near his or her place of residence.¹¹⁸ Family and friends must be notified any time the detainee is transferred to another place of custody.¹¹⁹

vi. *Denied Communication with the Outside World.*

When held in custody, with or without charges, a person should not be denied access to family and friends, lawyers, social and medical services, and non-governmental organizations.¹²⁰ Communication with the outside world, including visitation rights, should only be subject to reasonable conditions and restrictions.¹²¹ The UN Special Rapporteur on Torture has called for a total ban on detention without outside communication, stating that “[t]orture is most frequently practised during incommunicado detention.”¹²² The Human Rights Committee and the U.N. Commission on Human Rights have found that the practice of incommunicado detention may violate Articles 7 and 10 of the ICCPR, and, since it is conducive to torture, ill-treatment, and inhumane treatment, should be avoided.¹²³

¹¹⁷ Principles 16(1) and (4) and 15 of the Body of Principles, *supra*, note 55.

¹¹⁸ Principle 11(2) and 20 of the Body of Principles, *supra*, note 55; Article 10 of the Declaration on Disappearance, *supra* note 133; Rule 7(2) of the Standard Minimum Rules, *supra* note 72.

¹¹⁹ Principle 16(1) of the Body of Principles, *supra*, note 55; Rule 92 of the Standard Minimum Rules, *supra* note 72; Rule 10(2) of the Declaration on Disappearances, *supra* note 113.

¹²⁰ General Comment 21, *supra* note 93, para. 12; Rule 92 of the Standard Minimum Rules, *supra* note 72.

¹²¹ Principle 19 of Body of Principles, *supra*, note 55.

¹²² Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1995/434, para. 926 (d).

¹²³ *Albert Womah Mukong v. Cameroon*, (458/1991), 21 July 1994, UN Doc.

CCPR/C/51/D/458/1991; *El Megreisi v. Libyan Arab Jamahiriya*, (440/1990), 23 March 1994, UN Doc. CCPR/C/50/D/440/1990. Preliminary Observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, paras. 18 and 24, 25 July 1996 (examining Peruvian laws allowing 15 days incommunicado detention at the discretion of police to interrogate detainees suspected of terrorism-related offences). The UN Commission on Human Rights recognized that “prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment.” Resolution 1997/38, April 1997, para. 20.

vii. *Denied Access to Medicine and Medical Treatment.*

People held in custody have the right to be examined by a doctor and, when necessary, to receive medical treatment.¹²⁴ This right extends to dental treatment and psychological services.¹²⁵ The Human Rights Committee has stated that this right dictates that detainees be afforded prompt and regular access to doctors.¹²⁶ When necessary, detainees should be transferred to specialized institutions or civil hospitals for treatment.¹²⁷ The right is triggered if the detainee complains of illness or injury,¹²⁸ and should be provided whenever necessary and as promptly as possible after admission to the place of detention.¹²⁹ It is also recognized that a detainee's mental and physical health can be injuriously affected by continued imprisonment or a condition of imprisonment.¹³⁰

2. *Procedural Requirements Related to a Coerced Confession.*

a. Obligation to Investigate.

If an accused person alleges during the course of criminal proceedings that he or she has been compelled to make a statement or to confess guilt, the court must promptly and impartially investigate the allegation.¹³¹ A court or state must conduct this investigation before it can admit the confession into evidence. The judge should have authority to consider such an allegation at any stage.¹³² If a complaint is rejected or inordinately delayed, then the detainee may bring it before a judicial or other authority.¹³³

¹²⁴ Principle 24 of the Body of Principles, *supra* note 55; Rule 24 of the Standard Minimum Rules, *supra* note 72; Protocol II, Article 3 common to the Geneva Convention, Arts. 7(2), 5(2)(d)-(e), *supra* note 12.

¹²⁵ Rules 22(3) and 22(1) of the Standard Minimum Rules, *supra* note 72, respectively.

¹²⁶ General Comment 20, *supra* note 53, para. 11.

¹²⁷ Rule 22(2) of the Standard Minimum Rules, *supra* note 72.

¹²⁸ Rule 25 of the Standard Minimum Rules, *Id.*

¹²⁹ Principle 24 of the Body of Principles, *supra* note 55; and Rule 24 of the Standard Minimum Rules, *supra* note 72.

¹³⁰ Rule 25(2) of the Standard Minimum Rules, *supra* note 72.

¹³¹ CAT arts. 12 and 13; Holding under ICCPR art. 14(3)(g) in *Yasseen and Thomas v. Guyana*, CCPR Communication No. 676/1996, U.N. Doc. CCPR/C/62/D/676/1996 (31 March 1998).

¹³² General Comment 13, *supra* note 38, para. 15. Under Article 6 and 13 of the Convention against Torture, all allegations that statements have been extracted through torture or other cruel, inhuman or degrading treatment must be promptly and impartially examined by the competent authorities, including judges. *Supra* note 11. This obligation complements a similar duty found in Article 12 of the Convention

b. State Must Prove the Confession was Made Voluntarily.

Once the defendant alleges that his or her statement was compelled, the burden of proof is upon the State to show that a confession is voluntary, rather than upon the accused to show that it was coerced.¹³⁴ The state can only satisfy its burden when the judge in the criminal case investigates the defendants' claim that her confession was coerced.¹³⁵ The state can determine whether a confession resulted from coercion by examining the pre-trial conditions that existed during the detention and interrogation of the defendant.

c. Right to Present Exculpatory Evidence.

If an accused is attempting to show that his confession was coerced, or to rebut the state's proof that it was not, and the state interferes with the accused's access to evidence, that interference is a violation of Article 14(3)(g) of the ICCPR.¹³⁶ (See Section 2, part II(C)(2) above for additional discussion.)

against Torture to initiate a prompt and impartial investigation whenever there is a reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment has been committed. *Id.*

¹³³ Principle 33 of the Body of Principles, *supra* note 55.

¹³⁴ Concluding observations of the Human Rights Committee: Mexico, 27/07/99, U.N. Doc. CCPR/C/79/Add.109, (Concluding Observations/Comments), *United Nations High Commissioner for Human Rights/Treaty Bodies Database Search* [search "CCPR/C/79/Add.109"] (visited Sept. 25, 2000) <<http://www.unhchr.ch/>>; Convention against Torture, *supra* note 11, art. 12; *See also* the status report on Rwanda by the UN Human Rights Field Operation in Rwanda for 6 Jan. 1997 (two judges' requests that accused prove their confession were coerced, and the judges' failure to seriously attempt an independent inquiry, were reported as violations of article 14(3)(g) of the CCPR. "First Genocide Proceedings: Status Report [of the Field Operation]." United Nations Human Rights Field Operation in Rwanda – Status Report 6 Jan. 1997, "First Genocide Proceedings in Kibungo, Kigali, and Byumba on 27, 30 and 31 Dec. 1996 and 3 Jan. 1997" (Court proceedings in Kibungo Prefecture). <http://www.unhchr.ch/html/menu2/5/rwanda/rwa_sr1.htm. (visited July 10, 2000).

¹³⁵ *Yasseen and Thomas v. Guyana*, CCPR Communication No. 676/1996, U.N. Doc. CCPR/C/62/D/676/1996 (31 March 1998).

¹³⁶ *See* Human Rights Committee, *Berry v. Jamaica*, Communication No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (1994) at para. 11.7.

d. State Must Exclude Confession from Evidence.

The prohibition on coerced confessions has become practically absolute, requiring exclusion of such evidence. The Human Rights Committee requires that the law prohibit the use or admissibility of confessions produced by torture or other prohibited treatment, stating that “it is important for the discouragement of violations under article 7 of the ICCPR that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”¹³⁷ and that such statements should be “systematically excluded from judicial proceedings.”¹³⁸ Article 15 of the Convention against Torture explicitly provides that any confession extracted by torture is inadmissible as evidence and also requires that a state’s law prohibit admission into evidence of coerced confessions.¹³⁹

Evidence elicited under duress, and other prohibited treatment, is considered tainted and inadmissible, even if the treatment of the detainee does not necessarily rise to the level of torture.¹⁴⁰ The Human Rights Committee has opined that “evidence provided by . . . any . . . form of compulsion is wholly unacceptable.”¹⁴¹

The Committee’s Concluding Observations on Yugoslavia make it clear that this must be a prohibition not just in the language of the law, but in actual effect. The U.N. Committee against Torture, in its Concluding Observations on Yugoslavia, noted that while the Yugoslav Constitution and federal and republican codes are rife with language mirroring the Torture Convention, there was an “absence of detailed procedural norms pertaining to the exclusion of tainted evidence.” It reminded Yugoslavia that “Evidence obtained in violation of article 1 of the Convention should never be permitted to reach the cognizance of the judges deciding the case, in any legal procedure.”¹⁴² Prosecutors must refuse to use such evidence, except in prosecuting perpetrators of torture, to prove

¹³⁷ General comment 20, *supra* note 53, para. 12

¹³⁸ Concluding Observations on Georgia, CCPR/C/79/Add.75 at para. 26 (5 May 1997).

¹³⁹ The same protections can be found in Article 6 (2)(f) of the Geneva Conventions’ Additional Protocol II, which states that “no one shall be compelled to testify against himself or to confess guilt,” *supra* note 12.

¹⁴⁰ Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75 at para. 26 (5 May 1997).

¹⁴¹ General Comment 13, *supra* note 38, para. 14.

¹⁴² Concluding Observations of the Committee Against Torture: Yugoslavia, U.N. CAT, 21st Sess., paras. 35–52, U.N. Doc. A/54/44 (1998).

torture.¹⁴³ The absolute prohibition on admissibility of coerced confessions in the two conventions underscore that the prohibition on torture-induced confessions forms an integral part of the *jus cogens* prohibition of torture.

¹⁴³ See Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), Guideline 16.

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Communications Department
Lawyers Committee for Human Rights
333 Seventh Avenue, 13th Floor
New York, NY 10001

Tel: (212) 845-5200
Fax: (212) 845-5299
E-mail: comm@lchr.org

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