The need for the Principles on Effective Interviewing for Investigations and Information Gathering

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The worst and most cruel forms of torture happen in the course of interrogation of suspects and of persons thought to be in possession of information that is considered crucial to solving crime and to prevent other criminal offenses. During my tenure as United Nations (UN) Special Rapporteur on Torture (2010-2016) I was able to verify this fact on countless occasions, from interviews with victims of torture in all the countries I visited, to the hundreds of petitions received and treated under the case complaint mechanism of the UN Special Procedures. In my last report to the UN General Assembly, in October 2016,[1] I called on the international community to develop a protocol of non-coercive interrogation, so that crime investigators – as well as intelligence gatherers -- could have guidance on how best to interview suspects, witnesses and victims to get to the truth while preserving the human dignity and the rights to personal integrity of the persons interviewed. My report was the result of a consultation held in August of that same year with specialists on the matter from several countries. In that meeting, I learned not only that science demonstrated that coercion of all sorts is counterproductive to the establishment of the facts, but that there are alternatives to the brutality of torture that have been tried and tested now for three decades in several countries. We have, therefore, a science-based and practice-proven methodology that can be transformed into principles of universal applicability in the conduct of interviews that are essential to law enforcement, military and security intelligence gathering and similar purposes.

My 2016 report was well received at the General Assembly. Notably, it sparked a very enthusiastic response by the experts that I had consulted with in its preparation, but also by highly regarded researchers in criminology, psychology, neurology and law. In addition, human rights practitioners expressed a desire to join in the effort of developing standards that can provide more detail to the blanket prohibitions of international human rights law. Significantly, law enforcement experts from various legal and institutional cultures volunteered to join the effort from the perspective of their professional experience with interrogation. In early 2017 we met to begin discussions about how to draft such a document, and we laid the organisational basis for a project to ensure the broadest possible diversity of professional experience, legal cultures and gender. We also decided early on that the drafting process would be expert-driven while guaranteeing outreach and consultation along

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1 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/71/298, 5 August 2016, available at https://undocs.org/en/A/71/298 .

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the way. We would aim to have a document that could be endorsed eventually by the international community as a tool to generate change in institutional cultures. The result is the document we launched in June 2021, after more than four years of debates, drafting and redrafting, as the Principles on Effective Interviewing in Investigations and Information Gathering.[2]

That torture happens most frequently in the course of interrogation is an insight that does not reveal much that is new. The framers of the UN Convention Against Torture had it in mind when they mentioned interrogation as one of the several purposes for which torture is used, even though they wisely expanded the definition to include infliction of pain and suffering for various other ends. Torture and all forms of coercion have been absolutely prohibited since the very emergence of the international law of human rights, and as a matter of domestic law it has been banned for centuries in most legal cultures. And yet the prohibition and its absolute nature has not resulted in the abolition in practice of its use. As a matter of international law, the prohibition of torture and of cruel, inhuman and degrading treatment or punishment has risen to the level of *jus cogens*, that is, a peremptory norm from which no departure is available to any country, including non-signatories of the relevant treaties.[3] But even that heightened status in the hierarchy of norms does not prevent torturers from continuing to use it. International law also makes investigation, prosecution and punishment of torture an affirmative obligation of all States, and mandates them to offer reparations to victims and to adopt measures of non-repetition. Torture is a "crime under international law" that allows the intervention of international criminal tribunals and of the courts of other States when the territorial jurisdiction is unable or unwilling to act. We have a normative framework that provides us with a sophisticated arsenal to fight against torture, and yet humanity has so far been unable to eradicate it despite progress made in so many other areas.

Part of the reason is that popular culture conditions us to believe that, its abhorrent nature notwithstanding, torture "works" in the sense that it is an effective tool to bring out information that is useful to solving and preventing crime. Research in various disciplines shows conclusively that this "conventional wisdom" is fundamentally wrong. But the persistence of a popular sentiment that torture is inevitable and that it is best to live with it is perhaps the most formidable obstacle that prevents progress towards eradication. After 9-11-2001 and the so-called "Global War on Terror," the attitude of some powerful States to the use of torture and the impact of popular culture has led public opinion to a pernicious relativism on what was previously near universal moral condemnation. We know, however, that science and practice – including in the Global War on Terror – demonstrates the

2 Principles on Effective Interviewing for Investigations and Information Gathering, May 2021. Retrieved from www.interviewingprinciples.com.

3 See e.g., See Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8; Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 1 and 3.; *Prosecutor v Furundzija*, ICTY, 2002, Int'l Law Reports 213 (2002)

falsehood of this claim. In this sense, the Principles provide ample foundation for the proposition that torture does not result in effective fact-finding. The scientific literature cited in the Principles demonstrates that torture and coercion lead to judicial error and to waste of investigative resources; in the long term, it also exacts a heavy price in lack of civic trust in institutions that are essential to democracy and the rule of law.

The Principles are premised on the need to provide alternatives to brutal interrogation tactics. The culture of investigating agencies is one of misunderstood *esprit de corps* and tolerance and even cover-up for actions that breach the law. At the same time, investigators who are pressed for results (not only from their superiors but also from the public when citizens feel threatened by insecurity) can easily fall into shortcuts to solve crime or to obtain information, even if those shortcuts offend our sense of the dignity of all human persons and violate fundamental standards of due process and fair trials. For that reason, it is important to provide realistic alternatives to torture in interrogation. The Principles do just that, in describing the fundamental rules of rapport-based interviewing. The fundamental premise is that the object of the interview is not to obtain a confession but to establish the truth of the facts under investigation. In addition, the interview is conducted in a way that puts in operation the presumption of innocence, not as a rule of decision at trial, but as a living guideline to be observed at all stages of the investigatory process.

The Principles also stress the importance of ensuring the interview incorporates the safeguards against mistreatment that exist in all legal cultures and that are an integral part of due process of law as established in international human rights law. Built into the methodology of interviewing are important procedural guarantees against self-incrimination, about access to legal counsel at appropriate times, access to medical examinations and medical services as required, independent and impartial investigation of breaches of these rules, and so on.

The Principles are not meant to be a training manual for investigative interviewers. Instead, they distill the fundamental tenets that will inform the preparation of such manual in accordance with the institutional and legal cultures in which they are incorporated. They are inspired by the experience of jurisdictions that have successfully incorporated a rapport-based model of interviewing, but they include only the most fundamental and universally valid rules. The Principles are meant to be incorporated into domestic law and practice in every country in the world, with the necessary adaptations that may be required in each case. In that sense, it is hoped that the Principles will fill a void in the architecture of international human rights law applicable to investigations and information gathering, like other non-binding instruments have done in their own fields of application, like the Standard Minimum Rules on the Treatment of Prisoners (since 2015 called the Nelson Mandela Rules) on detailed rules for humane and legally sound prison conditions. Similar examples include the Minnesota Protocol on proper investigation of summary and extrajudicial executions, and the Istanbul Protocol for the detection and documentation of physical and psychological torture.

The Principles are meant especially to guide the practice of interviewing for these purposes, but they will also assist prosecutors, judges and defense counsel in determining what evidence needs to be excluded from the criminal process for having been obtained in violation of the prohibition of torture. Fundamentally, the Principles are directed to

policy-makers and to authorities in charge of supervising investigations, as a directive on the contents of public policy formulation and oversight, as well as on the rules to be followed in devising training and capacity-building in police academies and other law enforcement and intelligence gathering agencies.

An important first step in the strategies towards those goals is to obtain support and endorsement of these Principles by the international community. In due course, such expression of support will result in adoption of the Principles by all member States in their domestic jurisdiction, and become a powerful tool in the eventual eradication of torture.

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