



*Ending Torture. Seeking Justice for Survivors*



**Independent Medico-Legal Unit**  
A Just World-Free From Torture

# **TORTURE IN AFRICA: THE LAW AND PRACTICE**

**SUMMARY REPORT OF THE PROCEEDINGS OF A MEETING  
OF AFRICAN EXPERTS HELD IN NAIVASHA, KENYA  
FROM 10 TO 12 MAY 2012**

**MAY 2012**

## **Introduction<sup>1</sup>**

A Meeting of African Experts on the Law and Practice on Torture was held in Naivasha, Kenya from 10<sup>th</sup> to 12<sup>th</sup> May 2012. It was organised by REDRESS in collaboration with the Independent Medico Legal Unit (IMLU) as part of the project on “Reparation for Torture: Global Sharing of Expertise” supported by the EU’s European Instrument for Democracy and Human Rights (EIDHR). The meeting forms part of a series of regional events that REDRESS is organising in different parts of the world that seek to strengthen collaboration of practitioners to more effectively combat torture. The contributions made before and during the meetings will form part of regional and global reports on the law and practice relating to the prohibition of torture.

The meeting brought together experts drawn from 13 countries including Burundi, Cameroon, Cote d’Ivoire, the Democratic Republic of Congo (DRC), Ethiopia, Kenya, Madagascar, Nigeria, Senegal, South Africa, Sudan, Uganda and Zimbabwe. It provided an opportunity to exchange information and experiences on litigating torture cases and advocating legal and institutional reforms. Throughout, experts identified both systemic challenges and best practices in relation to promoting accountability and redress for torture.

The methodology of the meeting involved country reports, thematic presentations and panel discussions on a range of issues linked to the prohibition of torture and its practical application in the region. The specific areas covered include the challenges to the prevention of torture and inhuman and degrading treatment, accountability and reparation processes. Some of the recurrent problems and best practices in the above areas have also been identified in relation to the various countries.

In his opening remarks, Dr. Mohamud Said, the Vice Chairman of IMLU and President of IRCT welcomed the participants on behalf of the organisers and commended the participants for the important work they do in their respective countries. He provided a brief background about IMLU and an overview of recent developments in relation to the problem of torture in Kenya. Commissioner Med S. K. Kagwa of the African Commission on Human and Peoples’ Rights delivered the keynote

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<sup>1</sup> The organisers are grateful to the Rapporteur of the meeting, Ezan Mwiluki, for his contribution to the initial draft of this Report.

address on opportunities and challenges in relation to the resort to national and regional mechanisms for the protection of human rights in Africa.

The experts made presentations on the law and practice in their respective countries. In addition, experts presented on a range of themes, such as marginalisation, gender-based discrimination and torture, tackling impunity, access to justice, reparation and rehabilitation, challenges of proving torture, the role of forensic evidence, the protection of victims and witnesses and regional litigation and advocacy strategies.

### **Recurring issues**

In their presentations, participants raised a number of recurring and cross-cutting issues relating to the status of ratifications of international and regional instruments, and the effectiveness of national legal frameworks and alternative mechanisms for addressing the problem of torture. In particular, it was noted that most of the countries do not have specific laws criminalising torture although some of them have constitutional prohibitions as well as criminal law provisions that can be applied to acts constituting torture. The deliberations also took note of the fact that most countries do not have specific legislation on reparation and, consequently, the ability of victims to obtain civil or other forms of redress were extremely limited. The absence of adequate legal frameworks, independent judiciaries and impartial and accountable law enforcement agencies are some of the factors that were said to contribute to the chronic problem of impunity. Forensic documentation and protection mechanisms for victims and witnesses were considered to be very important when it comes to litigating torture cases. Participants also highlighted the role of civil society and lawyers and the need to strengthen the independence and effectiveness of national human rights institutions and regional mechanisms. The participants further addressed the problems of torture and other ill treatments linked to marginalisation, gender-based violence and discrimination.

### ***Ratification of International and Regional Instruments on Torture by African States***

All the African countries considered in the meeting had ratified the UN Convention Against Torture (UNCAT) with the exception of Zimbabwe. In contrast, most of the countries had not become parties to the Optional Protocol to the Convention against Torture (OPCAT). To date, only 11 African states

have ratified the protocol, including the DRC, Nigeria, and Senegal among those represented.<sup>2</sup> 53 states are parties to the African Charter on Human and Peoples' Rights (ACHPR).

Apart from the conventions related to torture, some of the experts noted the need for advocacy to ensure ratification of other international instruments such as the International Covenant on Economic, Social and Cultural Rights so that issues of torture and human rights may be handled in a more holistic manner by African countries. It was also determined that there is a need to consider that poor and disadvantaged groups have increasingly become the targets of torture and ill-treatment. Furthermore, participants noted that torture is frequently perpetrated by non-state actors, which in the case of countries like Uganda, led law makers to include a broad definition of torture in the new anti-torture bill which specifically includes non-state actors. This definition is more extensive than that provided for under the UNCAT.

### ***National Legal Framework, Implementation and Practice***

Although most African countries have taken steps to sign and ratify regional and international instruments on the prohibition of torture, there are concerns about their commitment to putting these obligations into practice at the domestic level.

#### ***The criminalisation of torture***

Most of the countries represented in the meeting had not enacted specific laws criminalising torture. Amongst those represented, only, Burundi, Cameroon, the DRC, Madagascar and Senegal have criminalised torture. In Uganda, a bill criminalising torture was given parliamentary assent and was awaiting confirmation by the President whereas in Kenya, a draft bill on the prohibition of torture (prevention and rehabilitation) championed by civil society is currently pending before parliament. The experiences of Uganda and Kenya were cited as examples of the importance of engaging relevant Parliamentary committees and individual parliamentarians, who could sponsor private members' bills, where the government is reluctant to take initiatives directly. Recently, the Prevention and Combating of Torture of Persons Bill was tabled before the South African Parliament, which provides for the offence of torture and related offences.

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<sup>2</sup> The eight remaining countries are: Benin, Burkina Faso, Gabon, Liberia, Mali, Mauritius, Togo and Tunisia.

In many countries there are constitutional prohibitions as well as provisions criminalising acts constituting torture under various categories of offences such as assault or assault causing grievous injury. However, such common crime definitions do not reflect the gravity of the crime of torture and its impact on victims.

### *Problems of implementation*

The practice in most African countries leaves much to be desired when it comes to the prevention of torture and providing reparations to victims. This applies equally to those countries that have criminalised torture as referred to above as well as the ones that haven't, such as Cote D'Ivoire and Ethiopia. The above demonstrates the limits of legislative enactments unless accompanied with a corresponding commitment on the part of governments to enforce duly enacted laws. As such, lawyers and civil society organisations need to redouble their efforts to promote the effective implementation of the relevant laws through advocacy and strategic litigation. The role of civil society, however, is severely curtailed in countries such as Ethiopia, which have enacted counter-terrorism laws and other special laws which restrict funding to organisations working in the human rights field. The failure to translate almost all international and regional treaties into the country's working language is another problem cited in relation to Ethiopia.

Apart from the legislative framework, it was also noted that it is important to conduct advocacy on institutional reforms relating to the judiciary, the police, prisons and oversight bodies. Most countries in Africa have weak and ineffective judiciaries that are prone to government and political manipulation in handling torture cases. Courts also often suffer from a backlog of cases and take a considerably long time to dispose of cases. The absence of effective independent judiciaries that are capable to ensure prompt investigations and prosecutions of torture cases also contributes to the recurrence of torture.

Participants also noted that detention facilities are in very poor conditions and often overcrowded in most of the countries represented. In many countries, the facilities are inaccessible to monitoring agencies such as human rights groups and civil society. The importance of ensuring the independence of national human rights commissions and providing them unfettered access to prisons and detention facilities was also highlighted.

### *The role of the police, army and other security agencies*

Torture is mainly perpetrated by the police, the military and other security agencies. The problem in many countries is that the very organ that is mandated to conduct criminal investigations - namely, the police - bears the main responsibility for acts of torture. As a result, there is public mistrust about the impartiality of the police to investigate torture cases and concern about the failure of police to notify superiors in respect of acts of torture and human rights violations they witness amongst colleagues. With respect to acts of torture and related abuses carried out by private individuals and groups, it was noted that it would be an abdication of duty on the part of state officials if they failed to bring the perpetrators to justice.

It was also noted that militia groups and rebel movements have been involved in gross human rights violations, including torture, in countries such as Burundi, Cote d'Ivoire, the DRC, and Uganda. For instance, in Uganda, the Lord's Resistance Army had caused devastation to the lives of people in Northern Uganda and is responsible for horrendous crimes, including rape and torture. The prevalence of acts of torture carried out by militia groups and rebels generated discussions on the need to expand the definition of torture to also include non-state actors, public and private individuals. The Ugandan anti-torture bill was cited as an example of initiatives aimed at providing such an expanded definition.

### ***Forensic documentation and witness protection***

The importance of medical evidence was emphasised in relation to judicial proceedings involving acts of torture. It was noted that there is a need for thorough documentation - forensic documentation in particular, with the involvement of key professionals including doctors, lawyers, police, judicial officers, social scientists, anthropologists and psychologists.

Government doctors in most African countries are often unable to undertake objective and impartial investigations and documentation due to their loyalty towards their employers or out of fear of losing their jobs. Proper documentation should include specific details of the nature of injuries inflicted on torture survivors. It was noted that methods of torture were becoming more and more sophisticated and, therefore, thorough forensic investigations must be carried out in order to establish the nature and circumstances of torture.

Mention was made about a South African initiative to develop DNA databases. The possibility of establishing DNA databases was also considered in other contexts, including the DRC, however concerns were raised about ethical and privacy issues and the lack of adequate resources to sustain the work.

Medical and psychological experts were said to be crucial to corroborate evidence and to provide counseling to victims and witnesses. In some of the countries such as Kenya and South Africa, legal experts/advocates were working closely with trauma counselors and psychologists to assess the impact of victimisation and also to minimise the risks of possible trauma linked to victims' participation in legal proceedings. However, the use of psychological reports may be challenging for judges who are unfamiliar with the field.

Witness protection was noted by participants to be an important precondition to the pursuit of justice for victims of torture. There are initiatives in Kenya and South Africa to provide witness protection. In Kenya, the witness protection programme is under an independent government body whereas in South Africa, it is situated within the Prosecutor's office.

### ***Reparation***

Reparation for victims of torture is rare in most countries in Africa due to the absence of adequate legal frameworks, the lack of political will and independent judiciaries. Victims are also hindered from exercising their rights because of their own lack of awareness and fears of retaliation by the authorities. The absence of a functioning legal aid system is another problem when it comes to access to justice. One of the worrying trends observed in some countries is that the authorities seek to entice families of victims into quietly abandoning their complaints and cases, with meager monetary compensation. In those instances in which victims were able to secure court judgments for reparation, there were delays in payment of awards.

There are also procedural challenges that are more specific to some of the countries that follow the civil law system, where victims cannot file a separate civil suit if they are parties (civil parties) to ongoing criminal proceedings. Also, they cannot file a civil suit if there was no criminal conviction.

### ***Marginalisation, gender based violence and torture***

One of the themes addressed by the meeting concerned the vulnerability to acts of torture and ill-treatment of marginalised groups, in particular indigenous communities, women, the disabled, children and religious minorities. Gender based violence, including female genital mutilation, rape, marital rape, and acts of violence based on discrimination on the basis of sexual orientation are common in many African countries. Many civil society organisations in Africa are reluctant to speak out on issues relating to sexual orientation, due to the hostile political and cultural environment in which they operate. However, these violations may amount to torture or other cruel, inhuman and degrading treatment and need to be treated as such by all actors involved, including lawyers and civil society. It is also important to raise awareness across different settings including within the family, at the workplace, educational institutions, health centres and other social service facilities.

### ***Tackling Impunity***

Impunity was attributed to the absence of the rule of law, weak institutions and violent armed conflicts. It is difficult to hold senior perpetrators accountable and provide redress to victims amidst ongoing conflicts and while the structural causes of violations and abuses remain in place. The DRC was presented as a country that best exemplifies the challenges referred to above.

What can be done to address this impunity gap in such contexts? What would be the best way to address past human rights violations in the contexts of transition from repressive rule and armed conflicts? On the first point, participants emphasised the role of civil society and lawyers in the investigation, documentation and exposure of human rights violations, including torture. It was also understood to be important to explore domestic remedies for torture, which may include civil suits, disciplinary proceedings and criminal prosecutions based on related offences, where torture is not specifically criminalised. Greater use of regional and international human rights mechanisms was also understood to be important, including advocacy opportunities such as the UN Human Rights Council's Universal Peer Review (UPR) process.

On the issue of transitional justice, participants agreed that there was not a single formula which could be applied to all countries. A range of approaches have been used in different country contexts, including truth commissions, national prosecutions, hybrid or ad hoc tribunals and the International



Criminal Court. Based on the experiences of Zimbabwe and Kenya, it was suggested that a disproportionately heavy focus on reconciliation and power sharing can sometimes perpetuate impunity.

### ***Role of National Human Rights Institutions***

Concern was expressed about the lack of effectiveness of national human rights institutions in many African countries. Often, such institutions do not possess the necessary independence or authority, though participants noted certain exceptions.

### ***Regional mechanisms to address torture in Africa***

Various regional mechanisms in Africa may provide recourse where national mechanisms prove ineffective. These include the Africa Commission on Human and Peoples' Rights, the African Court of Justice, the East Africa Court of Justice, the Court of Justice of the Economic Community of West African States (ECOWAS) and the Tribunal for the Southern African Development Community (SADC). Many of the participants had experience in dealing with one or a combination of these regional mechanisms. All noted that the suspension of the SADC Tribunal in 2011 was very troubling.

Some of the participants noted with frustration the delays in the disposition of complaints. The African Commission and the East Africa Court of Justice are experiencing a significant backlog in pending cases. It was also noted that the lack of familiarity with the procedures of regional bodies is a problem in many countries and that the necessary resources to file communications and issue follow up communications are often lacking. A further significant challenge concerned the lack of effective mechanisms to enforce the decisions of regional mechanisms.

### ***Role of civil society and legal counsel***

It was noted that civil society, lawyers and human rights defenders have a major role to play in combating the practice of torture and enabling victims to exercise their rights to reparation. While some of the countries have a relatively strong civil society, in other countries, such as Burundi, Ethiopia and Zimbabwe, civil society is weaker as a result of the imposition of various restrictions on

the work of nongovernmental organisations. In a number of African countries, human rights defenders are often subjected to intimidation, harassments, arrests and persecution.

### **Conclusions and Recommendations**

The meeting provided an important opportunity for networking, sharing of experiences and knowledge among more than 20 lawyers and civil society experts from 13 countries. The participants were able to gain insights on the peculiar challenges faced by colleagues in other countries and identify the challenges that are more common as well as best practices to overcome the challenges. All present agreed that it was important to continue to collaborate and build synergy among lawyers and human rights defenders in Africa. This was understood to be important to promote accountability and reparation for torture at the regional level and also to complement the efforts at the national level, especially in countries that have yet to develop appropriate legal and institutional frameworks.

The following is a summary of the recommendations made by participants during the meeting.

1. It is important for lawyers and civil society actors to build networks at the regional and international levels in order to help bring about policy and institutional reforms in their respective countries in relation to the prevention of torture and reparation for victims. The latter also requires engaging government officials and law makers.
2. There is a need to campaign for the ratification and effective implementation of the UNCAT, OPCAT and other international and regional instruments by all African states.
3. There is a need for sustained efforts directed at encouraging states to make declarations allowing the filing of individual complaints before the African Court of Justice, the Committee Against Torture and the UN Human Right Committee.
4. It is important to explore to what extent the definition of torture can be expanded so as to include those acts of torture committed by non-state actors, including rebel groups, in light of magnitude of victimisation caused by such groups.
5. Young and upcoming lawyers need to be encouraged, provided with appropriate training and mentoring to be actively involved in handling cases of torture and related human rights violations.

6. Lawyers and civil society organisations need to involve medical professionals, psychologists and other experts in the investigation, documentation and litigation of torture cases, which includes the use of forensic evidence.

### **Suggestions on the way forward**

Looking ahead, participants agreed to follow up on the deliberations of the meeting through an informal email network. A recommendation was also made to the organisers to work towards developing a database that can serve as a resource for researchers, activists and lawyers working towards the prevention of torture and reparation for victims in Africa. The organisers were also encouraged to facilitate information sessions/capacity building opportunities targeting parliamentarians, members of the judiciary and law enforcement agencies.

It was suggested that subsequent regional meetings could build on themes covered during the current meeting. Suggested themes included the role of non-state actors, counter-terrorism and torture; and the role of intelligence agencies. Participants also considered that it would be useful to involve national Bar Associations.