



# Torture in Africa: The Law and Practice

## Regional Conference Report

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## Methodology

Participants were invited to the Africa Regional Meeting *Law and Practice on Torture in Africa* on the basis of their expertise and experience in litigation and advocacy on torture related issues. The participants completed a questionnaire regarding the law and practice of torture in their jurisdiction and made presentations at the meeting covering national as well as thematic issues. The meeting brought together experts from 13 countries as listed above and provided an opportunity to exchange information and experiences on litigating torture cases and advocating legal and institutional reforms. While the expert from Tanzania was unable to attend the meeting, his written submissions are reflected in the present report.

This report builds on the presentations and discussions at the meeting, as well as the information shared by expert participants in their responses to the questionnaire that informed the content and structure of the meeting. As part of a project considering law and practice on torture around the world, the report provides a regional perspective aimed both at strengthening efforts to effectively combat torture across Africa and at sharing comparative expertise and experiences within the region and beyond.

## Executive Summary

Across Africa, torture is routinely used by police and security forces in the course of investigating ordinary crimes. It is also frequently used to crack down on political opponents, various protest movements and human rights defenders. In addition, torture, including gender-specific acts, is committed as a matter of course in armed conflicts by both armed groups and government forces. In this context, torture frequently amounts to war crimes, crimes against humanity or both.

The police and security forces are in most countries reported to be the main perpetrators of torture and ill-treatment. For the police, torture is often used in criminal investigations and is seen as a means of “solving” crimes expediently by securing a confession. Poor resources available to - and capacity of - police to solve crimes in many of the countries considered appears to be one of the main reasons for this practice. The use of torture to extort money has been attributed to the low wages paid to police and the lack of sanctions faced by perpetrators. In several countries, security and intelligences services have reportedly used torture as a means of intimidating opponents and others who are considered threats to State power and authority. In this context, torture is often used as a form of punishment to exact revenge for challenging the *status quo*. Across the region, actors have developed an increasing awareness of violence and abuse by non-State actors, including domestic violence. This applies equally to the attendant legal challenges of whether and under what circumstances, such acts can be, or should be, qualified as torture.

Individuals arrested and detained on suspicion of having committed a crime are most vulnerable to torture in almost all the countries included in this report. In several countries, individuals associated with political opposition groups or protest movements have been repeatedly targeted. Members of minorities such as lesbian, gay, bisexual, transgender and intersex (LGBTI) persons have also been subject to ill-treatment and torture in some of the countries considered in this report, such as Uganda, Cameroon and Tanzania. Poor and marginalised strata of society are at greater risk of torture, in part because they lack the resources to pay bribes to police, and in part due to limited awareness of their rights and inability to access justice due to resource constraints. Ethnic minorities are among the groups at increased risk of torture in a number of countries, especially in areas affected by armed conflicts. Women and children in particular have suffered numerous forms of sexual violence amounting to torture in the course of armed conflict, such as in the Democratic Republic of Congo (DRC) and Sudan.

All of the countries considered in this report are parties to the African Charter on Human and Peoples’ Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR), both of which contain the prohibition of torture. In addition, with the exception of Sudan and Zimbabwe, all of the countries have ratified the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). However, there is significant divergence in the status and implementation of international law at the domestic level, which in many cases results in a lack of application. This is attributed to the absence of domestic implementing legislation, lack of awareness of international law on the part of advocates and judicial officers, as well as reticence on the part of the judiciary to consider international law. In some countries such as Ethiopia, domestic provisions also stipulate that international law can only be invoked by the judiciary if the relevant instrument has been translated into the local language. While seemingly a technicality, the lack of such translation to date has effectively rendered international law inapplicable.

Almost all the constitutions of the countries considered contain an explicit prohibition of torture although this is generally not translated into statutory law and therefore largely unenforceable. The lack of criminal legislation that clearly defines and prohibits torture contributes to a failure to adequately investigate, prosecute and punish acts of torture. Of the relevant countries, Burundi, Cameroon, the Democratic Republic of Congo (DRC), Madagascar and Senegal have enacted specific criminal prohibitions on torture, though not all employ the definition of torture set out in article 1 of UNCAT and the punishments provided do not always reflect the gravity of the crime. Efforts have been made to develop comprehensive anti-torture legislation, for example in Madagascar an anti-torture law was adopted in June 2008. Uganda's anti-torture law was adopted in April 2012 and signed in July 2012 to become the Prevention and Prohibition of Torture Act. While anti-torture legislation is important, it is equally clear that its effectiveness depends on the functioning of key institutions. Legislative reforms must therefore go hand in hand with the reform of key institutions, such as the judiciary and the police force.

In practice, effective safeguards to protect detainees from torture and ill-treatment are frequently not in place. While constitutional or statutory law provisions limit the length of detention before being brought before a judge, exceptions apply in respect of security and emergency legislation and even in ordinary circumstances the guarantees are not consistently observed. The right of detainees to access lawyers is also not respected in practice. In addition, the effective exercise of the right is hampered by the limited number of lawyers and insufficient availability of legal aid. Access to medical examinations are rare, and, if available, will have to be paid for by the accused. The laws of the countries considered, with the exception of Senegal, provide that evidence and confessions obtained under torture or coercion are inadmissible in judicial proceedings. In practice, however, courts have repeatedly disregarded allegations that confessions had been extracted under torture.

Most countries have not established independent and effective complaint or oversight mechanisms for persons in detention. Common themes across all the mechanisms tasked with investigating allegations of torture include a lack of independence, ability to conduct effective investigations, or both. The mechanisms and practices often evidence a lack of clear political commitment to prosecuting torture cases, the result of which is an overwhelming failure to bring perpetrators to justice. Threats to victims, witnesses, lawyers and human rights defenders have been experienced in many of the countries considered, and while NGOs can provide some assistance in terms of protection, the absence of protection regimes poses a serious obstacle to accountability. As a result, accountability for torture remains the exception that is often confined to a few high profile cases or the prosecution of low-level perpetrators. By and large, perpetrators of torture enjoy *de facto* impunity. In countries such as Uganda<sup>1</sup> and the DRC, perpetrators were shielded from accountability for serious crimes, possibly including acts of "torture" committed in the context of armed conflicts by amnesty laws.<sup>2</sup> In Sudan, officials enjoy *de facto* impunity as a result of *de jure* immunity from prosecution, which can only proceed where the head of the respective forces authorises it.

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<sup>1</sup> Amnesty Act of 2000 (as amended in 2006). The amnesty provisions of the Act, however, were allowed to expire in May 2012 by virtue of section 16(3) of the Amnesty Act (Extension of Expiry Period) Instrument 2010. See Amnesty Act (Extension of Expiry Period) Instrument 2010 Statutory Instruments Supplement No. 16, Acts Supplement, Uganda Gazette, no. 31, vol. CIII, May 21, 2010, available at [http://www.beyondjuba.org/policy\\_documents/Amnesty\\_Act\\_Instrument.pdf](http://www.beyondjuba.org/policy_documents/Amnesty_Act_Instrument.pdf)

<sup>2</sup> In the DRC, a several amnesty laws have been passed for crimes committed in the context of armed conflict prior to 2003. The 2009 Amnesty Law, on the other hand, covers acts of war causing injury to others and insurrection committed in the eastern provinces of North and South Kivu from June 2003 to May 2009. *Loi n° 09/003 du 7 mai 2009 portant amnistie pourfaits de guerres et insurrectionnels commis dans les provinces du Nord-Kivu et Sud-Kivu*. For an unofficial translation, see International Centre for Transitional Justice, *Amnesty Must not Equal Impunity*, 2009, available at <http://www.ictj.org/sites/default/files/ICTJ-DRC-Amnesty-Facts-2009-English.pdf>.

Countries lack effective legal frameworks enabling torture victims to obtain adequate reparation for torture. In some countries such as Madagascar, anti-torture legislation includes specific provisions guaranteeing the right to reparation. In most countries, torture victims have to rely on available civil and criminal law remedies. There are, however, significant differences between legal systems in terms of the applicable procedural rules. In some countries, such as in Zimbabwe, South Africa and Uganda, it is possible to launch a civil action that is not dependent on the outcome of a criminal prosecution. In Burundi, Senegal and Cameroon, however, if there is no criminal conviction there can be no civil trial for damages, which presents a significant barrier. Another impediment to reparation is the lack of criminalisation of torture in the relevant jurisdiction. A number of additional factors compound the difficulties for victims to pursue effective remedies. Many torture victims lack the means and/or are marginalised members of society who face generic problems of access to justice. In torture cases, further challenges abound, such as the difficulty of obtaining forensic evidence to document torture or ill-treatment, the absence of effective investigations, limited independence of the judiciary and the lack of enforcement of awards.

Beyond reparation provided as a result of judicial proceedings, there is a noticeable lack of rehabilitation services for victims of torture. Access to medical treatment and psychological counselling for victims varies dramatically amongst the countries considered. In some, such as Madagascar and Tanzania, victims of torture have, in principle, some access to medical care and psychological help. However, in most other countries, the provision of these services is largely dependent on private funding or the work of NGOs, which can, and should not be, a substitute for services that States need to provide pursuant to their international obligations, particularly under article 14 of UNCAT.

Victims of torture committed in the course of armed conflict in the region have not benefited from adequate reparation programmes. While the question of reparation has been considered in countries such as the DRC, Sudan and Uganda, there has been limited political will and capacity to formulate and implement programmes to provide reparation to the victims of torture and related violations.

Many of the shortcomings identified in the context of the prohibition of torture form part of broader structural problems, including weak institutions and lack of respect for the rule of the law. Tackling torture and securing the rights of victims in Africa therefore requires multifaceted interventions that address both individual cases and deeper-seated systemic challenges.

# 1. Practice and patterns of torture

## 1.1 Actors and institutions responsible

Torture by State officials such as police officers and members of the security and intelligence services remains a routine practice in all the countries examined. In the case of the police, torture is used as a means of extracting confessions and gathering evidence in order to 'solve' crimes expeditiously, for example, in Zimbabwe, Uganda and Ethiopia. In several countries, the security forces in particular have resorted to torture as a means of repressing political opponents and dissidents.

In a number of countries experiencing conflict, both non-State actors such as rebel groups and armed factions of political parties, as well as the national armed forces are responsible for acts amounting to torture. In Uganda, the conflicts in the West and North of the country with rebel groups such as the Lord's Resistance Army and the Allied Democratic Forces have reportedly been characterised by serious violations, including torture. International Criminal Court (ICC) has issued several arrest warrants against leading suspects for war crimes and crimes against humanity. In Zimbabwe, war veterans and members of political parties have resorted to the use of systematic torture, particularly during major political events such as elections.

Acts of violence by private individuals consisting of purposefully inflicting severe mental or physical pain or suffering are also issues of major systemic concern in most of the countries covered. This includes domestic violence against women and children, taking the form of beatings, violence and female genital mutilation. "Unpopular" minorities such as lesbian, gay, bisexual, transsexual and intersex persons (LGBTI), those suspected of witchcraft as well as foreign nationals have repeatedly been subjected to severe abuse in countries such as Nigeria, Cameroon, Uganda and the DRC. State authorities have frequently failed to provide adequate protection in these circumstances, and in some cases, such as in Uganda, have even fuelled such situations through rhetoric or legislative action, such as the criminalisation of homosexual conduct.<sup>3</sup>

## 1.2 Forms of Torture and Ill-Treatment

Prevalent forms of torture reportedly include beatings, burning, tearing off of nails, electroshocks, simulation of drowning and "Palestinian hanging". In Madagascar, the most common form of torture is known as "kilalaka" whereby the fingers of the victim are placed in a basin of water followed by electric shocks. "Submersion", which consists of inserting the victim into water, face down until they give a confession, has reportedly been used in countries such as Uganda and Nigeria. The mutilation of genitalia is also practiced in Uganda, including pushing pins and needles into the scrotum, or injecting foreign substances into the testicles.

Torture and ill-treatment often cause permanent damage as demonstrated in a case cited from the DRC, where a victim was reportedly kept in complete darkness for prolonged periods and subsequently released into bright sunshine. As a result, he was permanently blinded. Sexual torture has been reported from most countries, and is acute with regards to female victims. It includes vaginal or anal rape, inserting objects such as bottles into the vagina or anus, or inserting a broomstick into the male urethra, as has been reported from Nigeria.

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<sup>3</sup> The Anti Homosexuality Bill, 2009, available at <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>.

Other forms of torture and ill-treatment, including humiliation, which may not leave physical traces, are equally widespread. Victims are undressed and paraded, as has been reported from Uganda, and forced to do gymnastics such as frog jumping, prolonged standing or forced abnormal positions. Examples from Nigeria and DRC indicate that denial of food, water, light and medical assistance is common, both due to conditions of detention amounting to ill-treatment and deliberate acts on the parts of authorities. In Uganda and Nigeria, officials reportedly forced individuals to witness the killing or torture of others, the destruction of property and livestock, and also threatened family members. One practice reported to be common in Uganda is to put the nozzle of a piston into the mouth of a victim, show him or her a grave and warn that he or she will be next. In Nigeria, mosquitoes, flies, roaches, spiders, rats or snakes are also used as part of the torture, as most people have a phobia of one of these.

### **1.3 Purposes and Causes of Torture**

#### ***Torture as a means of extracting confessions***

Participants from several of the countries considered highlighted that torture is frequently used in the context of law enforcement to expeditiously extract information from suspects as a short cut to “solving” cases. The widespread use of torture as an investigative technique is attributed to poorly funded, ill-equipped and under-trained police forces, which also lack forensic tools, ballisticians or pathologists to give evidence. In addition, police officers are often poorly paid and the use of extortion provides a way to obtain extra income. In Nigeria, for example, relatives of detainees often pay bribes during detention in exchange for bail or a release without charge. In the DRC and Senegal, participants explained that torture is common during investigations of even minor infractions such as theft and fraud and often seemingly inflicted gratuitously. In Nigeria, where reportedly every major police station contains a torture chamber with an officer in charge, the use of torture was reported at every point of contact with police forces, including during routine checks, arrests, interrogations and detention. Notably, some participants highlighted the social function of torture, which is in some cases used as a form of team building amongst police units, for example by subordinate police officers to satisfy their superiors and to reinforce group solidarity and camaraderie.

#### ***Torture as a means of coercion and punishment***

Torture is frequently employed as a form of coercion and punishment. This ranges from satisfying personal vendettas to the more systematic use of torture to intimidate opponents, activists and others. In Sudan, for example, the systematic targeting of student protesters, political opponents and human rights defenders by the intelligence and security forces has been well documented. Participants described similar practices in Burundi, Ethiopia, Cote d’Ivoire and DRC. In DRC, torture was reportedly used to punish those who have allegedly welcomed or sheltered members of armed opposition groups.

A particular form of legally sanctioned inhuman, degrading and cruel treatment or punishment, if not torture, is the use of whipping as a punishment for public order offences, which mainly targets women in countries such as Sudan.<sup>4</sup>

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<sup>4</sup> REDRESS, *No More Cracking of the Whip: Time to End Corporal Punishment in Sudan*, March 2012, available at <http://www.redress.org/downloads/publications/Corporal%20Punishment%20-%20English.pdf>.

## 1.4 Victims of Torture

Individuals arrested and detained on suspicion of having committed a crime were identified as one of the major targets of torture in almost all countries considered, with torture used by law enforcement bodies as a standard method of investigating crime. The pervasiveness of torture has been linked to high levels of poverty and socio-economic inequality. In many cases members of economically and socially disadvantaged groups tend to become the scapegoats and primary suspects of crimes and, therefore, frequently subjected to incarceration, torture and ill-treatment. Their lack of awareness, resources and influence in society makes these groups, including in particular women, children and the elderly, convenient targets for torture and ill-treatment with the perpetrators facing limited risk of being held accountable. In Lagos, Nigeria, for example, the raiding of commercial sex workers, usually involving widespread rape, is known as the “fringe benefit attached to night patrol” according to local activists.

Members of social minorities, such as LGBTI persons, are reported to be frequently targeted and subjected to torture in countries such as Cameroon, Uganda and Tanzania. This takes the form of torture by both public officials and violence by private individuals emboldened by the criminalisation of homosexual conduct and public rhetoric, and protected by official inaction. In Uganda, Section 140 of the Penal Code criminalises “carnal knowledge against the order of nature with a maximum sentence of life imprisonment,” which has generally been interpreted to mean that any homosexual behaviour is illegal. Moreover, efforts are underway to pass an Anti-Homosexuality Bill, a law that if passed, will make homosexual conduct punishable with life imprisonment as the minimum penalty and, in “aggravated” cases, with death penalty.<sup>5</sup> The bill also makes failure to disclose homosexual acts by anyone an offence punishable with up to 3 years imprisonment. The bill is bound to have the effect of further marginalising sexual minorities and exposing them to abuses at the hands of law enforcement officials, irrespective of the fate of the bill and the possible changes it might go through if enacted.

Torture and ill-treatment is also frequently employed as a means of intimidation and control. In several countries, such as Cameroon, the DRC, Ethiopia, Madagascar, Uganda and Sudan, individuals associated with political opposition groups, protesters, journalists and human rights defenders, are repeatedly targeted and reportedly subjected to arbitrary arrest, detention, torture and various forms of ill-treatment.

Recourse to torture in the context of conflict has been documented in countries such as the DRC, Sudan and Uganda, with members of ethnic groups, particularly those suspected of engaging in hostile activities, and women being particularly vulnerable to torture, including gender-based violence such as rape.<sup>6</sup>

Ethnicity is also a relevant factor, with some members of minority ethnic groups targeted as a form of repression or on the basis of their alleged affiliation with or support for opposition groups in countries such as Nigeria, Ethiopia and Sudan. In the DRC, for example, the “new Congolese” – composed of tribes of Rwandan origin – are reported to be at risk of attack from local communities in the east of the country.

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<sup>5</sup> *Supra*, note 3. The more recent version of the bill reportedly drops the death penalty but maintains all the principal features of the 2009 version. See Amnesty International, *Uganda: Anti-homosexuality bill ‘a grave assault on human rights’*, 7 February 2012, available at <http://www.amnesty.org/en/news/uganda-anti-homosexuality-bill-2012-02-07>.

<sup>6</sup> Report of the Secretary General, *Conflict Related Sexual Violence*, UN Security Council, UN Doc. S/2012/33, 13 January 2012.

## 2. The Legal Framework

### 2.1 International Law

#### *Status of ratification international treaties and instruments*

The main international treaties and instruments relating to torture include:

- The African Charter on Human and People’s Rights 1981;
- The International Covenant on Civil and Political Rights 1966;
- The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984;
- The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002.

All States considered are parties to the ACHPR and the ICCPR, both of which contain the prohibition of torture (articles 5 and 7 respectively; article 10 of ICCPR also provides that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”). In addition, with the exception of Sudan and Zimbabwe, the States considered are parties to UNCAT, which is the most detailed treaty setting out a number of obligations relating to the prohibition, prevention and punishment of torture. However, only Nigeria, the DRC and Senegal are parties to the Optional Protocol to the UNCAT (OPCAT), which provides for the establishment of national preventive mechanisms (monitoring bodies) and supervision by the Subcommittee on Prevention of Torture. South Africa, Madagascar and Cameroon have signed but not yet ratified the Protocol. The reluctance of the remaining States to become a party to OPCAT hampers prevention efforts.

Of the 14 States considered, nine are party to the ICC Rome Statute.<sup>7</sup> Zimbabwe, Cameroon, Sudan, and Cote d’Ivoire have signed but not yet ratified the Rome Statute while Ethiopia is not a signatory. In the countries considered in this report, the ICC was investigating the commission of international crimes in Cote d’Ivoire, Kenya, Sudan, and Uganda. However, continuing controversy surrounding the ICC, particularly allegations that it has unfairly targeted African countries, is seen to have resulted in a lack of cooperation that may undermine the ICC’s effectiveness in the region.

#### *Status and applicability of international law in the domestic legal system*

The status and applicability of international law in the domestic systems of the States considered varies significantly. In monist States including Cameroon, Kenya and Madagascar, the Constitution provides that international instruments that have been ratified automatically form part of domestic law and can be invoked in national courts. In theory, this renders the protections guaranteed in the international treaties more accessible and, depending on the provision in question, directly enforceable. The majority of States require domestic implementing legislation to enable the application of international treaties before national courts.<sup>8</sup> However, practice is patchy in this

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<sup>7</sup> *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, available at: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>

<sup>8</sup> For instance, Section 12(1) of the 1999 Constitution of Nigeria provides that: “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.”

regard, with adequate implementing legislation lacking in several countries. Nigeria has implementing legislation for the ACHPR but not the UNCAT, which has resulted in notable gaps of implementation, such as the lack of a criminal offence of torture.

A lack of awareness of international law by advocates and other actors in the legal system, as well as a reticence on the part of the judiciary, means that the impact of international human rights standards is limited in practice. In addition, in countries such as Ethiopia, for example, domestic law provides that for the judiciary to apply international law, the international instrument ratified by Ethiopia must be translated into the local language. However, none of the major international instruments has been translated to date, making it impossible for the provisions of the international human rights instruments ratified by Ethiopia to be adjudicated in domestic courts. In Kenya, lack of continuity between governments in recent years is cited as a reason for the non-application of international law. In particular, the personality and policy changes that take place with each government change mean that progressive ministers are often replaced by regressive ones through the election cycle, thereby halting the efforts to implement international obligations domestically.

The lack of judicial receptiveness is a major barrier to the application of international law in most jurisdictions. Even where it is invoked by advocates in the course of proceedings, international law is frequently ignored by judges in their final judgments. In some countries, such as Cameroon and Burundi, implementing legislation may be in place or not required for the application of international law, but judicial officers lack awareness and familiarity of the instruments. In Zimbabwe, NGOs have attempted to rectify this problem through training. However, programmes have been difficult to implement due to government efforts to limit access to judicial officers, including through a blanket ban on any training for magistrates by civil society.

While the non-adoption of implementing legislation is often due to a number of factors, it represents a political failure to translate international commitments into legislative realities. In a number of countries, the powerful role played by law enforcement institutions and security services is one of the major factors militating against changes. In Sudan, for example, a far-reaching reform of national security law envisaged in the Comprehensive Peace Agreement and Bill of Rights of 2005 failed to materialise as it would have significantly reduced the powers of the national security services.<sup>9</sup> Civil society has been able to raise awareness and achieve some implementation of international standards, for example in Uganda and Madagascar, but the impact of campaigns often remains limited due to repressive political environments, different political priorities and insufficient public support. Nonetheless, broad-based national coalitions and participatory processes have contributed to a series of significant advances, such as the drafting of a progressive constitution in Kenya and the adoption of anti-torture legislation in several countries, such as Madagascar and Uganda.

## 2.2 National Legal Systems

### *Constitutions*

Almost all the national constitutions of the countries covered contain an explicit and absolute prohibition on torture. The 2005 constitution of Uganda guarantees not only protection against torture but also the right to seek redress before a court for a violation of any fundamental right,

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<sup>9</sup> See references in REDRESS, *Arrested Development: Sudan's Constitutional Court, Access to Justice and the Effective Protection of Human Rights*, August 2012, available at [http://www.redress.org/downloads/publications/1208arrested\\_development\\_sudan.pdf](http://www.redress.org/downloads/publications/1208arrested_development_sudan.pdf)

including the right to be free from torture.<sup>10</sup> The exception is the constitution of Senegal,<sup>11</sup> which contains no reference to torture. However, it includes a right to bodily integrity and specific protection against physical injury, which can be interpreted as reflecting the prohibition against torture at least partly, although the focus on physical violence leaves out important other components of torture. Senegal's constitution also imposes on the State a duty to respect and protect the sacred and inviolable nature of human beings.

While important, the constitutional prohibition on torture is frequently left at the level of abstract principle. As a result, the principles are commonly not translated into law, not applied by the executive and are not interpreted by the judiciary in line with international standards and best practice. The consequences of this lack of operationalisation are particularly acute where torture is not recognised as a criminal offence. In practice, this results in a lack of understanding of the elements of torture and contributes to a failure to adequately investigate, prosecute and punish torture. In addition, as the example of the *Hissène Habré* case shows, a lack of implementing legislation, here establishing universal jurisdiction in Senegal's Criminal Procedure Code, may also hinder the prosecution of individuals for acts of torture.<sup>12</sup>

### **Criminal Law**

As reiterated in the *Robben Island Principles*, adopted in 2002 by the African Commission on Human and Peoples' Rights,<sup>13</sup> making torture a criminal offence subject to adequate punishments is one of the key obligations under UNCAT. However, many States have not criminalised torture as such, though recent developments in some countries point to a greater readiness to enact such legislation, for example in Uganda and South Africa. At present, Cameroon, DRC, Madagascar, Senegal and Burundi have enacted specific criminal prohibitions on torture, though not always in line with the definition of torture set out in article 1 of UNCAT.

Burundi criminalised torture in 2009, providing, in article 204 of its Criminal Code, a definition of torture in line with UNCAT language. The punishment ranges from ten to twenty years in prison, depending on the characteristics of the perpetrators and the circumstances. The use of the UNCAT definition is significant, and the punishment provides an appropriate reflection of the gravity of torture.<sup>14</sup> In Cameroon, article 132 of the Criminal Code defines torture as:

[A]ny act by which pain or suffering, either physical or psychological, is intentionally inflicted on a person, by a State agent or anyone acting with the State's authority or consent with a

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<sup>10</sup> Articles 24, 44 and 50, The Constitution of the Republic of Uganda, as amended by Constitutional Amendment Act 21/2005, 30 December 2005.

<sup>11</sup> Constitution of the Republic of Senegal, 7 January 2001.

<sup>12</sup> Hissène Habré, the former president of Chad (1982-1990), has been accused of having been responsible for international crimes, including acts of torture. He fled to Cameroon and then to Senegal in 1990 where he has been residing since. Attempts to prosecute him for torture and other crimes have been unsuccessful to date despite a recent ruling by the International Court of Justice holding that Senegal must do so without delay. See Questions relating to the obligation to prosecute or extradite (*Belgium v. Senegal*), Judgement of 20 July 2012, available at <http://www.icij.org/docket/files/144/17064.pdf>

<sup>13</sup> The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, also known as the *Robben Island Guidelines*, were adopted by the African Commission on Human and Peoples' Rights on 23 October 2002.

<sup>14</sup> While the new Criminal Code article 204 provision is welcomed, the Committee Against Torture have questioned Burundi as to why the definition of torture relating to *violations of international humanitarian law*, in the same Criminal Code (article 197-5) has a restricted definition. See Committee Against Torture, *List of Issues prior to the submission of the second period report of Burundi*, UN Doc. CAT/C/BDI/Q/2, 9 March 2011.

view to obtaining from them information, confessions, to punish the act of a third person, to intimidate, or for any other reason based on any type of discrimination.<sup>15</sup>

No circumstances, however exceptional, such as a state of war or political instability can be invoked to justify torture, and neither can orders from a higher authority. Punishment ranges from life imprisonment, to two years in prison accompanied by a fine. While the definition of torture used is in conformity with article 1 of UNCAT, the spectrum of punishment provides judges with extensive discretion, with two years imprisonment being inappropriately short.

In the DRC, before the adoption of the new law on torture in 2011, torture was only considered as an aggravating factor in the crimes of abduction or arbitrary detention. Now, however, torture is recognised as an independent crime in article 48 *bis* of the penal code, with a definition in line with article 1 of UNCAT. The new provision states:

Any civil servant or public official, any person responsible for a public service or any person acting under such a person's orders or instigation, or would his express or tacit consent, who intentionally inflicts on a person several pain or suffering, whether mental or physical, for the purpose of obtaining from him or a third person information or a confession, to punish him for an act he or a third has person committed or is suspected of having committed, or intimidate or put pressure on him, or to intimidate or put pressure on a third person, or for any reason based on discrimination of any kind, will be punished with five to ten years imprisonment [*servitude pénale principale*] and a fine of fifty thousand to one hundred thousand Congolese francs.<sup>16</sup>

In Senegal, torture is defined in Article 295(1) of the penal code, which states:

Torture constitutes assault, battery, physical or mental abuse or other assaults voluntarily exercised by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, either for the purpose of obtaining information or a confession, as reprisal, or for acts of intimidation, or discrimination for any reason.<sup>17</sup>

The definition incorporates many of the important elements of the UNCAT definition, but is deficient in some regards. For example, there is no reference to torture for the purpose of obtaining a confession for an act that a third person is suspected of having committed, or for intimidating a third person. The punishment for torture in Senegal consists of five to ten years' imprisonment, and a fine of one hundred thousand to five hundred thousand Senegalese francs. In addition, article 88 of Decree No. 74-471 of 13 June 1974 provides that any arbitrary act of the police that deprives citizens of their liberty constitutes an abuse of power, susceptible to a disciplinary penalty against them. On the other hand, Article 424 of the revised Criminal Code of Ethiopia, states that:

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<sup>15</sup> Article 132bis, Act No. 97/009 of 10 January 1997, amended and supplemented provisions of the 1967 Penal Code of Cameroon.

<sup>16</sup> Translated from French: "Tout fonctionnaire ou officier public, toute personne chargée d'un service public ou toute personne agissant sur son ordre ou son instigation, ou avec son consentement exprès ou tacite, qui aura intentionnellement infligé à une personne une douleur ou des souffrances aiguës, physiques ou mentales, aux fins d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit, sera puni de cinq à dix ans de servitude pénale principale et d'une amende de cinquante mille francs congolais à cent mille francs congolais."

<sup>17</sup> Translated from French: "Constituent des tortures, les blessures, coups, violences physiques ou mentales ou autres voies de fait volontairement exercés par un agent de la fonction publique ou par toute autre personne agissant à titre officiel ou à son instigation ou avec consentement express ou tacite, soit dans le but d'obtenir des renseignements ou des aveux, de faire subir des représailles, ou de procéder à des actes d'intimidation, soit dans un but de discrimination quelconque." Article 295-1 of the Penal Code of Senegal as amended by Law No. 96-15 of 28 August 1996.

[A]ny public servant charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a Court of justice, detained or serving a sentence, who, in the performance of his duties ... threatens or treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar end , or to make him give a testimony in a favourable manner, is punishable [...].

The second paragraph of this Article also states, “where the crime is committed by the order of an official, such official shall be punished with rigorous imprisonment [...]”. However it should be noted that unlike the Convention, which defines torture as any act by which “severe pain or suffering, physical or mental” is inflicted, the Criminal Code uses the term “torture” without identifying what kind of pain or suffering constitutes torture. Moreover, the above provision only deals with the use of torture for the purpose of extracting testimony thereby potentially excluding acts of torture committed for purposes of intimidation, punishment or for reasons of discrimination, as provided under UNCAT. Similarly, the prohibition concerns acts committed by civil servants and does not extend to acts committed at the instigation, with the consent or acquiescence of State agents. As such, it does not comply with article 1 of UNCAT.

### ***Efforts to Develop Comprehensive Anti-Torture Legislation***

The law of 25 June 2008 in Madagascar criminalises torture, provides for measures to protect victims and guarantees access to reparation. Its adoption is said to result from the United Nations Human Rights Committee review of Madagascar in 2007. The definition of torture is practically the same as provided in UNCAT with the addition that the Madagascan law specifies members of the army and security forces among the public agents susceptible to commit acts of torture. The punishment for torture ranges from only two to five years imprisonment, which is incommensurate with the gravity of torture. Five to ten years is prescribed if aggravating factors are present, such as torture committed against a child, a pregnant woman, or if an instrument designed to torture was used.

In April 2012, the Ugandan parliament passed the Prohibition and Prevention of Torture Bill 2009, enacted in July 2012, which criminalises torture in accordance with the UNCAT definition, and punishes the offence of torture with 15 years’ imprisonment as well as a discretionary power to order compensation, restitution and rehabilitation for survivors of torture. Under the law, individual perpetrators will be held liable and the defence of superior order will be inapplicable. The law was passed following ten years of advocacy from NGOs and with support from across the population.

In South Africa, the parliamentary process for adopting specific anti-torture legislation is reportedly underway, as a result of significant NGO activity. The Prevention and Combating of Torture Bill was approved by the Cabinet and submitted to the South African Parliament for debate in May 2012. In Kenya, the Prevention of Torture Bill 2011, which has not yet been adopted or tabled for Parliamentary debate, creates a separate offence of torture and sets out an elaborate procedure for reporting and investigating acts of torture, as well as a National Assistance Fund for Victims of Torture.<sup>18</sup>

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<sup>18</sup> The Prevention of Torture Bill, 2011, reprinted in The Kenyan Section of the International Commission of Jurists (ICJ Kenya), IMLU, *et al* State of Torture and Related Human Rights Violations in Kenya, Alternative Report to the Human Rights Committee to Inform its Review of Kenya’s Third Periodic Report at Its 105th Session (9 - 27 July 2012), Annex, available at [http://www2.ohchr.org/english/bodies/hrc/docs/.../WOAT\\_Kenya\\_HRC105.doc](http://www2.ohchr.org/english/bodies/hrc/docs/.../WOAT_Kenya_HRC105.doc)

### ***The need to apply anti torture legislation in practice***

Anti-torture legislation serves an important symbolic function and, in principle, enables and commands the authorities to take action to prevent and respond to torture. However, it has become evident that more must be done to ensure that the legislation is applied in practice. This is most clearly illustrated by the paradox in countries such as the DRC, Cameroon and Burundi, where legislation is in place, but torture continues to be particularly widespread. In particular, there has been a dearth of prosecutions for torture in most jurisdictions where anti-torture legislation exists, which many of the experts attributed to an overall disregard for the relevant laws. For example, in Burundi, there is not a single reported case under the Criminal Code. In Cameroon, the only case of torture that went before a court did not result in a conviction, due to witness intimidation. In Ethiopia, there have been instances of successful prosecution against police officers for torture. However, it is not clear what sanctions, if any, the individual perpetrators faced. As a result, impunity continues to prevail, which suggests that existing complaints procedures and systems of investigation and prosecution are inadequate.

### ***Limited litigation in respect of torture***

According to some experts, the paucity of litigation concerning torture may be attributed to the relative newness of many of the laws considered, as well as to victims' fears of retaliation. In addition, combating impunity for torture necessitates a strong civil society that is capable of challenging State institutions responsible. This poses a problem in countries where a repressive regime has weakened democratic institutions and civil society movements, and where the judiciary lacks independence. A key question identified by participants is whether advocacy for anti-torture legislative developments also takes into account other reform processes that are required in order for anti-torture legislation to function effectively, such as judicial and police reforms. While it was recognised that the process of changing legislative and institutional frameworks may take time to bear fruits, it was equally acknowledged that developing effective strategies in this regard constitutes a major challenge for civil society.

### ***Lack of criminalisation of torture***

Nigeria, Zimbabwe, Tanzania, Cote d'Ivoire and Sudan do not yet have any specific criminal prohibition on torture. Instead, perpetrators may be charged with assault under the Criminal Code, with the gravity of the assault determining the sentence. While the existence of anti-torture legislation is not an indicator that it will be applied in practice, the process of advocating for a law raises awareness and provides stakeholders with the opportunity to examine and address structural factors that impede access to justice and accountability. By engaging in this dialogue, civil society and other national actors can contribute to the adoption and passing of anti-torture legislation, and to its effectiveness once enacted. Such advocacy can bring the problem of torture onto the political agenda for broader debate.

## 3. Safeguards Against Torture in Law and Practice

### 3.1. Pre-trial detention

Pre-trial detainees are often the most vulnerable to torture and ill-treatment as the opportunities and incentives for torture are heightened during this initial phase of the criminal justice process. The regulation of pre-trial detention, particularly with regard to limiting its length, is an important safeguard against torture, which has been routinely invoked by the Committee Against Torture as an obligation of States party to UNCAT under article 2.<sup>19</sup> The *African Fair Trial Standards* also include the right to be brought promptly before a judicial officer, and set out the reasoning behind this obligation.<sup>20</sup> Moreover, article 9 of ICCPR prohibits arbitrary arrest and detention, guarantees the right to be informed of the reasons of arrest and detention and the right to habeas corpus whereas article 14 of ICCPR guarantees, *inter alia*, the right to access a lawyer of one's choice.<sup>21</sup>

In all of the countries considered, constitutional and statutory provisions guarantee varying levels of protection for individuals in detention. However, the enactment of security or emergency legislation seriously undermines the existence of any protective regimes, such as in Sudan.<sup>22</sup>

In terms of protective regimes, most legislation fixes a maximum of 48 hours in detention before a suspect must be brought before a judge. For example, in Uganda, this is enshrined in article 23(4) of the constitution, which states:

A person arrested or detained [...] shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.

Article 49 (1) (f) of Kenya's constitution provides for an even shorter limit of a maximum of twenty-four hours after arrest. Additional legal protections are in place in a number of the countries considered. For example, both Nigeria<sup>23</sup> and Ethiopia<sup>24</sup> guarantee the right to silence. The Nigerian Criminal Procedure Code guarantees the right of the person arrested to be notified of the cause of the arrest<sup>25</sup> and to be informed without delay of the charge against him or her and to be given reasonable facilities for obtaining legal advice.<sup>26</sup> In South Africa, a suspect is allowed to challenge the refusal of bail at any time prior to trial.<sup>27</sup>

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<sup>19</sup> General Comment No. 2, *Implementation of Article 2 by States parties*, Committee against Torture, UN Doc. CAT/C/GC/2, 24 January 2008, para. 13, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm>

<sup>20</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted by the African Commission on Human and People's Rights, May 2003 available at: [http://www.iag-agi.org/bdf/docs/fair\\_trial\\_and\\_legal\\_assistance\\_in\\_africa.pdf](http://www.iag-agi.org/bdf/docs/fair_trial_and_legal_assistance_in_africa.pdf)

<sup>21</sup> See also UN Human Rights Committee (HRC), CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, No. 8, available at: <http://www.unhcr.org/refworld/docid/4538840110.html>

<sup>22</sup> See REDRESS, *Extraordinary Measures, Predictable Consequences: Security Legislation and the Prohibition of Torture*, September 2012. Available at: [http://www.redress.org/downloads/publications/1209security\\_report.pdf](http://www.redress.org/downloads/publications/1209security_report.pdf). See also, REDRESS and SORD, *Security for all: Reforming Sudan's National Security Services*, September 2009, available at [http://www.redress.org/downloads/publications/Security\\_for\\_all\\_Final.pdf](http://www.redress.org/downloads/publications/Security_for_all_Final.pdf).

<sup>23</sup> Section 35(2) of the Constitution of the Federal Republic of Nigeria, enacted on 29 May 1999.

<sup>24</sup> Article 27(2) of the Criminal Procedure Code 1961 of the Federal Democratic Republic of Ethiopia.

<sup>25</sup> Section 5 of the Criminal Procedure Code of Nigeria.

<sup>26</sup> Section 9 of the Criminal Procedure Code of Nigeria.

<sup>27</sup> Section 65 of the Criminal Procedure Act (CPA) of South Africa, 1977. However, it must also be noted that South Africa's bail laws have been amended five times since 1994 and generally have made it more difficult for those arrested to be released on bail.

In some countries, legislative protections also exist to regulate the treatment of detainees. For example, the Criminal Procedure Code of Nigeria states that a person arrested shall not be exposed to unnecessary restraint, including handcuffing, unless there is a judicial order, a reasonable apprehension of violence, an attempt to escape, or restraint is considered necessary for the safety of the person arrested.<sup>28</sup> Similarly Uganda's Prison Act regulates the use of force, weapons and firearms by prison officers.<sup>29</sup>

Despite the legal protections in place, almost all the participants reported difficulties in enforcing and respecting the legal guarantees for a variety of reasons. These include the lack of independence of the judiciary, lack of awareness and resources as well as fear of reprisals on the part of detainees, indifference among the political and judicial authorities to the principles of due process and fair trial and the tendency to treat suspects as criminals against whom all forms of pressure, including torture, can be legitimately employed.

### **3.2 Access to a Lawyer and medical examination upon arrest**

Detainees' rights to prompt access to a lawyer and a medical examination are fundamental safeguards against torture and ill-treatment for those in pre-trial detention, and are firmly established in international standards, such as the Istanbul Protocol,<sup>30</sup> and regional instruments including the *African Fair Trial Standards*.<sup>31</sup>

The right of detainees to access a lawyer is guaranteed in many of the countries considered. In Nigeria, the Criminal Procedure Code requires the authorities to provide reasonable facilities for obtaining legal advice and otherwise making arrangements for a detained person's defence.<sup>32</sup> A limited right is guaranteed in Burundi, where access to a lawyer is not available at the stage of arrest, but only in the pre-judicial phase before the prosecution.<sup>33</sup> Similarly in Senegal, a detainee cannot have access to a lawyer until after the initial 48 hours in detention.<sup>34</sup> Even where access to a lawyer is provided for in the law, this right is often undermined in practice by the lack of legal aid or publicly funded lawyers for those who cannot afford to pay, as is the case in Ethiopia. Similarly, in Madagascar, though a detainee's right of access to a lawyer is established in Article 4 of the 2008 law on torture, this law is not applied in practice.

In practice access to a medical examination on request for detainees is rare. If available at all, an examination is only carried out at the expense of the accused. In Senegal, it is only possible to request medical attention 48 hours after the initial arrest. Some jurisdictions such as South Africa and Uganda provide for a medical check upon admittance to prison, as opposed to pre-trial detention. In Uganda, at some police stations and prisons, the authorities do not admit suspects with evident injuries before they have received treatment. The suspects may be examined by medical officials and any injuries documented before admission. In Zimbabwe, obligations only arise if, upon the initial remand hearing, the victim informs the court that they have been tortured in custody. The magistrate must then order a medical examination and an inquiry into the allegations.

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<sup>28</sup> Section 4 of the Criminal Procedure Code of Nigeria.

<sup>29</sup> Sections 11 and 59 of the Uganda Prisons Act, 2006.

<sup>30</sup> UN Office of the High Commissioner for Human Rights, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"), 2004, UN Doc. HR/P/PT/8/Rev.1, available at: <http://www.unhcr.org/refworld/docid/4638aca62.html> [accessed 30 September 2012]

<sup>31</sup> *Supra note 20.*

<sup>32</sup> Section 9 of the Criminal Procedure Code of Nigeria.

<sup>33</sup> Article 92 of the Criminal Procedure Code of Burundi.

<sup>34</sup> Article 55 of the Criminal Procedure Code of Senegal.

In Cameroon and Madagascar, access to a medical check-up is provided for in legislation, but is reportedly not adhered to in practice.

### 3.3 Admissibility of evidence obtained under coercion

The inadmissibility of statements obtained through torture or ill-treatment is an important component of States' obligations to prevent torture, as explicitly provided for in Article 15 of UNCAT. The *African Fair Trial Standards* call on prosecutors to refuse any evidence against suspects they know or believe has been obtained through unlawful means, including torture and ill-treatment. All jurisdictions, with the exception of Senegal, provide that evidence obtained under torture or coercion are inadmissible in judicial proceedings. In Uganda for example, the Evidence Act provides that no evidence obtained through violence, threat of violence, or promise can be admitted into proceedings.<sup>35</sup>

Commonly, this prohibition is only of a procedural nature without sanction. However, article 16 of the Ugandan Prevention and Prohibition of Torture Act, mentioned above, provides two years' imprisonment or a fine for persons that use information obtained through torture in the prosecution of the person tortured. Despite the prohibitions against the use of such evidence, significant problems reportedly continue in their enforcement in practice, particularly where the police values confession as principal means of solving cases and judges fail to counter such practices. For example, in several high profile cases resulting in the death penalty in Sudan, the accused alleged that confessions used had been obtained as a result of torture.<sup>36</sup> In the DRC, a Military High Court, sentenced *Firmin Yangambi*, a civilian lawyer and human rights activist, to death following a trial characterised by numerous irregularities and after having rejected the defendants plea for the exclusion of the statement that he has allegedly made under torture.<sup>37</sup> In South Africa, on the other hand, the Supreme Court of Appeal applied the "fruit of the poisonous tree" doctrine and excluded evidence obtained as a result of torture in a recent landmark judgment.<sup>38</sup> The Court held that any use of evidence obtained through torture automatically renders proceedings unfair.

### 3.4 Complaints procedure and Independent Oversight

The ability to complain about torture or ill-treatment is one of the most fundamental safeguards against torture for detainees, and form part of a State's obligations to prevent torture. The African Fair Trial Standards state that, "[a] detained person or his or her legal representative or family shall have the right to lodge a complaint to the relevant authorities regarding his or her treatment, in particular in case of torture or other cruel, inhuman or degrading treatment," and that States are responsible for ensuring that such mechanisms are effective and that the right to complain is

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<sup>35</sup> Section 26 of the Evidence Act provides: "If such confession as is referred to in section 25 is made after the impression caused by such violence, force, threat, inducement or promise has, in the opinion of the court, been fully removed, it is relevant."

<sup>36</sup> See for example, Opinion No. 38/2008 (Sudan), Opinions adopted by the Working Group on Arbitrary Detentions, UN Doc. A/HRC/13/30/Add.1, 2 March 2010, paras. 166-181.

<sup>37</sup> Case of *Firmin Yangambi*, Military High Court of Kinshasa-Gombe, RP 042/HCM/11, 3 March 2010 See also, FIDH, *Condamnation de M. Firmin Yangambi, avocat membre du Conseil de l'ordre du Barreau de Kisangani et président de l'ONG d'appui aux victimes de la guerre « Paix sur terre »* - COD 002 / 0110 / OBS 011.1, 8 March 2010, available at: <http://www.fidh.org/Condamnation-de-M-Firmin-Yangambi>. On appeal, the Military High Court Upheld the conviction but reduced the sentence to 20 years imprisonment. See *Le Potentiel, Congo-Kinshasa: Haute Cour militaire - Me Firmin Yangambi condamné à 20 ans, Eric Kikunda et Ben Olangi à 10 ans*, 16 June 2011 available at: <http://fr.allafrica.com/stories/201106160363.html>

<sup>38</sup> South African Supreme Court of Appeal, *Mthembu v The State* (379/2007)[2008] ZASCA 51 (10 April 2008), paras.34, 36.

promptly made known to all arrested or detained persons. Oversight mechanisms also play an important role in monitoring detention centres with a view to reducing the risk of torture.

Several of the countries considered have some form of complaints procedure for victims of torture or ill-treatment. In South Africa, the Judicial Inspectorate is mandated to receive and investigate complaints made by prisoners, as well as monitor and inspect prisons. The Independent Police Investigative Directorate is tasked with much the same in relation to suspects in police custody. The mandate of these mechanisms is mostly reactive and civil society is in the process of lobbying for a change in their governing legislation so as to increase their investigative mandate.

In Uganda, the police force has disciplinary courts instituted by the Inspector General of Police that hear complaints against officers. These courts decide whether perpetrators are to be discharged, dismissed, cautioned, fined or demoted in rank. Individuals can also make written complaints relating to police misconduct under Article 70 of the Police Act.<sup>39</sup> Furthermore, the police have put in place the Professional Standards Unit of the Police, replacing the Human Rights and Complaints desk, which investigates all complaints against the police. Additionally, there are reportedly human rights committees in prisons as well as complaints books for inmates to write down allegations of torture or ill-treatment by prison officials. While these are important initiatives, they have not translated into accountability in the absence of effective criminal investigations.

Some of the other countries considered also nominally have oversight mechanisms in place but in practice the bodies are non-functioning and do not serve as an adequate complaints mechanism for detainees. In Kenya, the Independent Police Oversight Authority (IPOA) was established in 2007, but it reportedly lacks independence and in addition has no prosecutorial mandate. In Nigeria, a lack of resources is viewed as undermining the effectiveness of oversight mechanisms.

### **3.5 Human Rights Commissions and Independent Supervisory Bodies**

National human rights institutions (NHRIs) play an integral role in the implementation of human rights norms at the domestic level, through standard-setting advocacy to advance the rule of law and by assisting victims of human rights violations in securing access to justice and an adequate and appropriate remedy. The *Paris Principles relating to the status of National Institutions*<sup>40</sup> clearly set out the requirements for the NHRIs independence, remit and mandate, and methods of operation. According to the Principles, NHRIs should be established in legislation with a broad mandate to promote and protect human rights and their independence from the government should be enshrined in law. Members of NHRIs should be appointed (by election or other means) through a transparent process that guarantees representation of all relevant stakeholder groups involved in the protection and promotion of human rights, including members of civil society, academic experts, parliament and government representatives.

According to the representatives from Uganda, the Uganda Human Rights Commission (UHRC) has proved to be largely successful in fulfilling its mandate. Article 54 of the Constitution provides that the UHRC is not subject to any formal control by any authority. The UHRC recruits its own staff and obtains its funding from a consolidated fund. It acts as an investigative body that can examine cases falling within its jurisdiction and prescribes its own procedures for investigations. In addition, it can visit jails, prisons and places of detention or related facilities unannounced with a view to assessing

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<sup>39</sup> Police Act of Uganda, 1964, as amended.

<sup>40</sup> The Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.

and inspecting conditions of detention and the well-being of the inmates and make recommendations. The UHRC is therefore capable of establishing facts and ordering compensation and other remedies for victims. It also runs a continuing programme of research, education and information to enhance respect of human rights and recommends to Parliament measures to promote human rights, including provision of compensation to victims of violations of human rights or their families. However, the UHRC has in several instances been unable to undertake prompt investigations reportedly due to obstructions by security agencies in providing information. It should also be noted that while the UHRC has awarded numerous complainants compensation against the Attorney General, the vast majority of these awards have not been paid by the government.<sup>41</sup>

The National Human Rights Commission (NHRC) of Nigeria can also visit any police detention facility or prison without prior notice and its decisions can be registered in the high court and enforced as decisions of the court. It reportedly benefits from enhanced level of financial autonomy as it is now funded from the federal consolidated revenue fund of the and no longer under the federal Ministry of Justice. Kenya's human rights commission has also played an active role in the promotion and protection of human rights.

While national human rights institutions have been established in several other countries, in many cases these are non-functional or dysfunctional owing to lack of independence and resources, as well as political obstacles. In Sudan, a National Commission for Human Rights was established in January 2011, but its members were appointed directly by President Bashir, and are largely unknown in the field of human rights. A second governmental institution, the Advisory Council for Human Rights, has proved to be largely ineffective, due to its failure to respond to allegations and complaints submitted to it, as well as concerns about its impartiality. In Madagascar, a National Council of Human Rights is mandated to receive individual and collective complaints about torture, however it is not currently functional. Similarly, the Zimbabwean National Human Rights Commission is not yet properly constituted.

The National Commission of Human Rights in Burundi has reportedly been largely ineffective to date due to financial constraints. In Tanzania, the Commission for Human Rights and Good Governance is tasked with investigating allegations of torture. It is legally independent but reportedly prone to interference from the State, as its commissioners are appointed by the President and it is dependent on the government for its budget. The Commission has reportedly been slow in addressing the many cases of human rights violations reported in Tanzania, but did have some success in 2003 when it conducted an inquiry into an atrocity in *Nyamuma* village where villagers had been tortured and displaced by State authorities.

In Cote d'Ivoire, the National Human Rights Commission (CNDH) was established in 2005 through a presidential decree, but is a highly politicised organ that does not conform to the Paris Principles and has no influence in practice. The Ethiopian Human Rights Commission, which has a broad mandate to investigate human rights abuses, lacks the requisite independence to effectively combat torture in the country.

In Senegal, a law enacted in 2009 pursuant to the OPCAT created a National Observer of Places of Detention. However, since the coming into force of the law in June 2011, the National Observer has apparently been beset by concerns that its financial, material and human resources are insufficient to meet its task.

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<sup>41</sup> See also, REDRESS, *Baseline Study on the Situation of Torture Survivors in Uganda*, 2007, available at [http://www.redress.org/downloads/publications/TortureUganda\\_Apr%2007.pdf](http://www.redress.org/downloads/publications/TortureUganda_Apr%2007.pdf)

### ***The role of civil society organisations in monitoring torture***

Civil society, lawyers and human rights defenders have a major role to play in terms of monitoring, documenting and reporting on human rights violations, including torture. While some of the countries have a relatively strong civil society, in other countries, such as Burundi and Ethiopia, civil society is weaker as a result of the imposition of various restrictions on the work of NGOs. In a number of African countries, human rights defenders are often subjected to intimidation, harassments, arrests and persecution. Despite these constraints, however, international and local NGOs attempt to fill gaps left by the absence of effective and independent monitoring mechanisms in some countries. For example, in Burundi, international NGOs such as *Avocats Sans Frontiers*, *Terre des Hommes* and *International Bridge to Justice*, as well as local NGOs such as the *Association for the Protection and the Defence of Rights of Prisoners* (APRODH) and ACAT make visits to prisons. A reduction in the number of cases of torture on police premises is reported in Burundi as a result of the transparency and general awareness created by such visits, although this did not necessarily prevent torture from happening in other places.

### ***Ineffective safeguards in practice***

Overall, while the legislation in many of the countries under consideration provides for essential safeguards against torture, in most cases these laws are not effectively implemented and enforced in practice. A general disregard for due process of law facilitates the abuse of power. Suspects are not informed of their rights, nor provided with adequate legal representation (often due to lack of legal aid) and guarantees against the use of confessions or other evidence obtained under torture are not stringent enough. A lack of independence of investigating bodies and widespread corruption inhibit accountability. The challenge is therefore ensuring that legislation is adequate in the prevention and prohibition of torture, and that the institutions and agencies responsible for implementing such legislation undergo the necessary reform and training processes in order to effectively carry out this function. This task is made all the more difficult by the fact that the use of violence on suspected criminals is so deeply ingrained in cultural attitudes means that the enforcement of torture safeguards, and the need to raise awareness about these amongst police and other law enforcement agencies, is neither a political nor popular priority.

## 4. Accountability: investigation and punishment of torture in practice

### 4.1. Investigations and prosecutions

International human rights law has developed well-established principles for investigating allegations of torture.<sup>42</sup> Investigations must be prompt, impartial and effective, that is capable of establishing the facts and identifying the perpetrators. While States are under the obligation to conduct criminal investigation and prosecution in cases involving serious human rights violations, including torture, these can be complemented by oversight mechanisms that are mandated to look into the conduct of police officers and security forces with procedures for the submission of complaints. While several countries such as South Africa, Uganda, Kenya and Nigeria have set up such mechanisms, a number of them are beset by lack of independence and financial constraints, as mentioned under section 3.4 above. The Nigerian Police Service Commission and Police Complaints Bureau, for example, are both acutely under-resourced and lack political support. In the past, they have failed to carry out inquests and autopsies on suspects who have died in custody and prosecution is reportedly rare due to lack of co-operation or obstruction by police, as well as connivance with lower cadres of the judiciary.

Lack of judicial independence and oversight over the integrity of the judicial process and the entire criminal justice system was stated as the most significant barrier to meaningful prosecutions. In Cameroon and Ethiopia, for example, a sense of solidarity, rather than independence, characterises the relationship between the prosecutor and police defendants, rendering successful prosecutions practically impossible.

In relation to violation committed in the context of conflicts involving government forces and armed opposition groups, authorities are typically reluctant to investigate cases implicating individuals currently in power or close to power. In Cote D'Ivoire, for example, it is widely acknowledged that the forces supporting *President Ouattara* (the current President) and "pro-Gbagbo" forces were equally responsible for various cases of torture in the context of the post-election violence of 2010-2011. However, not a single member of the forces supporting the current President has been investigated, whereas more than 200 "pro-Gbagbo" forces have been imprisoned. In Uganda, the War Crimes division of the High Court has jurisdiction over war crimes committed during the conflict with the Lord's Resistance Army but not over such acts committed by the Ugandan army.

In Senegal, investigations into allegations of torture frequently stall at the early stages, and are often dismissed following brief investigations, which points to major shortcomings in the system.

### 4.2. Obstacles to accountability

#### ***Lack of adequate legal framework and strong institutions***

While the lack of specific criminal prohibition is an important obstacle to the investigation and prosecution of torture in a number of countries, it does not fully account for the absence of investigations and sanctions against perpetrators. As can be gleaned from the previous sections, the

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<sup>42</sup> Human Rights Committee, General Comment No. 31: *The nature of the legal obligation imposed on States Parties to the Covenant (ICCPR)*, 26 May 2004.

most common impediments to accountability across the region are lack of political commitment, the absence of strong and independent institutions and paucity of resources.

### ***Immunity, amnesties, time limits***

Other factors contributing to the lack of accountability in some countries include procedural barriers such as amnesties, immunities, and statutes of limitation for the crime. Such barriers have negatively impacted on victims' abilities to seek redress and hold torturers accountable in many of the countries considered and are generally considered incompatible with States' international law obligations to investigate and prosecute torture.<sup>43</sup>

Legal immunities pose a problem in several countries, namely Burundi, Tanzania, Zimbabwe and Sudan. In Tanzania, the Presidential Affairs Act protects State officials from being prosecuted or subpoenaed to testify in court. Article 46 of the Constitution of Tanzania also accords immunity to the President from prosecution for any act committed while in office. In Sudan, the Police Act 2008 provides that no legal action may take place against police officers if their conduct was carried out in good faith. The security services and the army are covered by similar provisions in the National Security Act of 2010 and Armed Forces Act of 2007 respectively. In any case, no prosecution can be brought against the member of any of these forces without the sanction of their respective head of forces.

### ***Lack of victim and witness protection***

The lack of victim and witness protection constitutes another impediment to ensuring accountability. While the protection needs of victims and witnesses will vary from case to case, real fears of government reprisals play a significant role in preventing victims of torture from coming forward. States' obligations to provide adequate protection can be considered in a number of different ways: (a) protection as a right in and of itself; (b) protection as a condition precedent to the realisation of other rights; and (c) protection as a remedy, i.e. one of the ways in which to guarantee non-repetition.<sup>44</sup>

Threats to victims, witnesses, lawyers and human rights defenders are reportedly common in almost all countries considered. In Nigeria, police often threaten victims seeking accountability as well as activists seeking or advocating for justice on behalf of victims. Human Rights Watch reported in its publication *Rest in Pieces*,<sup>45</sup> that victims of police torture attempting to gain accountability face many obstacles such as intimidation, harassment and obstruction. For example, two schoolgirls who were gang raped by police in Enugu received threatening phone-calls from the accused, stating "If you don't drop the case, I will deal with you and show you I am a man."<sup>46</sup>

In the DRC, the cases of *Floribert Chebeya* and *Fidèle Bazana* gained much public attention. These two human rights defenders were killed in June 2010 at some point after their arrival at the police

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<sup>43</sup> *Ibid.*

<sup>44</sup> REDRESS, *Implementing Victims' Rights, A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, March 2006, available at: <http://www.redress.org/downloads/publications/Reparation%20Principles.pdf>. See also REDRESS, *Ending Threats and Reprisals Against Victims: A Call to Action*, 2009, available at: <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>

<sup>45</sup> Human Rights Watch, *Rest In Pieces, Police Torture and Deaths in Custody in Nigeria*, July 2005.

<sup>46</sup> *Ibid.*

headquarters following a request that they meet with the Chief Inspectorate of Police.<sup>47</sup> In Tanzania, the journalist *Said Kubenea* had acid sprayed into his eyes by the police following his reporting of corruption by the government. He was taken for medical treatment in India but no action was taken against the State agents responsible. In Sudan, human rights defenders have been repeatedly targeted in response to reporting of human rights violations, including by means of torture and ill-treatment.<sup>48</sup> In Cameroon, wealthy clients of human rights lawyers are often intimidated for “enriching lawyers who oppose the President” and end up withdrawing their custom from the lawyers, affecting the financial viability of their practice.

Few formal regimes of victim and witness protection are in place. It was reported that NGOs often step in to fill this gap. In the DRC, for example, security training is provided by the NGO Protection International – with a focus on evaluating threats, preventing and responding to harassment, developing a security plan and data protection measures. In Zimbabwe, civil society organisations often rally together to protect each other through swift information transmission as well as a rapid response to arrests.

### ***The need for effective protection regimes***

Implementation of an effective victim and witness protection regime is a crucial part of any strategy combating torture. Such protection contributes to strengthening legitimate institutions and governance and provides citizens with the security and justice needed to break the cycle of violence. If protected, victims and other witnesses will be able to give testimony freely which would be one of the factors enhancing the prospect of perpetrators being held accountable for the crimes they have committed. Some suggestions for protection measures include:

- Judicial protection measures by the court - in Kenya, for instance, proceedings regarding sexual offences are conducted in camera as opposed to open court to safeguard the dignity of the victim;
- Police protection measures - ranging from ensuring the safety and security of individuals in a specific area and ensuring confidential investigations by means of providing services such as physical protection to a victim or a witness in court, or a police escort to a court room;
- Temporary residence in a safe house;
- Video conferencing for testimony so that the victim need not meet the perpetrator face to face;
- Resettlement of a victim to a new and undisclosed place;
- Identity change for victims and witnesses in extreme situations.

When constructing witness protection measures, it should be borne in mind that the ideal of victim protection is reliant on an ethical and properly functioning investigative practice, a proper system of State security, an independent justice system and the capacity of the State to fund expensive protective measures such as identity change and permanent relocation when required. These elements are not yet well established in many areas of Africa, where there is often a lack of integrity in the justice sector in addition to severe budget constraints.

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<sup>47</sup> Convictions in for their murders were handed down in June 2011, with 4 death sentences, one life sentence and three acquittals. The case is was on appeal at the time of publication.

<sup>48</sup> African Centre for Justice & Peace Studies, the Sudan Democracy First Group and REDRESS, *Joint Alternative Report, Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment*, April 2012, available at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>

## 5. Reparation for Torture

### 5.1. The Right to Reparation for Torture

The right to reparation for victims of human rights violations is an established principle of international law enshrined in a number of international and regional human rights instruments and declarations, including the UNCAT, ACHPR, the African Fair Trial Standards, and the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*.<sup>49</sup> According to the Basic Principles, forms of reparation include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to reparation comprises the procedural right to an effective remedy and the substantive right to obtain adequate forms of reparation, which should be underpinned by a victim oriented perspective that grants victims procedural rights of participation and protection in a non-discriminatory fashion.

A variety of avenues for obtaining reparation for torture are in principle available in the countries considered. In some countries, explicit legal provisions guarantee the right to reparation for torture. For example, in Madagascar, article 21 of the Law 2008-008 on torture guarantees victims of torture the right to obtain reparation from the State. It provides that the victim will be compensated fairly, including through the provision of appropriate medical care, advice and counselling. Even in the absence of an explicit legal right to reparation for acts of torture, the majority of legal systems, such as South Africa, Uganda, Nigeria, Senegal, Tanzania and Zimbabwe allow for constitutional remedies and/or some form of civil action, where the burden of proof is on the plaintiff (victim) and the standard of proof is usually the civil standard of a balance of probabilities. Compensation is often monetary, however occasionally it can take different forms.

#### ***Constitutional rights of petition***

Several countries provide various forms of constitutional remedies. Article 30(3) of the Constitution of Tanzania contains a general provision whereby any person claiming a violation of a constitutional right may institute proceedings for redress in the High Court. There is a similar right to redress under article 46 of the Nigerian constitution, in addition to a guarantee of legal aid for bringing such an action. Article 50 of the Ugandan constitution enjoins any person who believes that his rights have been violated to petition a court of competent jurisdiction for redress, which includes compensation, and Article 137 of the constitution provides the right of any person to petition the Constitutional Court. In combination, these two provisions provide both individual civil suits and public interest litigation against government.

In Tanzania, the petition method has been widely used in many cases of human rights violations and individuals have obtained redress. Redress by the High Court has included declaratory orders against the State, compensation, an order for amendment of the law, amongst others. The only challenge is the undue delays of hearing human rights cases to the extent that the redress is sometimes meaningless. In Nigeria, these mechanisms are curtailed by lack of judicial oversight over the integrity of the judicial process, lack of adequately trained judicial officers informed about international standards, judicial insensitivity to the plight and rights of torture victims, the judiciary's witting or unwitting tolerance of investigative processes that employ torture, and difficulties surrounding the proof that would enable victims to

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<sup>49</sup> General Assembly resolution 60/147 of 16 December 2005, available at <http://www2.ohchr.org/english/law/remedy.htm>

bring their torturers to justice. In Uganda, while fundamental rights petitions have been used in human rights cases, the challenges faced for the efficacy of reparation claims in torture cases include the lack of a law criminalising torture (before July 2012), lack of adequate forensic documentation, and lack of witness protection programmes among others.

### ***Civil and criminal legal action for torture***

In Zimbabwe, South Africa, Nigeria and Uganda it is possible to launch a civil action that is not dependent on the outcome of a criminal prosecution. In Burundi, Senegal and Cameroon, however, a civil case cannot be brought in the absence of a criminal conviction. The principle according to which criminal cases precede over civil cases presents a significant barrier where the lack of effective investigations makes it impossible to secure a criminal conviction.

In theory, it is possible to lodge a civil case on grounds of torture or ill-treatment in a number of countries; however few cases have been brought in practice. Lack of awareness and resources, fear of reprisal from the authorities coupled with uncertainties about the prospects of success for victims account for the dearth of civil suits. Also, the outcome of a civil case would sometimes depend on the investigation of a criminal case.

In Kenya, torture is not (yet) defined in criminal legislation, which can create difficulties in prosecuting cases successfully. In Uganda, victims had been left with the option of bringing a civil suit under the Government Proceedings Act whereby a person who suffers damage at the hands of a government employee can institute proceedings against the Attorney General. However there is a two-year limitation period for such actions.

### ***Non-Judicial Mechanisms***

In some countries, torture victims may be able to pursue compensation claims through non-judicial/quasi-judicial procedures. The Uganda Human Rights Commission has a quasi-judicial tribunal with powers to award compensation to victims of torture. However, there are reportedly challenges in ensuring that compensation awarded by the UHRC is disbursed by the Government in a timely manner.

Other types of non-criminal remedies include recourse to the Ombudsman in Madagascar, or formal apologies and demand for release of a detainee under Section 46 of the Nigerian Constitution. In Senegal and Ethiopia, no successful cases have to date been heard that award compensation as a form of reparation for torture, in either domestic courts or before national human rights commissions.

## **5.2 Rehabilitation**

The provision of adequate medical treatment and psychological counselling forms an important aspect of reparation for torture victims. The provision of these services varies dramatically among the countries studied.

In Madagascar, pursuant to article 21 of the law 2008-008 on torture, the State guarantees to provide medical care, advice and psychological help. However, there is no case law to provide

information on the functioning of the reparation mechanisms included in the 2008 law. Likewise in Tanzania, victims of torture or ill-treatment such as sexual violence are entitled to both medical treatment and counselling under the Penal Code and the HIV/AIDS Prevention and Control Act 2007. In the DRC, it is reported that a nurse is sometimes present in prisons to deal with minor injuries, however no services are available to address the psychological impact of torture.

Elsewhere, however, the availability of medical treatment is largely dependent upon private funding or the work of NGOs. Sudan, Zimbabwe, Senegal, Nigeria and Burundi all report being heavily reliant on civil society for the provision of such care. In Uganda, victims are referred to the *African Centre for Treatment and Rehabilitation of Torture Victims* (ACTV) where they receive medical treatment and psychological counselling. The medical reports are also used as evidence before tribunals investigating the crime.

In Ethiopia, it was reported that even in the presence of visible physical injuries judges would often imply that the victims had either self-harmed or been involved in fights with other prisoners. No health or medical care of any form is provided.

### **5.3 Challenges to Obtaining Reparation**

#### ***Access to a lawyer***

Notwithstanding legislation providing for various forms of reparation of torture, a number of factors seriously impede access to these remedies. Limited access to a lawyer and the insufficient provision of legal aid is a significant barrier in many jurisdictions, which prevents victims from pursuing cases based on professional legal advice. This problem is prevalent across the region in countries such as Zimbabwe, South Africa, Uganda, the DRC and Cameroon. In Zimbabwe, particularly in rural areas, disadvantaged groups have little knowledge of the redress available to them. In the absence of legal aid schemes, the inability of victims from rural areas or disadvantaged groups to pay for legal representation poses a further obstacle to their ability to secure redress. Furthermore, only few lawyers are willing or able to take up cases pro bono. Provision of legal help by NGOs can, however, mitigate these difficulties to a certain extent, as has been reported in Cameroon and DRC.

#### ***Lack of adequate forensic examination and documentation***

A lack of forensic evidence can also be an obstacle to securing reparation for victims. In Uganda, the UHRC refers victims to the ACTV for treatment, and the UHRC can rely on doctors at the Centre to provide good quality medical forensic reports and to give evidence before the quasi-judicial human rights tribunal of the UHRC. However, in many cases, victims of torture do not have access to medical facilities and when they do, there are very few doctors—in Uganda, there are only four doctors who are trained in forensic medicine. In Burundi, doctors do not receive appropriate and adequate training in recording evidence of torture or ill-treatment, resulting in poor documentation and weak evidence to use in torture cases. In Kenya, it was reported that doctors may document forensic evidence, but fall short of explicitly linking the signs of abuse to acts of torture, which makes such medical reports difficult to use as evidence in court.

### ***Lack of independence of the judiciary and procedural barriers***

The lack of judicial independence is a major obstacle in many countries across the region. In Ethiopia, it was reported as the most substantial barrier to non-criminal remedies, where it was impossible to cite a single successful claim for compensation for abuses committed by State agents. In Nigeria, judicial insensitivity to the plight and rights of torture victims and their tolerance of investigative processes that employ torture were identified as some of the most significant impediments to effectively pursuing torture claims.

Procedural matters can also hamper access to non-criminal remedies. In Tanzania, the government can be held liable in civil suits following torts committed by its servants under vicarious liability principle under the Government Proceedings Act, 1967. However, the Law of Limitation Act, 1971 requires notice of 90 days to be given to the Attorney-General if one wishes to proceed against the government, its departments and agents, which is difficult to comply with, particularly for persons lacking the requisite awareness and/or access to legal advice. Moreover, cases involving human rights can only be heard by three judges, as opposed to a single judge, which is the general rule. This leads to undue delays in hearing human rights cases to the extent that the redress, where granted, is sometimes rendered meaningless.

In Uganda, the UHRC reported the challenge of late complaints, made years after the date of the alleged violation, which creates difficulties with regard to gathering medical and forensic evidence and locating witnesses who may have moved or face difficulties recalling events. Also, under the UHRC Act, the Ugandan Human Rights Commission cannot handle any complaint that occurred five years after the date of the alleged violation.

### ***Unwillingness to execute awards and out of court settlements***

The passivity of governments in recognising or honouring judgments that award compensation to torture victims is another significant barrier that has been highlighted in the DRC, Uganda and Zimbabwe, Uganda.

In several countries, such as Senegal, the perpetrators or responsible authorities offer money to victims and/or their families in return for not pursuing cases. The effect is that the victims and/or their families often have little incentive to pursue a long, expensive uncertain civil claim. As a result, torture cases are often not brought before courts, which perpetuates a culture of lack of public acknowledgment and impunity.

## 6. Overarching Themes and Key Findings

Participating experts 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 systems in addressing the problem of torture. Notably, 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. Most countries do not have specific legislation on reparation and, consequently, the ability of victims to obtain civil or other forms of redress is extremely limited. The absence of adequate legal frameworks, independent judiciaries and impartial and accountable law enforcement agencies are some of the key factors identified as contributing to the chronic problem of impunity. Forensic documentation and protection mechanisms for victims and witnesses, which are crucial means for the effective litigation of torture cases, are not readily available or provided for in most countries considered. Strengthening the role of civil society and lawyers and the independence and effectiveness of national human rights institutions and regional mechanisms is fundamental given weaknesses of national legal systems. In addition, participants stressed the need to develop effective responses to the vulnerability to torture and other ill-treatment arising from marginalisation and discrimination.

### ***Effective implementation of international commitments***

While all of the countries considered have ratified UNCAT, with the exception of Sudan and Zimbabwe, and the ACHPR, there is an across the board failure to effectively implement international legislation at the domestic level. Though many of the countries included have constitutional prohibitions on torture, most have not enacted specific laws criminalising torture. However, there are some positive developments in this regard, in particular in Uganda with the recently enacted anti-torture law, and in South Africa and Kenya where anti-torture legislation is in varying stages of Parliamentary consideration. While adopting legislation is an important part of prohibiting torture and ill-treatment, the practice in most African countries falls short in effectively preventing torture, even in countries that have criminalised torture. This demonstrates the limits of anti-torture legislation when not accompanied by a government-wide commitment to its implementation and enforcement.

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 frequently prevented from exercising their rights because of their own lack of awareness and fears of retaliation from the authorities. The lack of legal aid for victims is another obstacle to seeking redress, as is the failure of governments to deliver any reparation awarded, if victims are able to secure court judgments or other awards for reparation. In civil law countries, procedural barriers preclude victims from filing a separate civil suit if they are parties to on-going criminal proceedings, and make it impossible to file a civil suit if there is no criminal conviction. Similarly, in common law countries, where filing a civil suit is possible, there is very little awareness of the possibility of making a claim for damages for torture.

### ***Tackling Impunity***

Impunity among the police and security forces was identified by all participants as one of the major factors contributing to the use of torture, which is sustained by a common mentality prevalent in many countries that views torture as a legitimate tool to combat crime. The lack of adequate legal

safeguards further facilitates torture in the context of weak institutions, including the judiciary and national human rights institutions that often struggle – due to lack of independence, capacity problems and other weaknesses – to provide adequate protection. Victim and witness protection is an important precondition to the pursuit of justice for victims of torture, but one that is lacking in many African countries, thereby hindering the ability and even willingness of victims to come forward about their abuse. Despite the absolute prohibition, there is still a lack of concerted effort to combat torture, both by putting systems in place and by raising awareness, which would be needed to tackle more effectively what constitute in many countries deeply engrained practices.

Impunity is attributed to the absence of the rule of law, weak institutions and violent armed conflicts. In most countries torture is perpetrated by the police, the military and other security agents, which in many cases are the same organs mandated to conduct investigations into alleged cases of torture. This leads to a lack of trust in the impartiality of the police tasked with investigating such cases. Furthermore, there are significant challenges in attempting to hold senior perpetrators accountable and to provide redress to victims amidst on-going conflicts and while the structural causes of violations remain in place. The DRC was identified as a country that best exemplifies these challenges.

What can be done to address this impunity gap in such contexts? What are the best avenues to address past human rights violations in the contexts of transition from repressive rule and armed conflicts? Participants emphasised the role of civil society and lawyers in the documentation, investigation and exposure of human rights violations, including torture. Equally, participants stressed the importance of testing 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 seen as important, including advocacy opportunities such as the UN Human Rights Council's Universal Peer Review (UPR) process.

Participants agreed that there was not a single formula that could be applied to all countries in respect of “transitional justice”, i.e. how to deal with a legacy of violations in times of transition. A range of approaches has 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 is suggested that a disproportionately heavy focus on reconciliation and power sharing can sometimes undermine victims' rights and perpetuate impunity.

### ***Forensic Documentation***

Participants emphasised the importance of the availability of medical evidence in relation to judicial proceedings involving acts of torture. There is a need to strengthen capacity of health professionals to provide forensic documentation in line with internationally recognised standards, particularly the Istanbul Protocol. The fact that government doctors in most African countries are often unable to undertake objective and impartial documentation due to their loyalty towards their employers or fear of losing their job is a serious challenge.

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

Marginalised groups, in particular LGBTI persons, women, the indigent, the disabled and indigenous communities are particularly vulnerable to torture and ill-treatment across the region. The hostile political and cultural environments of many of the countries considered make it difficult for civil

society organisations to speak out on issues relating to sexual orientation, even though these violations may amount to torture or ill-treatment. The marginalised socio-economic status of victims of torture is also relevant factor in targeting legal assistance and other kinds of support necessary for the pursuit of legal remedies

### ***Civil society action towards making the prohibition of torture more effective***

The anti-torture experts from across Africa, in considering the strategic challenges faced in respect of effectively combating torture and promoting and protecting victims' rights to reparation highlighted the need for taking concerted action. While the following list was not formally agreed upon, it reflects some of the priority needs for the work of lawyers and NGOs identified during the meeting:

1. The importance of lawyers and civil society actors building networks at the regional and international levels with a view to advocating effectively policy, legislative and institutional reforms relating to the prohibition of torture in their respective countries, including by addressing structural factors, such as weak institutions, that perpetuate an environment conducive to torture and lack of justice;
2. The need to encourage young lawyers and civil society actors to engage in litigation and advocacy on the prohibition of torture, and, to provide them with appropriate training and mentoring;
3. The need to campaign for the ratification and effective implementation of the UNCAT, OPCAT and other international and regional instruments across the region;
4. The need for sustained efforts directed at encouraging States to make declarations that allow the filing of individual complaints before the African Court of Justice and Human Rights, the Committee Against Torture and the UN Human Right Committee;
5. The desirability of examining further international standards on the prohibition of torture, particularly the definition of torture, and how they could or should be interpreted so as to be utilised effectively to respond to the nature of torture and ill-treatment in the region, considering particularly the vulnerability of marginalised groups, the prevalence of non-State actors and the weakness of institutions.

## **Annex 1: Questionnaire on the Law and Practice of Torture in Africa**

### **I. Patterns, practices of torture, or both**

1. What are the most common patterns and causes of torture and related ill-treatment? Where is torture often perpetrated and by whom?
2. Are there groups that are particularly vulnerable to torture and ill-treatment, such as women, children, ethnic or religious minorities, IDPs, foreign nationals, HIV positive individuals, LGBT? (Please describe context)
3. Are there any enabling contexts (armed secessionist activities/rebellions) within which torture is condoned?

### **II. Legal Framework**

#### ***International and Regional Instruments***

4. Which international treaties prohibiting torture have been signed/ratified? What is the status of international law domestically? Has any implementing legislation been enacted? Does the judiciary apply relevant international standards in its jurisprudence?
5. If international legal standards on the prohibition of torture are not fully complied with domestically, what are the reasons for that: lack of knowledge or sensitisation, concerted policy, insufficient institutional capacity, widespread corruption and/or anything else? Have any measures been taken to ensure compliance with those standards and to remove factors leading to non-compliance?
6. Have international bodies, such as treaty bodies, special procedures, field missions, the ICC, international and hybrid tribunals, where applicable, had any impact upon domestic law and practice on torture? If yes, has it been positive?
7. Is there a record of compliance with decisions and recommendations of regional treaty bodies, such as the African Commission on Human and Peoples' Rights, and sub-regional courts, such as the ECOWAS court, the East African Court of Justice and the SADC court, and/or international treaty bodies, such as the Human Rights Committee and the Committee against Torture? If not, what are the reasons for non-compliance?

#### ***National Legal system***

8. Is torture prohibited in national law, including the constitution and statutory laws? Is it a criminal offence? If so, how is it defined? Are there any other offences which can be and/or are being used to prosecute torturers? What punishment is prescribed for the offence(s)?
9. Does the legal system apply the prohibition of *refoulement*, extradition and deportation of individuals to countries where they might face the risk of torture
10. Do national courts exercise jurisdiction of acts of torture committed abroad?

### **III. Safeguards against torture**

11. Are there any provisions in laws and regulations which are capable of acting as safeguards, including checks against arbitrary detention, limits to and supervision of pre-trial detention, access to lawyer and to a judge to challenge the legality of detentions and lodge complaints?
12. Are there any established guarantees (such as obligatory medical examination, access to a lawyer upon arrest) that the authorities have to comply with in situations potentially facilitating torture, including immediately after apprehension of a suspect and in places of detention?
13. Is evidence obtained through torture or as a result of torture (directly, i.e. confessions and statements, and indirectly, e.g. material evidence obtained following such statements) admissible in legal proceedings? Has there been any relevant jurisprudence?
14. Are there any bodies and mechanisms in place (such as bodies tasked with the independent oversight of places of detention, national or regional human rights institutions) that are mandated to prevent torture? If yes, are they effective? Can you give examples of their successes/failures?
15. Are the above safeguards and guarantees working in practice? If not or not fully, what are the most widespread patterns of irregularities? What are the reasons for them? Can you refer to the most indicative and/or most well-known examples?

### **IV. Accountability: Investigations, prosecution and punishment for torture**

16. Are there any procedural obstacles capable of preventing successful prosecution and/or conviction for torture (such as amnesties, immunities, statutes of limitation)?
17. Which institution is responsible for investigations into allegations of torture and/or ill-treatment? What measures, if any, are in place to ensure the independence of this institution? Are such investigations conducted impartially, promptly, and effectively in practice? Are they capable of leading to the establishment of facts, identification and prosecution of the perpetrators, and systemic changes? If not, why?
18. Have victims and witnesses, as well as lawyers and human rights defenders involved in investigation and prosecution of torture, been subjected to threats and harassment? Which measures have been taken to ensure their protection?
19. Have there been any prosecutions and/or trials for the offence of torture or related offences? If so, what was the status of the suspects/accused and what has been the outcome? What are the procedural and practical obstacles to effective prosecutions and trials in torture cases?

### **V. Reparations**

20. What non-criminal remedies are available, such as fundamental rights' or constitutional rights petitions, civil remedies (independent or as part of criminal proceedings, i.e. *partie civile*)? If yes, what is the applicable procedure, in particular, who carries the burden of proof and what is the standard of proof?
21. Have these remedies been used in practice? What challenges are faced in accessing justice in practice by members of disadvantaged groups such as those referred to under No. 2 above?

22. Is it possible to lodge a civil claim relying upon an occurrence of torture and/or ill-treatment as a cause of action? If so, does the outcome of the civil case depend on the results of the criminal investigation?
23. Is a right to reparation for torture recognised in laws and judicial practice? What forms of reparation are envisaged in law, if any, and provided in practice?
24. Do victims get medical treatment and psychological counselling?

## **VI. Cases**

25. Can you provide an example/examples of cases, preferably from your own or your organisation's experience, of investigation and prosecution of torture? What was the overall outcome? What do you think are main lessons learnt from that case?

## Annex 2

# GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA

## THE ROBBEN ISLAND GUIDELINES

Banjul, The Gambia, 23rd October 2002

### Preamble

**Recalling** the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment;

**Deeply** concerned about the continued prevalence of such acts;

**Convinced** of the urgency of addressing the problem in all its dimensions;

**Recognising** the need to take positive steps to further the implementation of existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment;

**Recognising** the importance of preventive measures in the furtherance of these aims;

**Recognising** the special needs of victims of such acts;

**Recalling** the provisions of:

- Art. 5 of the African Charter on Human and Peoples' Rights which prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment;
- Art. 45 (1) of the African Charter which mandates the African Commission to, inter alia, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
- Arts. 3 and 4 of the Constitutive Act of the African Union by which States Parties undertake to promote and respect the sanctity of human life, rule of law, good governance and democratic principles;

**Recalling** further the international obligations of States under:

- Art. 55 of the United Nations Charter, calling upon States to promote universal respect for and observance of human rights and fundamental freedoms;

- Art. 5 of the UDHR, Art. 7 of the ICCPR stipulating that no one shall be subjected to torture, inhuman or degrading treatment or punishment;
- Art. 2 (1) and 16 (1) of the UNCAT calling upon each State to take effective measures to prevent acts of torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction;

**Noting** the commitment of African States as reaffirmed in the Grand Bay Declaration and Plan of Action adopted by the 1st Ministerial Conference on Human Rights in Africa to ensure better promotion and respect of human rights on the continent;

**Desiring** the implementation of principles and concrete measures in order to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment in Africa and to assist African States to meet their international obligations in this regard;

The *“Robben Island Workshop on the Prevention of Torture”*, held from 12 to 14 February 2002, has adopted the following guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment and recommends that they are adopted, promoted and implemented within Africa.

## **Part I: Prohibition of Torture**

### **A. Ratification of Regional and International Instruments**

1. States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish.

This would include:

- a) Ratification of the Protocol to the African Charter of Human and Peoples’ Rights establishing an African Court of Human and Peoples’ Rights;
- b) Ratification of or accession to the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment without reservations, to make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 and recognising the competency of the Committee to conduct inquiries pursuant to Article 20;
- c) Ratification of or accession to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the First Optional Protocol thereto without reservations;
- d) Ratification of or accession to the Rome Statute establishing the International;

### **B. Promote and Support Co-operation with International Mechanisms**

2. States should co-operate with the African Commission on Human and Peoples’ Rights and promote and support the work of the Special Rapporteur on prisons and conditions of

detention in Africa, the Special Rapporteur on arbitrary, summary and extra-judicial executions in Africa and the Special Rapporteur on the rights of women in Africa.

3. States should co-operate with the United Nations Human Rights Treaty Bodies, with the UN Commission on Human Rights' thematic and country specific special procedures, in particular, the UN Special Rapporteur on Torture, including the issuance of standing invitations for these and other relevant mechanisms.

### **C. Criminalization of Torture**

4. States should ensure that acts, which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.
5. States should pay particular attention to the prohibition and prevention of gender-related forms of torture and ill-treatment and the torture and ill-treatment of young persons.
6. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of the UN Convention against Torture.
7. Torture should be made an extraditable offence.
8. The trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards.
9. Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.
10. Notions such as "necessity", "national emergency", "public order", and "ordre public" shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.
11. Superior orders shall never provide a justification or lawful excuse for acts of torture, cruel, inhuman or degrading treatment or punishment.
12. Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.
13. No one shall be punished for disobeying an order that they commit acts amounting to torture, cruel, inhuman or degrading treatment or punishment.
14. States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

### **D. Non-Refoulement**

15. States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.

## **E. Combating Impunity**

16. In order to combat impunity States should:

- a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process.
- b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.
- c) Ensure expeditious consideration of extradition requests to third states, in accordance with international standards.
- d) Ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody.
- e) Ensure that where criminal charges cannot be sustained because of the high standard of proof required, other forms of civil, disciplinary or administrative action are taken if it is appropriate to do so.

## **F. Complaints and Investigation Procedures**

17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.
18. Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.
19. Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).<sup>50</sup>

## **Part II: Prevention of Torture**

### **A. Basic Procedural Safeguards for those Deprived of their Liberty**

20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:
  - a) The right that a relative or other appropriate third person is notified of the detention;
  - b) The right to an independent medical examination;

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<sup>50</sup> Annexed to UN GA Res. A/55/89, 4 Dec. 2000, UN Publication No.8, HR/P/PT/8.

- c) The right of access to a lawyer;
- d) Notification of the above rights in a language, which the person deprived of their liberty understands;

## **B. Safeguards during the Pre-trial Process**

States should:

21. Establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>51</sup>
22. Ensure that those subject to the relevant codes of criminal procedure conduct criminal investigations.
23. Prohibit the use of unauthorised places of detention and ensure that it is a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.
24. Prohibit the use of incommunicado detention.
25. Ensure that all detained persons are informed immediately of the reasons for their detention.
26. Ensure that all persons arrested are promptly informed of any charges against them.
27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.
28. Ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of video and/or audio taped recordings of interrogations.
29. Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.
30. Ensure that comprehensive written records of those deprived of their liberty are kept at each place of detention, detailing, inter alia, the date, time, place and reason for the detention.
31. Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members.
32. Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.

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<sup>51</sup> UN GA/Res. 43/173, 9 Dec.1988

## C. Conditions of Detention

States should:

33. Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN Standard Minimum Rules for the Treatment of Prisoners.<sup>52</sup>
34. Take steps to improve conditions in places of detention, which do not conform to international standards.
35. Take steps to ensure that pre-trial detainees are held separately from convicted persons.
36. Take steps to ensure that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities.
37. Take steps to reduce overcrowding in places of detention by, inter alia, encouraging the use of non-custodial sentences for minor crimes.

## D. Mechanisms of Oversight

States should:

38. Ensure and support the independence and impartiality of the judiciary including by ensuring that there is no interference in the judiciary and judicial proceedings, guided by the UN Basic Principles on the Independence of the Judiciary.<sup>53</sup>
39. Encourage professional legal and medical bodies to concern themselves with issues of the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment.
40. Establish and support effective and accessible complaint mechanisms which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.
41. Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.<sup>54</sup>
42. Encourage and facilitate visits by NGOs to places of detention.

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<sup>52</sup> UN ECOSOC Res. 663 C (XXIV), 31 July 1957, amended by UN ECOSOC Res. 2076 (LXII), 13 May 1977.

<sup>53</sup> UN Doc. E/CN.4/1995/39.

<sup>54</sup> UN A/Res/48/134, 20 Dec. 1993

43. Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State Party.
44. Examine the feasibility of developing regional mechanisms for the prevention of torture and ill-treatment.

## **E. Training and Empowerment**

45. Establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups.
46. Devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel.

## **F. Civil Society Education and Empowerment**

- a. Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.
47. The work of NGOs and of the media in public education, the dissemination of information and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment shall be encouraged and supported.
48. Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.

## **Part III: Prevention of Torture**

49. The obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought. Thus all States should ensure that all victims of torture and their dependents are:
  - a) Offered appropriate medical care;
  - b) Have access to appropriate social and medical rehabilitation;
  - c) Provided with appropriate levels of compensation and support;
50. In addition there should also be a recognition that families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as victims.