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Seeking Reparation for Torture Survivors

BRINGING THE INTERNATIONAL PROHIBITION OF TORTURE HOME

NATIONAL IMPLEMENTATION GUIDE FOR THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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FOREWORD

The UN Convention against Torture is an important achievement in the history of the international campaign against torture and cruel, inhuman or degrading treatment and punishment and a key tool to combat torture effectively. The Convention is one of the most ratified human rights conventions, with 141 states parties. Despite this, almost twenty years after the Convention came into force in 1987, torture remains commonplace in many parts of the world. In addition, the Convention requires states to take "effective legislative, administrative, judicial or other measures to prevent acts of torture…" yet there are serious shortcomings in national laws purporting to implement Convention obligations and in the practices of the competent officials in many countries around the world.

REDRESS is writing this Guide to encourage and assist states parties to the Convention to take the international standards and obligations contained in the Convention seriously and to bring the international prohibition of torture home. The rights set out in the Convention must be given practical application if the prohibition against torture is to have real resonance at home.

Many states have anti-torture provisions in their constitutions or criminal codes. However, in most cases such provisions and the limited national jurisprudence that interprets them, do not provide a comprehensive anti-torture framework and their application has often been piecemeal and inconsistent. If anything, the focus on isolated 'success stories' highlights the lack of an adequate legal framework that would ensure a consistent practice with regard to prevention, accountability and reparation for torture.

Against this background, this Guide is intended to help reinvigorate the campaign for a full and effective implementation of the Convention against Torture at the domestic level and both to encourage and to assist states in taking the requisite steps towards this end. This Guide is designed to provide governments with essential information to make the necessary legislative changes to

implement the prohibition of torture, and to help judges to apply relevant international standards in their decisions. It is also meant to be a tool for human rights groups, lawyers and others advocating for law reform and seeking judicial remedies in torture cases.

The Guide:

- reviews and analyses states' obligations
- examines existing examples of implementing legislation and
- maps out a suggested framework for law reform to successfully implement the prohibition of torture
- It also analyses the practice of courts in applying international standards relative to the prohibition against torture. Although its' main focus is on the practice of states parties to the UN Convention against Torture, the Report also draws on the practice of other states that are bound by the prohibition of torture either as parties to other human rights treaties or under customary international law.

The Guide draws on a comprehensive review of the reporting practices of states parties to the UN Committee against Torture, reports of national, regional and international human rights bodies, as well as the findings of REDRESS' ongoing survey of country specific practices. It has equally benefited from information provided by a wide range of individuals, organisations and institutions.

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I. INTRODUCTION

Torture is universally condemned, and whatever its actual practice, no country publicly supports torture or opposes its eradication. In addition to the Convention against Torture, Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, also expressly prohibit torture. The prohibition against torture is also codified in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights.

The prohibition against torture is also fundamental to humanitarian law, which governs the conduct of parties during armed conflict. Common Article 3 to the Geneva Conventions, for example, bans "violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment." The use of force to obtain information is specifically prohibited in Article 31 of the Fourth Geneva Convention: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." Furthermore, the prohibition against torture is well established under customary international law as *jus cogens*; that is, it has the highest standing in customary law and is so fundamental as to supersede all other treaties and customary laws (except laws that are also *jus cogens*).[1]

On 10 December 1984, after a seven-year drafting period by an *ad hoc* working group, the General Assembly of the United Nations, by consensus, adopted Resolution no. 39/46 embodying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention"), opening it for signature or ratification. The Convention entered into force on 26 June 1987, one

[1] See in particular ICTY, *Prosecutor v. Furundžija*, paras.144 and 153-157. [Note: full citations appear in the Table of Authorities, at part VII of this Guide]

month after the twentieth ratification. The Convention is the first binding international instrument exclusively dedicated to the struggle against torture. It is one of the most widely ratified human rights conventions with 141 states parties as of 13 December 2005.

The text of the Convention defines torture as

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" to obtain information or a confession; to punish, intimidate or coerce; "or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" (article 1).

The Convention is divided into three parts, in addition to a five-paragraph preamble. Part I (Articles 1-16) deals with the substantive provisions, including *inter alia* a comprehensive definition of torture, the provision of universal criminal jurisdiction over torturers, and the espousal of the extradition principle *aut dedere aut punire*. Part II (Articles 17-24) covers the implementation provisions establishing the Committee - a supervisory body consisting of ten independent experts appointed by the Parties and acting in their individual capacity - and providing for its competences. Part III (Articles 25-33) contains the final clauses concerning ratification, entry into force, amendments and includes two reservation clauses concerning the competence of the Committee and the judicial settlement of disputes.

II. SUMMARY OF STATES' OBLIGATIONS TO IMPLEMENT THE CONVENTION

In general, universal or regional treaties, including human rights treaties such as the Convention against Torture, contain both the commitment of states and the rights and freedoms of individuals under their jurisdiction. If a state has agreed to the standards of a human rights convention, then that state is obliged to abide by the rules set down in the convention. Human rights treaties call on states parties to account for their measures to implement these standards and to answer any allegations that may arise.

The parties to a treaty are legally bound to fulfil and implement the obligations contained in the treaty. These obligations should be met in good faith by the parties (the principle of *Pacta sunt servanda*). A state adhering to a treaty cannot invoke its national law (whether it be the Constitution, national legislation, judicial decisions or administrative acts) to justify the non-fulfilment of these obligations; It is legally required to uphold the terms of the Treaty.[2]

1. States' domestic law must be in line with their obligations in the Convention against Torture

States parties must ensure that their domestic law is in line with their obligations under the Convention.[3]

Accordingly, states are bound to make such legislative modifications as may be necessary to ensure the fulfilment of the obligations contained in the Convention.[4] For example, if a state party's national law does not penalise torture or exempts certain high-ranking

[2] See Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

[3] Article 26 ibid.

[4] *Exchange of Greek and Turkish Populations,* p.20, Permanent Court of International Justice (1925). Note that other treaties contain prohibitions of torture, including the International Covenant on Civil and Political Rights (ICCPR) as well as regional human rights instruments.

officials from investigation or prosecution for acts of torture, then the state would be obliged to enact new legislation or amend existing legislation in order to comply with the terms of the Convention.

States have discretion on the procedure they use to incorporate the treaty as well as how they ensure that the obligations under the treaty are effectively met.[5] The implementing procedure available to states depends on their constitutional and political makeup. This makeup varies between states and few states are identical.

2. States' domestic practice must be in line with obligations in the Convention

The Convention is a proactive treaty that not only requires states parties to ensure that their domestic legal framework prohibits conduct amounting to torture and that it abstains from acts amounting to torture; importantly, it goes further to require states to take specific measures to ensure practical implementation of the prohibition of torture, including positive measures of prevention, ensuring adequate and effective mechanisms to investigate allegations of torture and where sufficient evidence exists, initiate prosecutions. The Convention also requires effective remedies and reparation for victims, and where relevant, their families.

The notion that states have a responsibility not only to abstain but also to protect individuals from human rights violations is enshrined in Article 2 (1) of the Convention, which states that: "*Each State Party shall take effective legislative,* administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". The nature of a state's obligation is therefore twofold: a duty to abstain and a duty to protect; the former being a negative obligation, to

[5] See Ingelse, *Committee against Torture,* p.259 and ECHR, *Case of Swedish Engine Drivers' Union v. Sweden*, para.50. See also, for example, the position of the United States, UN Doc. HRI/CORE/1/Add.49, para.139. Occasionally though a treaty specifically obliges states parties to incorporate its provisions into domestic law and/or accord them a specific type of status, such as Article V of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 which requires states to 'enact the necessary legislation' to give effect to the Convention.

refrain from a certain action, and the latter a positive obligation to ensure individuals are not subjected to a violation.

In other words, it is not sufficient for states parties to enact laws that prohibit torture, these laws must be reinforced by capable institutions that have sufficient mandates, resources and training to carry out the work effectively and impartially. In the *Velasquez Rodriguez v. Honduras Case*, the Inter-American Court of Human Rights determined that state parties not only have the obligation not to violate the enshrined rights but also that the Inter-American Convention "requires to take reasonable steps to prevent situations which are truly harmful to the rights protected."[6] This obligation of due diligence means that states must examine the adequacy and implementation of legal safeguards to address and counter torture. It imposes various possible measures that states must adopt.

Furthermore, the highest authorities should publicly condemn torture in all its forms whenever it occurs. As was recommended by the United Nations Special Rapporteur on Torture, "the authorities should, in particular, make unannounced visits to police stations, pre-trial detention facilities and penitentiaries known for the prevalence of such treatment. Public campaigns aimed at informing the population at large, in particular marginalized and vulnerable segments of society, of their rights with respect to arrest and detention, notably to lodge complaints regarding treatment received at the hands of law enforcement officials, should be undertaken."[7]

3. Failure to incorporate international treaty and/or customary international law into the domestic legal order entails state responsibility

As a general rule a state is responsible for any act or omission that is attributable to it under international law and constitutes a breach of

[6] Inter-Am. Ct. H.R. *Velasquez Rodriguez v. Honduras,* para. 187.

[7] General Recommendations of the Special Rapportuer on Torture, E/CN.4/2003/68, para. 26.

its international obligations.[8] Obligations under the Convention include positive measures such as prohibiting torture and ensuring statements obtained by torture are not admissible in proceedings, as well as obligations to refrain from certain conduct, for example the practice of extraditing or otherwise sending persons to states where there are substantial grounds to believe the person will be subjected to torture.

There is no general rule that the failure by a state to ensure conformity of its legislation with its international obligations constitutes a breach entailing state responsibility. However, a lack of implementing legislation may result in a breach either where a treaty expressly obliges states to implement legislation or where the non-implementation results in an obligation not being met.[9] Under the Convention, the adoption of new legislation or the repeal or modification of existing legislation may be needed to give effect to particular obligations, for example making torture a specific offence under criminal law, or to general obligations, such as taking legislative measures to prevent torture. Consequently, the failure to take such steps to give effect to the Convention and the resulting inability to implement required by it may result in a breach.

According to international law on state responsibility, in case of breach a state remains under a continued duty to perform the obligation,[10] to cease any acts that are in breach, to offer guarantees of non-repetition, and to provide reparation where appropriate.[11]

[8] See Articles 1 & 2 ILC Draft Articles on State Responsibility.

[9] See on the general principle, Brownlie, *Principles*, p.35. See with regard to torture, ICTY, *Prosecutor v. Furundžija, para.150:* "Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect."

[10] Article 29 of the Vienna Convention on the Law of Treaties.

[11] Articles 30 and 31 ILC Draft Articles on State Responsibility.

This duty is traditionally owed primarily to the injured state.[12] In case of human rights violations such as torture, the violating state has this duty also vis-à-vis the individual victim(s), and, because the prohibition of torture is a peremptory norm at customary international law (*jus cogens*), towards the international community as a whole (*erga omnes*).[13]

III. METHODS AND PROCEDURES FOR IMPLEMENTING THE CONVENTION

1. Introduction to the Implementation of Treaties in National Law

The way in which international obligations are incorporated into national law depends on the legal system of the country in question.

There are principally two modes of incorporating the Convention into domestic law, either directly through ratification and official publication of the Convention in states parties' official gazettes or indirectly through implementing legislation. States' legal systems in this respect can be roughly divided into two groups, 'monist' and 'dualist', although the line between these two frameworks is not always clear cut and the approaches of states are rarely the same. This basic distinction is nonetheless a useful starting point to gage the procedures for the implementation of the Convention in national law as well as the status of international treaties in domestic legal systems and the role of the judiciary.

It is worth noting however that in practice, regardless of the system, some form of domestic implementation action will normally be

[12] Article 42 ibid.

[13] Article 48 ibid.

required, whether through legislation, parliamentary ratification or publishing in an official gazette.

(i) Implementation of international treaties in 'monist' countries

Monism sees international and domestic law as one legal system, with international law being superior.[14] According to monist theory, international treaties that are binding on a state automatically become part of the domestic legal order following ratification and publication in the official journal or legal gazette (doctrine of adoption). Depending on the content of the treaty, its provisions may be directly applicable by domestic authorities and courts.

There is no uniform practice concerning the exact rank of international treaties in monist countries. International treaties are superior to domestic laws in several Latin American countries, such as in Chile.[15] In other countries, such as France, Croatia and Japan, international treaties rank higher than statutory law but lower than the Constitution.[16] Finally, in some countries, for example in Egypt and Georgia, international treaties have the same status as statutory law, and may be overriden by subsequent legislation.[17]

(ii) Implementation of international treaties in 'dualist' countries

[14] See in particular Kelsen, *Principles*, pp. 553 et seq., and for an overview of the debate Brownlie, *Principles*, pp.31 et seq.

[15] See Article 5 (2) of the Chilean Constitution of 1980 and Chile, UN Doc. CAT/C/39/Add.14 and Corr.1, para.3. See also Articles 46 of the Guatemalan Constitution of 1985 and Articles 93 and 94 of the Colombian Constitution of 1991 respectively. While the Peruvian Constitution of 1979 granted primacy to international law, and especially to treaties related to human rights, in case of conflict with international legislation (Articles 101 and 105), no similar provision is contained in the 1993 Constitution.

[16] See Article 140 of the Croatian Constitution of 1990 and Article 55 of the French Constitution of 1958. See on Japan, UN Doc. CCPR/C/115/Add.3, para.9.

[17] See Article 151 of the Egyptian Constitution of 1971 and Articles 6 (2) and 7 of the Georgian Constitution of 1995.

Dualism sees international law and domestic law as two completely different legal systems. International treaties may only become part of domestic law via domestic implementing legislation or other legally binding national instruments. This process is known as the doctrine of transformation. Dualist systems are prevalent amongst common law countries, such as the United Kingdom,[18] Australia,[19] Canada,[20] India[21] and Zambia,[22] as well as in Scandinavian countries[23] and several other states, including Vietnam.[24]

Implementing legislation in dualist states normally involves enactment of new, or amendments to existing, statutory law. Occasionally the provisions of a treaty are incompatible with the Constitution requiring amendment of the latter which can be a long and difficult process.

The rank of international treaties incorporated in the internal legal order depends on the status of the implementing legislation. Implementing legislation can be found in, and thereby rank at the same level as, the Constitution, such as the Bill of Rights in the South African Constitution, or by the enactment of new statutes, such as

[18] See United Kingdom of Great Britain and Northern Ireland, UN Doc. HRI/CORE/1/Add.5/Rev.2, para.142.

[19] See Australia, UN Doc. HRI/CORE/1/Add.44, para.169.

[20] See Canada, UN Doc. HRI/CORE/1/Add.91, paras.136 et seq.

[21] Article 253 of India's Constitution of 1950 and Entry 14 of the Union List of the Seventh Schedule. See also *State of Madras v G.G. Menon* and *People's Union for Civil Liberties v Union of India, 1954*. For the proposition that some provisions of international treaties might be self-executing see Shah, J., Sep.Op., in *Maganbhai Ishwarbhaiv Union of India*, 1969, and comments by Verma, *International Law*, p. 632.

[22] Zambia, UN Doc. HRI/CORE/1/Add.22/Rev.1, para.69.

[23] See for example Sweden, UN Doc. HRI/CORE/1/Add.4/Rev.1, para.77; Denmark, UN Doc. HRI/CORE/1/Add.58, para.103 and Finland, UN Doc. HRI/CORE/1/Add.59, para.43 (while theoretically dualist, the document states that Finland is de facto monist as international treaties are commonly incorporated *in blanco*, i.e. in their entirety, either by Act of Parliament or Presidential Decree).

[24] See Vietnam, UN Doc. CCPR/C/VNM/2001/2/Add.1, paras.6 and 33 that appear to imply a dualist system.

the Sri Lankan Convention Against Torture Act 1994[25] or through amendment of existing statutes, such as the inclusion of a new specific criminal offence of torture in the existing Criminal Code of the country in question. Implementing legislation that is incorporated into existing or new statutes can usually be changed in the same way that ordinary statutes are amended in the country concerned and therefore such implementing legislation can usually be superseded by subsequent legislative amendments, although this rarely happens in practice.

Some national systems blend monist and dualist elements. In the United States and South Africa, for example, provisions of treaties that are considered 'self-executing' may be directly applicable following parliamentary approval of their ratification.[26]

(iii) A comparison of monist and dualist models

Although the monist model appears to be more favourable to the incorporation of international law, there are a number of practical difficulties associated with it. As a general rule, courts will only apply international treaty provisions that are "self-executing". The doctrine of "self-executing" treaties developed in the United States[27] and has

[25] See also the United Kingdom Human Rights Act, 1998. Some legislation may also be adopted by entities within federal states or Unions, such as the Torture Prohibition Act of Yukon Territory, 1988, in Canada.

[26] USA: UN Doc. HRI/CORE/1/Add.49, paras.134 et seq. South Africa, while traditionally dualist, changed to a monist position in the early 1990's and has now adopted a position that seemingly combines both elements, as provided for in section 231 (4) of the 1996 Constitution: "Any international agreement becomes law in the Republic when it is enacted into law by national legislation: but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, see Dugard, *International Law*, pp.77-92.

[27] *Foster v Neilson,* 1829, despite not using the term "self-executing" is regarded as the source of the distinction between self-executing and non-self-executing treaties. See for a critical assessment of US jurisprudence concerning the Convention against Torture Rosati, *United Nations Convention Against Torture*, pp. 533-577.

been applied in different forms in other countries.[28] In essence, courts decide whether the treaty provision in question is meant to be directly applicable, such as by stipulating individual rights or unequivocal prohibitions, or whether it is programmatic, requiring the state to take further measures, particularly implementing legislation.[29] In practice, courts in monist countries have been reluctant to interpret treaty provisions as self-executing and to apply international treaty provisions directly. This reluctance may reflect a general preference amongst the judiciary to apply domestic legislation; they are less familiar with international law and often uncertain about the legal nature of "self-executing" treaties.[30] The practical effect is that even in 'monist' countries, domestic legislation is often required.

In dualist countries, treaties must be incorporated into domestic law via amendments to existing legislation or enactment of new legislation, unless the existing law and practice is in conformity with the treaty obligations. States parties often claim that their laws are in full conformity with treaty obligations, however official treaty-monitoring bodies such as the UN Committee against Torture have frequently disagreed, finding shortcomings in the domestic legal system.[31] Many dualist states have failed to adopt any implementing legislation at all, thereby preventing the domestic application of the Convention.

Courts in dualist countries are commonly barred from applying international treaties directly. Nonetheless courts will often consider

[28] See for France, Daillier/Pellet, *Droit International Public*, pp.232 et seq.

[29] Conforti, *International Law*, p.27. See also Cyprus, *Malachtou v. Aloneftis*, 1986 "... for a treaty to be applicable it must be self-executing ... Only such provisions of a convention are self-executing which may be enforced by the Courts and which create rights for the individuals; they govern or affect directly relations of the internal life between the individuals, and the individuals and the State or the public authorities. Provisions which do not create by themselves rights or obligations of persons or interests and which cannot be justifiable or do not refer to acts or omissions of State organs are not self-executing ... The question whether or not treaties are self-executing is influenced by the wording of the convention, its provisions and the relevant constitutional law in a given country."

[30] See e.g. Daillier/Pellet, *Droit International Public*, pp.232 et seq. and at V, 3.2. infra.

[31] See infra, at III, 4.

the state's duties under relevant treaties in interpreting constitutional provisions and statutory law so as to ensure that the interpretation does not run counter to obligations incurred by the state.[32] Courts are also obliged to apply rules of customary international law, which are commonly considered to be part of the law of the land.[33] This includes the prohibition against torture, that is binding upon states irrespective of whether the Convention was incorporated into domestic law.

2. The role of the Judiciary in implementing international obligations

The judiciary can play a vital role in giving effect to the rights and obligations contained in international treaties. The ability of courts to apply treaties and human rights standards varies between states according to their particular legal system. As noted above, a basic distinction exists between monist and dualist systems.

Courts in monist states may directly apply treaty provisions that are considered self-executing even if these provisions contravene domestic statutory laws. Where the provisions are not considered self-executing, courts will not apply them unless they have been incorporated into domestic law. Courts may still use treaty provisions as guidance in interpreting the law.[34]

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[32] Section 233 of the 1996 Constitution, South Africa: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." Section 39 (1): "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." See also, by way of example, Iceland, UN Doc. CAT/C/37/Add.2, 9 June 1998, para.24; Mauritius, UN Doc. CAT/C/SR.213, 1 May 1995, para.3 and Norway, UN Doc. CAT/C/SR.123, 8 February 1993, para.4.

[33] See for example in the U.S. *Henfield's* Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) and The Paquete Habana, 175 U.S. 677, 700 (1900) and the judgment of the Indian Supreme Court in *Gramophone Co. of India Ltd v Birendra Bahadur Pandey*, 1984, p. 671.

[34] See Conforti, *National* Courts, pp.7 et seq.

In dualist states, courts may use international law as an aid to interpreting constitutional provisions or legislation, provided there is no unambiguous statutory law that blocks recourse to rules of international law as a means of interpretation.[35] The New Zealand Law Commission, in a study of *International Law and its Sources*, listed four additional ways in which courts may have regard to international treaties, namely: as a foundation of the Constitution; as relevant to the determination of the common law; as a declaratory statement of customary international law which is automatically part of the law of the land; and as evidence of public policy.[36]

As a general rule, courts in all legal systems commonly follow the presumption that domestic laws are in conformity with the countries' international obligations, and that domestic laws are to be interpreted accordingly.[37]

The practice

In practice, there has been a growing awareness and readiness of courts in many jurisdictions to apply international human rights standards. Courts have applied treaties directly, applied domestic law modelled on treaty provisions, and referred to treaty provisions as a means of interpretation.[38] Courts are also increasingly called

[35] See Lord Bingham in *Regina v Lyons and Others*, 2002, para.13 "… It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept, as Mr Emmerson strongly contended, with reference to a number of sources, that the efficacy of the Convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the Convention so far as they are free to do so."

[36] New Zealand Law Commission, *Guide to International Law*, p. 23.

[37] See Heyns and Viljoen, *Impact of UN Human Rights Treaties*, p.8.

[38] Ibid., p.18, mentioning in particular Australia, Canada, Colombia, Finland, Spain and South Africa as countries where frequent use of international treaties as an interpretative tool was made. See also Jayawickrama, *Judicial Application of Human Rights Law,* pp.166 et seq. and Conforti/Francioni, *Enforcing*

upon to rule on the enforcement of the decisions of international treaty bodies.[39]

The emerging practice is, however, patchy. Although courts in some dualist countries, especially those in the Commonwealth including Australia, Canada, India, South Africa and the United Kingdom, have applied international human rights standards, the jurisprudence is often inconsistent and there are continuing debates, especially amongst judges and lawyers, about the weight that should be attached to them.[40] In other countries, courts have almost completely ignored international human rights law.[41]

The judiciary's record in monist countries in applying international treaty provisions has also been mixed, perhaps surprisingly, as treaty provisions are in principle directly applicable by the courts.[42] While courts in several states have been receptive to applying treaty provisions in domestic proceedings, notably Argentina, Belgium and Colombia,[43] many states' courts have not, especially in certain countries in Africa.[44]

International Human Rights. See for regional developments, Adjami, *African Courts,* pp. 103-167 and Mendez/Mariezcurrena, *Human Rights in Latin America*.

[39] International Law Association, *Final Report*.

[40] See e.g., for Australia, Charlesworth et al., *Deep Anxieties* and Lacey, *Judicial Discretion*.

[41] See the findings in the comparative study by Heyns and Viljoen, *Impact of UN Human Rights Treaties*, p.18, and, for a regional example, Danilenko, *Implementation of International Law in CIS States*. See for the record of commonwealth countries the Commonwealth Human Rights Case Law Database maintained by Interights, to be found at www.interights.org.

[42] See, for example, the study on the implementation of the ICCPR by Harland, *Status of the International Covenant on Civil and Political Rights*, pp.196, 197. See also for example Decaux, *Role of French Judges*, pp.111 et seq.

[43] See below on the jurisprudence of Argentinean and Belgium courts and for Colombia the case study in Heyns and Viljoen, *Impact of UN Human Rights Treaties*, pp.163 et seq.

[44] As the dearth of reported cases from countries such as Algeria, Morocco and Tunisia demonstrates. See respective reports of these states to the Committee against Torture UN Docs. CAT/C/25/Add.8; CAT/C/66/Add.1 and CAT/C/20/Add.7. The reports of other states parties such as Burundi, Cote d'Ivoire and Mali have been overdue for several years and no cases are known where the courts of these countries have applied the CONVENTION.

Several initiatives have been undertaken by judges and others to foster greater awareness and application of international human rights standards in domestic law. In 1988, a high level judicial colloquium, organised by the organisation Interights and the Commonwealth Secretariat, led to the adoption of the "Bangalore Principles" which urge the judiciary to play a more active role in applying international human rights law in domestic courts.[45] The Principles are credited with fostering a considerable change in the attitude of courts in many common law countries.[46] The re-statement of the Principles in 1998 reflected this change by referring to the duty of the judiciary and legal profession to interpret and apply constitutions and ordinary legislation, as well as to develop the common law in harmony with international human rights law and to ensure the actual implementation of fundamental rights "in the daily life of the people".[47]

Further initiatives have been undertaken by the Institute of International Law in 1993,[48] a Judicial Colloquium held in Fiji in 2004 'Access to Justice in a Changing World',[49] and by the International Law Association.[50] There have also been regional initiatives to strengthen the capacity of domestic courts in applying international

[45] See Bangalore Principles at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf.

[46] See Kirby, *Bangalore Principles*.

[47] INTERIGHTS, *Developing Human Rights Jurisprudence*.

[48] Resolution of the Institute of International Law, *The Activities of National Judges and the International Relation of their State, Session of Milan*, 1993 http://www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF.

[49] The Colloquium adopted the Suva Statement on the Principles of Judicial Independence and Access to Justice in which it emphasised "the increasing significance of international human rights law in all jurisdictions" and called upon judges to "use such law in the interpretation and application of domestic law." Judicial Colloquium in Suva, http://www.interights.org/pubs/Online%20Fiji%20Colloquium%20Report.doc.

[50]The International Law Association has undertaken a comprehensive study, published in 2004, in which it focused its attention on ways of ensuring the enforcement of the decisions of international human rights bodies by national courts. See International Law Association, *Final Report*.

human rights law.[51] These developments are testimony to the growing awareness and willingness of judges, lawyers, academics, civil society organisations and others to promote the application of international human rights law in domestic courts.

3. Modes of Implementing Legislation

As discussed above, most states require domestic implementing legislation to incorporate the Convention. Implementing legislation may be adopted either before or after the coming into force of the Convention through ratification or accession. It may take three forms, namely:

- Specific anti-torture legislation, in particular aimed at implementing the Convention either comprehensively or partially;
- Amendment of existing legislation, including repeal of laws incompatible with the Convention, with the objective of bringing it in line with the Convention; and
- A combination of the two, i.e. adoption of specific anti-torture legislation partially incorporating the Convention and amendment of existing legislation.

3.1. Specific Anti-torture legislation

(i) Specific anti-torture legislation implementing the Convention wholesale

[51] See e.g. for Africa, An-Na'im, *Universal Rights, Local Remedies*. See also references to human rights and independence of judiciary in African Union, *Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa*; for Europe the work of the OSCE and the Council of Europe; for the Middle East, Qabbani, *International Human Rights Texts in the Arab World*, pp.12 et seq.; for South Asia, the South Asian Judicial Colloquium Series on Enforcing Human Rights and Access to Justice facilitated by the Commonwealth Human Rights Initiative and Interights http://www.humanrightsinitiative.org/jc/default.htm and for Latin America the work undertaken by the Center for Justice and International Law, www.cejil.org.

Single pieces of legislation incorporating the whole Convention into domestic law are rare. This rarity is because monist states often claim to have fulfilled their obligations by ratifying and publishing the Convention in their official gazettes,[52] while dualist states tend to pass specific anti-torture acts partially implementing the Convention or amend existing legislation.[53]

Legislation implementing the Convention ensures that the entire Convention becomes part of the domestic legal system, binding all authorities. It also precludes the possibility of any discrepancy between legislation and the text of the Convention. However, it is one thing to restate the text of the obligations contained in the Convention in domestic law, it is another to effectively implement those obligations. Many of the obligations require further steps to be taken, such as the obligation to prevent torture or ensure adequate and effective complaints and investigations procedures.

Further, implementing the entire Convention wholesale may lead to duplication with domestic law, some of which may already meet the obligations under the treaty.[54] Even where existing laws are not in full conformity with obligations it might be preferable to insert any amendments required into existing law rather than passing a new act so as to ensure coherence and consistency of the legal system. This rationale is behind the more common state practice of preferring targeted reforms to comprehensive incorporation in a single legal instrument, discussed more fully below.

[52] See for example country study on Lebanon in REDRESS, *Reparation for Torture,* and Togo, UN Doc. CAT/C/5/Add.33, in particular paras.58 (the report will be considered by the Committee against Torture in its 36th session in May 2006) and UN Doc. CCPR/CO/76/TGO, para.6. See as a further example, even though there have been some recent reforms, Armenia, UN Doc. CAT/C/43/Add.3, para.10 and UN Doc. A/56/44, paras.33-39.

[53] See at III, 3.1 (ii), infra.

[54] See, for example, Ireland, UN Doc. HRI/CORE/1/Add.15/Rev.1, para.34, on why Ireland opted against direct incorporation of the ICCPR.

ii) Specific anti-torture legislation implementing part of the Convention

Specific anti-torture legislation implementing part of the Convention is often the result of a process of reviewing the conformity of existing legislation with the state's obligations under the Convention. In such a circumstance the legislation that results from this process can be thought of as targeted. The state itself may conduct such a review as part of its ratification process or thereafter, such as what has occurred in Australia, Mexico, the Netherlands and Sri Lanka.[55] Alternatively, targeted anti-torture legislation may be a response to a review undertaken by the United Nations Committee against Torture as part of its monitoring and oversight of the state's compliance with the Convention after ratification or accession. However, anti-torture legislation that implements only a part of the Convention does not necessarily follow on from a process of reviewing and targeting in order to conform with the Convention as a whole – it may instead merely be the result of the state party's lack of intent to meet all of the Convention's obligations.

States' implementing legislation is typically confined to particular areas of law. One example is the Sri Lankan *Convention against Torture Act*, which makes torture a specific offence, provides universal jurisdiction for torture, and stipulates that torture is an extraditable offence and that the Government shall give assistance to authorities of other states in criminal proceedings relating to torture. The *Torture Prohibition Act* of Yukon Territory, on the other hand, addresses the question of civil liability of public officials and their employers only. Other legislation, such as the New Zealand *Crimes of*

[55] See the Australian Crimes (Torture) Act of 1988; the Mexican Federal Act to Prevent and Punish Torture of 1991; the Netherlands Act of 29 September 1988 for the implementation of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, later repealed by the International Crimes Act of 19 June 2003; and the Sri Lankan Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No.22 of 1994. See also the Torture Prohibition Act of 1988 of Yukon Territory in Canada and the Crimes of Torture Act of 1989 in New Zealand. An example of such anti-torture legislation not implementing the Convention but instead giving effect to domestic constitutional provisions is Nepal, see the Nepalese Torture Compensation Act and Article 14 (4) of the Nepalese Constitution of 1990.

Torture Act combines elements of both criminal liability and civil redress. A further field of incorporating legislation concerns laws relating to acts of torture committed abroad, such as the *Australian Crimes (Torture) Act* making torture subject to, albeit qualified, universal jurisdiction.

The United States has probably the most comprehensive legislation in this respect,[56] having enacted statutes providing for universal jurisdiction in torture cases (albeit limited),[57] establishing a civil action for torture committed abroad,[58] rehabilitation for torture survivors in form of support for domestic and foreign treatment centres[59] and regulations purporting to implement the Convention in extradition proceedings.[60]

Specific anti-torture legislation implementing part of the Convention has several advantages. It allows the government in question to identify those areas of the law where there is a need for implementing legislation, while enhancing the visibility of anti-torture legislation by incorporating all reforms in one identifiable 'anti-torture' Act. The weakness of this approach is that it runs a strong risk of failing to implement all of the Convention's obligations. This may occur in particular due to the following reasons:

- The state may interpret substantive obligations differently from the United Nations Committee against Torture and/or other international bodies and courts:

[56] USA, UN Doc. CAT/C/28/Add.5 and UN Doc. CAT/C/48/Add.3.

[57] The Torture Act of 2000, 18 U.S.C. §§ 2340, 2340A, and 2340B.

[58] Torture Victims Protection Act of 1991, U.S. Code Collection, Title 28, Part IV, Chapter 85, § 1350.

[59] Torture Victims Relief Act of 1998. Act 30 October 1998, P.L. 105-320, 112 Stat. 3016 (Effective 1 October 2003).

[60] See Regulation 22 C.F.R. Part 95.1 (Implementation of torture convention in extradition cases), effective as of 26 February 1999, issued by the Department of State to implement the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, as required by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277.

This may result in deficient anti-torture legislation, which is often the case with regard to the definition of torture used. The definition in the *US Torture Act* of 2000 is considerably narrower than the one contained in the Convention.[61] Neither the definition of torture used in the Mexican *Federal Act to Prevent and Punish Torture* nor the one found in the Sri Lankan *Convention against Torture Act* are in full conformity with Article 1 of the Convention.[62] A further example is the scope of universal jurisdiction in the Australian *Crimes (Torture) Act* that falls short of the Convention's requirements.

- The state may view its legal system as already complying with the Convention:

The Sri Lankan experience is such as example. The relevant Sri Lankan Act contained no provisions allowing victims to claim reparation for torture and nor was there complementary legislation to this effect.[63] In its report to the United Nations Committee against Torture, Sri Lanka referred to the availability of constitutional remedies in respect of its obligation to provide remedies and reparation.[64] Although the Sri Lankan Supreme Court has developed a consistent jurisprudence of awarding compensation for torture, there are significant limitations and the practice of the Supreme Court is not, strictly speaking, rights-based but discretionary.[65] It would therefore have been advisable to provide for a specific right to

[61] See also definition of torture according to the memoranda adopted by the Department of Justice's Legal Office of Legal Council in 2002 and 2004, USA, UN Doc. CAT/C/48/Add.3, para.13.

[62] The definition contained in Article 1 of the Convention is as follows: "1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[63] Existing statutes, namely the Crown Liability Act, has not proved to be an effective remedy. See REDRESS, *Responses*, pp.70 and 72.

[64] See UN Doc. CAT/C/28/Add.3, 21 November 1997, in particular paras.128 et seq.

[65] See REDRESS, *Responses*, pp.68 et seq.

reparation in legislation. A further example is Senegal where Senegalese courts declined to exercise universal jurisdiction in the Habré case,[66] contrary to the Government's earlier assertion that "(t)he legal provisions [cited in relation to Article 5 of the Convention] do not in any way hinder the prosecution of torture offences committed in Senegal or abroad and are therefore in keeping with the Convention against Torture."[67]

- Different levels of government in federal systems may not share commitment to reform:

The national level of government in a federal state may ratify the Convention but local states may have sole jurisdiction to enact all or arts of the necessary legislation or to implement broader reforms. Local states with responsibilities over policing and liability for police misconduct such as Australia, Canada, Germany, Mexico and the United States, may not have the same perspectives on reform as the national level of government when it agreed to be bound by the Convention. In Mexico, for example, where the Federal Act to prevent and punish torture applies only to the federal police and there is no federal mechanism to promote the application of international human rights standards on the (local) state level, the majority of states have failed to enact a specific offence of torture for the conduct of the state police, resulting in an implementation gap.[68]

- Provisions of the implementing act are drafted in such a way that they result in unintended consequences and the failure to accomplish the end ostensibly pursued:

The Sri Lankan *Convention against Torture Act*, for example, has to date only resulted in two successful prosecutions. This is often attributed

[66] See infra, at IV, 10.1.

[67] Senegal, UN Doc. CAT/C/17/Add.14, para.42.

[68] In Mexico, a new Criminal Code containing a definition of torture close to the one contained in the Inter-American Convention to Prevent and Punish Torture was adopted in Mexico City in 2002 but other states' efforts to adopt a specific offence of torture have failed to date.

to, amongst other things, the seven year minimum punishment for torture under the Act, which is thought to be too inflexible to take into account less severe cases.[69]

- Failure to undertake the necessary institutional measures and practical reforms to ensure that implementation is effective in practice:

This may, for example, consist of serious shortcomings in the investigation of torture cases, e.g. in Georgia, Mexico and Sri Lanka, in particular in relation to the impartiality of the investigating agency, victims and witness protection and the timely access to medical examinations.[70] These deficiencies have resulted in a stark discrepancy between the number of torture cases reported and the number of cases investigated and prosecuted.[71]

3.2. Amending existing legislation

The most widely used technique for incorporating the Convention into the domestic legal order is to amend various laws to implement the substantive provisions of the Convention. This often follows a process of evaluating a state's existing compliance with the Convention to determine which laws require amendment.

The main areas for legal reform have focused upon the introduction of the prohibition of torture as a fundamental right in the constitution and the inclusion of the specific offence of torture in criminal law, and, to a lesser degree, the inclusion of provisions relating to the prosecution or extradition for torture committed overseas.[72] Other important areas of reform have concerned the

[69] See REDRESS, *Responses*, pp.68 et seq.

[70] See REDRESS/Article 42, Georgia and country studies on Mexico and Sri Lanka in REDRESS, *Reparation for Torture*.

[71] Ibid.

[72] As the survey of states parties' reports to the Committee against Torture and the comparative research carried out by REDRESS for this guide show.

introduction of safeguards against torture, including the prohibition of *refoulement* (sending persons to locations where there is a substantial risk of torture) in immigration or deportation laws and legislation providing for the inadmissibility of evidence extracted under torture in criminal procedure codes or other laws. Further reforms have consisted in strengthening investigations in torture cases, and passing legislation that may be used to claim reparation for torture.

The benefit of targeted amendments is that they provide states with the flexibility to fine tune rather than overhaul the entire legal system to meet treaty obligations. Such an approach can ensure consistency and effectiveness where it is based on a comprehensive review of existing legislation and/or where the system is responsive to shortcomings identified in law and practice.

The main weakness of targeted amendments is similar to that highlighted in respect of specific anti-torture legislation implementing part of the Convention. Unless amendments follow a comprehensive process of review they risk being piecemeal and deficient. Such a process requires commitment and resources. The reasons for the lack of comprehensive measures taken by states parties to bring their legal system into conformity with the Convention are the ad-hoc nature of such responses, for example the introduction of a specific offence of torture in Brazil following public protests,[73] and the selective implementation following pressure by regional or international bodies, for example in the Caucasus and Central Asia.[74] The legislation that has been adopted has often been drafted according to national priorities and understandings of the meaning of torture rather than by fully taking into account relevant international standards.[75] Amendments may also suffer from a lack of visibility compared to a package of anti-torture legislation.

[73] See Brazil, UN Doc. CAT/C/9/Add.16, para.63. However, possibly due to the manner in which law No.9.455/97 was adopted, it is deficient, failing in particular to define torture in line with Article 1 of the Convention.

[74] See relevant country specific examples in Chapter II, 2.

[75] Ibid.

3.3. Assessment of various types of implementing legislation

The survey of the various modes of implementing legislation shows that there is no single most effective model. Although the adoption of a separate specific anti-torture act has much to commend it, there can be good reasons why a state may prefer to amend existing laws instead of passing specific anti-torture legislation. The optimal mode of implementation for any given country depends on the structure of the legal system and on such political questions as expediency. Whichever method is chosen, it should be the most suitable to ensure the greatest degree of compliance and implementation of the Convention in the practice of the country concerned. The survey indicates that it is the quality of the implementing legislation, and the adoption of measures ensuring actual application that are the most crucial factors in achieving this objective rather than the mode of implementation.

The preceding sections have revealed substantial shortcomings in legislation that either purports to give effect to the Convention or has been referred to by states parties as an example of relevant implementing legislation. The main reason reforms fall short of meeting obligations under the Convention is the haphazard nature of reforms undertaken. Many laws appear to have been drafted with little attention to the text of the Convention and the rights and obligations contained therein. This is especially the case where the purpose of adopting legislation has not been to give effect to the Convention but has instead been driven by other considerations, or where states have reformed their legal system in the course of political transition.

But even where laws have been passed with the clear objective of implementing the Convention, states have often taken a partial approach and drafted laws in accordance with their own legal traditions or their own understanding of torture rather than with

reference to the Convention.[76] The outcome of reforms is thus often patchy and lopsided, resulting in inadequate implementation that fails to ensure full application of the Convention. Examples are laws criminalising torture without reforms of complaints procedures and reparation mechanisms or conversely, the adoption of reparation laws for torture without laws and mechanisms for ensuring accountability. Moreover, in federal countries, anti-torture legislation has often been introduced only at the federal or local (state) level respectively, thus leaving a gap in implementation. Furthermore, in the context of dealing with past human rights violations, several reparation schemes have failed to provide effective remedies and reparations to all torture survivors and criminal accountability has not been fully ensured, mainly because political considerations have hindered full compliance with the Convention.[77] Examples are the passing of amnesty laws to facilitate transition in countries like Argentina, Chile and South Africa, and reparation schemes covering only certain groups of victims of human rights violations but not torture survivors, such as in Chile, Peru and several former Communist countries, which will be examined in more detail below.[78]

4. Lack of (adequate) implementing legislation

Several states have failed to adopt adequate or even any legislation aimed at incorporating the Convention.[79] A survey of the concluding observations by the Committee against Torture from 1993 to 2005 shows that the Committee has repeatedly urged the majority of states parties, after identifying shortcomings relating to incorporation

[76] For example in the US, see 3.1. (ii) for specific country examples.

[77] This has for example been the case to varying degrees in Argentina, Brazil, Chile and Peru as well as in Nigeria, South Africa, Indonesia and the Philippines. See for further information the relevant country studies in REDRESS, *Reparation for Torture*.

[78] At IV, 9.3.

[79] As evidenced by the concluding observations of the Committee against Torture on individual state party reports. See also the country studies in Heyns and Viljoen, *Impact of UN Human Rights Treaties*, and REDRESS, *Reparation for Torture*.

and actual implementation, to carry out legal and other reforms concerning a wide range of substantive obligations under the Convention.[80] In spite of this, some states have insisted that no reforms are necessary to ensure compatibility of their national laws with the Convention, at times in open defiance of the Committee against Torture.[81] The reluctance to follow the recommendations of the Committee against Torture undermines the effectiveness of the Convention. The reasons for this lack of compliance vary but for many Governments adopting implementing legislation to bring their laws in line with the Convention simply appears not to be a priority.[82] This is particularly the case where there are not sufficient domestic or international incentives or pressures to do so. This can be seen when contrasting implementation efforts by states that have become party to the Rome Statute of the International Criminal Court, or where states have the added incentive to adhere to human rights

[80] See exemplary recommendations by the Committee against Torture to this end in Egypt, UN Doc. A/49/44, para.93; Israel, UN Doc. CAT/C/XXVII/Concl.5; Mauritius, UN Doc. A/54/44, paras.118-123, para.123; United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/CR/33/3, paras.5 (a), (b) and (d); Uruguay, UN Doc. A/52/44, paras.81-94, para.93 and Venezuela, UN Doc. CAT/C/CR/29/2, para.11 (a).

[81] United Kingdom, UN Doc. CAT/C/67/Add.2, para.30. The Committee against Torture disagreed with the British Government and recommend that the state party ensure that section 134 (4) of the Criminal Justice Act be brought in line with the requirements of the Convention against Torture. See UN Doc. CAT/C.CR/33/3, paras.4 (a) (ii) and 5 (a) respectively. In a further example, Denmark, in contrast to Norway, which recently introduced a specific offence of torture into its criminal law, refused to incorporate an offence of torture in its military code even though it had been repeatedly urged to do so by the Committee against Torture, arguing that it would only have symbolic character as acts of torture could be punished under existing Danish legislation. See BBC Monitoring Europe, 11 April 2005 (text of a report taken from Politiken website, Copenhagen, 10 April 2005). Finally, see the position of Italy with regard to the "The Problem of the Introduction of the crime of torture into the Italian penal order", UN Doc. CAT/C/44/Add.2, paras.7 et seq.

[82] In the Philippines (which had become a party to the Convention against Torture in 1986), several private member bills (House Bill No.2302 by Congressman Reginaldo N. Tilanduca and Senate Bills 2481 by Sen. Sergio Osmeña III and 2484 by Sen. Francis Pangilianan seeking to make torture a criminal offence that carries the life sentence and House Bill 2855 of Cong. Loreta Ann Rosales to provide compensation for victims of torture) have been pending for several years, as many legislators apparently believe that the offences relating to physical injuries and murder in the Revised Penal Code of the Philippines are sufficient to prohibit the acts of torture. See on this point the differing assessment of the Philippines Commission of Human Rights in its Position Paper on Bill 2302. In the latest development, Renato "Ka Rene" B. Magtubo introduced House Bill No.3359 "An Act penalising the commission of acts of torture and other cruel, inhuman and degrading treatment or punishments, and for other purposes", which incorporates most substantive provisions of the Convention against Torture. In South Africa, the Criminalisation of Torture Bill was, in mid-2005, being drafted by the responsible government department, seven years after South Africa had ratified the Convention.

obligations as part of a list of preconditions for European Union accession or where they must make certain legislative amendments in order to comply with judgments of regional courts.[83]

IV. SUBSTANTIVE OBLIGATIONS CONTAINED IN THE CONVENTION

1. Introduction

This Part explores the various obligations contained in the Convention. It also discusses ways that specific obligations can be realised domestically, with occasional use of illustrations from state practice highlighting instances where the obligations have or have not been met. The judiciary's role in implementing the Convention either directly or through applying or interpreting domestic implementing legislation is also examined.

2. States Must Criminalise Acts of Torture

2.1. Torture should be a specific offence carrying appropriate penalties

Torture should be designated and defined as a specific crime of the utmost gravity in national legislation.[84] The offence of torture should be characterised as a specific and separate offence; to subsume torture within a broader, more generic offence (e.g., assault causing grievous bodily harm; abuse of power) fails to recognise the particularly odious nature of the crime and makes it more difficult for

[83] Such as the Inter-American Court of Human Rights, which has developed a practice of ordering states parties to adopt specific legislative measures to remedy violations. See Cassel, *Impact of the Jurisprudence*.

[84] Article 4 of the Convention provides 'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

states to track, report upon, and respond effectively to the prevalence of torture.

States must provide appropriate penalties that reflect the grave nature of torture.[85] Lenient penalties may fail to deter torture, while rigid and draconian penalties, such as a seven year minimum, may result in courts being unwilling to apply the law as it fails to flexibly take into account individual circumstances.[86] The practice of the Committee against Torture indicates that a significant custodial sentence is generally appropriate.[87]

2.2. Defining Torture

The most effective way to ensure that all acts of torture are outlawed is to insert a definition of torture in conformity with Article 1 of the Convention. Inserting a clear definition of torture into the relevant national law minimises the possibility that courts will fail to interpret the crime in line with international requirements. In those instances in which states have failed to incorporate the Article 1 definition wholesale, problems of classification invariably occur. For example, often purely psychological torture is excluded from broader categorisations of crimes or the threshold for what amounts to torture is otherwise made overly restrictive – e.g., by requiring "systematic" violence to be inflicted.[88]

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[85] Article 4(2) of the Convention. For punishment considered too lenient see Russia, Kyrgyzstan, and Uzbekistan where no torture prohibition laws provide for a maximum punishment exceeding 5 years of imprisonment.

[86] E.g. in Sri Lanka, supra, III, 3.1.

[87] Ingelse, *Committee against Torture*, p.342. The Committee against Torture has not prescribed a rule for the required punishment by specifying a minimum or maximum length of imprisonment. It has, however, indicated the limits of appropriate sentences, finding on the one hand that short sentences of three to five years imprisonment are inadequate, and on the other that too serious penalties might deter the initiation of prosecutions.

[88] See Article 119 of the 2003 Armenian Penal Code and concerns raised by the Committee against Torture concerning the draft Penal Code in UN Doc. A/56/44, paras.33-39, para.37 (a) and Article 133 of the Azerbaijan Criminal Code, Azerbaijan, UN Doc. CAT/C/CR/30/1, para.5 (b): "… the definition of torture in the new Criminal Code does not fully comply with article 1 of the Convention,

The requisite elements in the Convention definition of torture are as follows:

Intentionally inflicted:	The intentional infliction of
Nature of harm:	Severe pain or suffering, whether physical or mental, on a person

The Convention does not provide an exhaustive list of acts that are severe enough to satisfy the threshold of what is meant by 'torture.' This is because the severity of the act must be analysed in view of the context in which it is carried out and the impact it has on the victim, and because it would be impossible to exhaustively list all of the different forms of torture; unfortunately there continue to be new forms of ill-treatment or 'enhanced interrogation techniques' amounting to torture. Nonetheless, certain practices have been considered by a range of courts and international treaty bodies to amount to torture and it is recognised that torture may be physical OR mental. Article 7 of the International Covenant on Civil and Political Rights refers explicitly to the prohibition against subjecting someone without his free consent to medical or scientific experimentation. The European Court of Human Rights has assessed this threshold, and has held that it depends on the duration of the treatment, its physical or mental effects and on the sex, age and state of health of the victim, and the level of severity.[89] Several national courts in Africa, Asia and the Caribbean have held that the use of chains and leg-irons and the practice of detaining prisoners in continuously lit, single, locked cells violated the prohibition against torture.[90]

because, *inter alia*, article 133 omits references to the purposes of torture outlined in the Convention, restricts acts of torture to systematic blows or other violent acts, and does not provide for criminal liability of officials who have given tacit consent to torture."

[89] ECHR, *Ireland v. United Kingdom*, paras. 162, 167. See also Selmouni v. France, para.101.

[90] See *Namunjepo & Ors v. The Commanding Officer*, Namibia, Supreme Court, 2000 [referring to Namibia's accession to the Convention against Torture and the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners]; *Blanchard & Others v. Minister of Justice*, Legal and Parliamentary Affairs & Anor, Supreme Court, Zimbabwe, 2000 [referring to provisions in the ECHR and ICCPR, jurisprudence by the European Court of Human Rights and the UN Standard Minimum

Specific purpose:

To obtain from him or a third person information or a confession or to punish him for an act he or a third person has committed or is suspected of having committed or to intimidate or coerce him or a third person or for any reason based on discrimination of any kind

For an act to be considered as torture it must be inflicted for a specific purpose (such as, a form of punishment, intimidation, soliciting information,…)[91]

Official capacity:

Committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

This would include, for instance, the actions of a police officer, military official or prison warden. However, in some circumstances, the state may also be in breach of its obligations to prohibit torture when it has failed to prevent acts of torture or ill-treatment from occurring. International humanitarian law, and indeed international criminal law, differs somewhat from the definition in the Convention against Torture in that it does not require the involvement of a person acting in an official capacity as a condition for an act intended to inflict severe pain or suffering to be defined as torture.

Rules for the Treatment of Prisoners] and *Harding v Superintendent of Prisons & Anor*, St Lucia, High Court, 2000 [referring to the definition of torture developed by the European Court of Human Rights in the case of *Ireland v. UK*]. See also *Prem Shankar Shula v. Delhi Administration*, 1980, in which the Indian Supreme Court held, in its interpretation of fundamental rights, that the routine hand-cuffing of prisoners violated fundamental rights, referring to Article 5 of the Universal Declaration of Human Rights (prohibition of torture) and Article 10 of the ICCPR (treating persons deprived of their liberty with humanity and respect for their dignity).

[91] ECHR, *Ilhan v. Turkey*, (2000), para. 85.

Not incidental to lawful sanctions:	Unless such pain or suffering is arising from, inherent in or incidental to lawful sanctions.

While several treaties and international texts provide that torture does "not include pain or suffering arising only from, inherent in or incidental to lawful sanctions",[92] in 1992, the Human Rights Committee, in its General Comment, stated that the prohibition of torture and ill-treatment "must extend to corporal punishment",[93] "and may amount to cruel, inhuman or degrading punishment or even to torture".[94]

The Convention specifically notes that its definition of torture is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."[95] In other words states parties must ensure that their national definition of torture is at least as broad as what is contained in Article 1 of the Convention. For example, the Inter-American Convention to Prevent and Punish Torture has defines torture more broadly than the UN Convention. It includes as torture "the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".[96] Also, the Rome Statute for an International Criminal Court has slightly extended the definition in the UN Convention, in that it does not explicitly require the consent or acquiescence of a public official or any other person acting in an official capacity. It defines torture, as an element of crimes against humanity, as: "the intentional infliction of severe pain

[92] Article 1, Convention against Torture; Article 2(2) of the Inter-American Convention to Prevent and Punish Torture, which provides that "The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

[93] Human Rights Committee, General Comment 20, 1992, para. 5.

[94] UN Commission on Human Rights Resolution 2000/43 and Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1997/7, para. 6.

[95] Article 1 Paragraph 2.

[96] Inter-American Convention to Prevent and Punish Torture, Article 2.

or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".[97]

2.3. Superior orders are no defence

In most states, there will be a requirement to place specific attention to the question of 'superior orders', which as mentioned previously cannot be used as an excuse to commit torture. In fact, officials are under a duty to disobey orders from a superior to commit torture. In many instances, this duty to refrain from torture despite an order to the contrary may be inconsistent with the general duty of officials, particularly those within strict hierarchical structures such as the police or the military, and will be most difficult to implement in protectionist, insular command structures. The implementation of this provision will not only require law reform in most cases, it will usually also require clear general directives to be issues coupled with effective independent oversight mechanisms so that junior officials have places to go when faced with this dilemma.[98]

3. The status of the law prohibiting torture

This obligation to prohibit torture is absolute.[99] This means that there can be no exceptions or limitations to the prohibition such as in times of public emergency, war or in the fight against terrorism or

[97] Article 7(2)(e) of the Rome Statute.

[98] See Greece, U.N. Doc. CAT/C/CR/33/2, para.6 (g).

[99] The prohibition of torture has the status of a '*jus cogens*' norm of international law, which means States cannot derogate from the obligation to prohibit it, as stipulated in Article 2 (2) of the Convention, Article 4 of the ICCPR and recognised, *inter alia*, by the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor v. Anto Furundzija* paras.153-4: "…because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is a norm that enjoys a higher rank in the international hierarchy than treaty law or even 'ordinary customary rules' … Clearly the just cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."

organised crime.[100] Nor can the prohibition be subjected to balancing against other considerations such as state interests. [101] In its General Comment No. 20 on article 7 of the Covenant, the Human Rights Committee underlined the non-derogable nature of this provision:

> "The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority".[102]

Arguments have been put forward to legitimate the use of torture or ill-treatment in the fight against terrorism, some states have relied on "national security interests" to suggest that an override of human rights protections including the prohibition against torture and cruel, inhuman or degrading treatment or punishment may be warranted. Yet, the Convention is absolutely clear on this point, and numerous international and regional bodies have reiterated the absolute nature of the prohibition of torture, even when countering terrorism. As explained by Mary Robinson, former UN High Commissioner for Human Rights, "the only long-term guarantor of security is through ensuring respect for human rights and humanitarian law"[103] The UN Committee against Torture also reminded states parties to the

[100] See CAT, *Arana v. France*, para.11.5; Statement by the Committee against Torture UN Doc. CAT/C/XXVII/Misc.7; Russian Federation, UN Doc. CAT/C/CR/28/4, para.4 and judgments of the European Court of Human Rights in the case of *Selmouni v. France,* para.95, *Chahal v. UK*, para.79 and *Aydin v. Turkey*, para 81.

[101] For example in Canada, see *Suresh v. Canada,* [2002], para.58.

[102] General Comment No. 20, 10/3/1992 (para 3).

[103] M. ROBINSON, statement at 59th session of UNHRC, 20 March 2002, in REDRESS, *Terrorism, counter-* terrorism and torture, July 2004, p.3.

Convention of the non-derogable nature of the obligations contained in the Convention. The European Court of Human Rights indicated as follows:

> "Article 3 … enshrines one of the most fundamental values of democratic society…. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4…, Article 3 … makes no provision for exceptions and no derogation from it is permissible under Article 15 … even in the event of a public emergency threatening the life of the nation…".[104]

As the obligation to prohibit torture is absolute, any laws prohibiting torture should be protected from being subsequently overruled by parliament or the judiciary.[105] This can usually be best achieved by enshrining it in the Constitution which in most states overrides legislation and binds courts.[106] A specific provision outlawing torture could be inserted into the Constitution or alternatively the Constitution could contain a provision stating that international human rights treaties bind domestic law.[107] Another option is to

[104] ECHR, Chahal v. the United Kingdom, para. 79.

[105] Whether this is necessary depends on the status of international law in a state's legal system. Accordingly, the terms of treaties signed by a State may have a status superior or equal to the constitution, in-between the constitution and statutory law or the same status as statutory law. In the absence of such a reference to international law, it is commonly the judiciary that is tasked with deciding on the applicability and status of international human rights treaties such as the Convention. See supra at II.

[106] At least 97 out of the countries that have ratified the Convention Against Torture have an explicit prohibition in their Constitution or other relevant statute. The constitutions of a number of countries, such as Brazil, Indonesia and Nigeria expressly provide for a non-derogable fundamental right to be free from torture and other forms of ill-treatment. See Article 5 of the Constitution and Brazil, UN Doc. CAT/C/9/Add.16, para.51; Articles 28 (g) and 28 I (1) of the Indonesian Constitution and sections 34 (1)(a) and 45 of the Nigerian Constitution.

[107] As stressed by the Committee Against Torture: See Chile UN Doc. CAT/C/32/5, para.7 (f) and, for the Committee's recommendations to implement the Convention against Torture in domestic

place the prohibition in a general Human Rights Charter which can be expressed as having superior legal status than ordinary legislation. Finally, if the prohibition is contained in legislation, it can be protected by building in more difficult means of amending or repealing it than ordinary legislation, such as requiring a larger parliamentary majority.

4. States Must Take Effective Measures to Prevent Torture

Because of its far-reaching physical and psychological effects, the harm inflicted by torture on the victim can never be undone. Prevention is therefore of primary importance. Article 2, para. 1, of the Convention obliges each state to "take effective legislative, administrative, judicial or other measures to prevent acts of torture".

It is therefore not sufficient to simply pass laws prohibiting torture; states must also take all reasonable measures to ensure that torture does not occur in practice. To achieve the eradication of torture in practice states must take steps protecting those in custody, such as ensuring prompt access of detainees to lawyers and courts. States must train law enforcement and other personnel coming into contact with those in custody and review interrogation rules. Finally, oversight bodies should be set up to monitor how effective measures to prevent torture are. Although the Convention does not specify which measures must be taken, the following are examples of 'effective measures'. Failure to take such measures may result in a failure to comply with the obligation to prevent torture.

4.1. States must protect those in custody from torture and cruel, inhuman or degrading treatment

law, Israel, UN Doc. CAT/C.XXVII/Concl.5, para.7 (a); Mauritius, UN Doc. A/50/44, paras.132-145, para.141; Zambia, UN Doc. CAT/C/XXVII/Concl.4, para.8 (a).

States must provide safeguards to protect those arrested, detained or in custody from torture and cruel, inhuman or degrading treatment.[108] In particular:

- Specific preventive measures should be taken to ensure that the right to physical and mental integrity is fully guaranteed during all transfers, especially from the place of arrest to the initial detention facility;
- The right to inform family members or third persons immediately about their detention, and, in case of foreign nationals, their consular representatives;[109]
- The right to access a lawyer of their choice. This right encompasses equal and effective access to a lawyer of their choice, the right to be informed of this right upon detention, and the right to consult freely and confidentially with their lawyer;[110]
- The right to a proper medical investigation upon entering and leaving the place of detention or imprisonment.[111] Such examinations should be conducted confidentially and independently, away from the supervision of law-

[108] As recognised by the Committee Against Torture and other human rights bodies.

[109] Belgium, UN Doc. CAT/C/CR/30/6, para.7(g); Latvia, UN Doc. CAT/C/CR/31/3, para.7 (c); Russian Federation, UN Doc. CAT/C/CR/28/4, para.8 (b) and Principle 16 of the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, and the ICJ judgments in the *LaGrand Case (Germany v United States of America)*, and *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*. An instance of failure to provide for the right to inform a third party of arrest is Latvia, UN Doc. CAT/C/CR/31/3, para.6 (g).

[110] Yemen, UN Doc. CAT/C/CR/31/4, para.7 (c); Latvia, UN Doc. CAT/C/CR/31/3, para.7 (c); Estonia, UN Doc. CAT/C/CR/29/5, para.6 (e); Spain, UN Doc. CAT/C/CR/29/3, paras.10 and 14. See *UN Basic Principles on the Role of Lawyers*, and *UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*. There have been many instances of the Committee Against Torture finding failures to ensure the right to choose a lawyer at all stages of proceedings, see Azerbaijan, UN Doc. CAT/C/CR/30/1, para.6 (c); Belgium, UN Doc. CAT/C/CR/30/6, para.5 (h); Czech Republic, UN Doc. CAT/C/CR/32/2, para.5 (a); Indonesia, UN Doc. CAT/C/XX/VII/Concl.3, para.9 (d) and (f) and Slovakia, UN Doc. A/56/44, paras.99-105, para.104 (g).

[111] See e.g. Russian Federation, UN Doc. CAT/C/CR/28/4, para.8 (b). The Committee noted with approval measures taken in Denmark to make a medical examination of detainees mandatory and to be carried out without delay. See Denmark, UN Doc. CAT/C/CR/28/1, para.5 (b).

enforcement officials.[112] In addition, detainees should be able to petition competent authorities for an independent second opinion where medical examinations have been carried out by state-appointed doctors;[113]

- Conditions that could lead to the risk of torture and that may constitute cruel, inhuman or degrading treatment, such as rules allowing 'moderate physical pressure' during interrogation, should be prohibited;[114]
- Blindfolding and hooding of detainees during interrogation should be forbidden as it constituted a form of sensory deprivation that may amount to ill-treatment and makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers;
- Time spent in police custody should be strictly limited and detainees must have the right to appear before a magistrate or judge to challenge the legality of detention within a reasonable timeframe.[115] The European Court of Human Rights has held that even taking into account security or

[112] See Czech Republic, UN Doc. A/56/44**,** paras.106-114, para.114 (d) and Lithuania, UN Doc. CAT/C/CR/31/5, para.6 (d). For instantes of failure to provide such rights, see Albania, UN Doc. CAT/C/CR/34/ALB, para.7 (m); Azerbaijan, UN Doc. CAT/C/CR/30/1, para.6 (c); Brazil, China, Egypt, Kenya, Morocco, Indonesia, Turkey and Uzbekistan. See respective country studies in REDRESS, *Reparation for Torture*.

[113] Lithuania, UN Doc. CAT/C/CR/31/5, para.6 (d). See regarding the duty to provide an independent medical examination with respect to rape in detention ECHR, *Aydin v.* Turkey, para.107. See also Principle 24 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and *Article 6 Code of Conduct for Law Enforcement Officials.*

[114] For instance, in its recommendation and conclusions on three reports by Israel, the Committee against Torture found that rules allowing "moderate physical pressure" as a tool of interrogation were unacceptable because they were "creating conditions leading to the risk of torture." Israel, UN Doc. A/49/44, paras.159-171, paras.167 and 168.

[115] The Committee against Torture has emphasized that the period of police custody must be limited to a "strict minimum"; see Morocco, UN Doc. CAT/C/CR/31/2, para.6 (c). The Committee has also recommended that any extension of police custody should be approved by a judge and that possibilities for extending custody should be curtailed as much as possible. See Cameroon, UN Doc. CAT/C/CR/31/6, paras.9 (a) and (b). Also, the European Court of Human Rights, for instance, has interpreted article 5 (3) of the Convention that guarantees the right to be brought "promptly" before a judge, very strictly, arguing that despite security or terrorism-related considerations, even a period of four days was too long to be held incommunicado. See *Brogan and Others v. the United Kingdom*, para.62. Examples of failures to provide for courts to supervise the legality of detention include Uganda, UN Doc. CAT/CO/34/UGA, para.6 (b) and Uzbekistan, see Mission to Uzbekistan, Report of the Special Rapporteur on Torture, para.11.

terrorism considerations, four days was too long to be held before appearing before the courts. Minimising time spent in police custody. This not only reduces the risk of torture, it also facilitates the discovery of evidence of torture when it has been committed;

- Incommunicado detention should be prohibited.[116] Incommunicado detention is not only conducive to torture, it also constitutes a form of cruel, inhuman or degrading treatment.[117] In order to end incommunicado detention, the practice should be made illegal and scrupulous requirements regarding the recording of information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be enforced with penalty;
- Emergency, public security or anti-terrorism legislation that provides law enforcement personnel and security forces with overly broad interrogation or detention powers or immunity from prosecution for committing torture must be abolished;[118]
- Effective measures to prevent prisoner-on-prisoner violence, including investigating reports of such practices and punishing those responsible, and offering protective custody to vulnerable individuals, without putting them at further risk of ill-treatment;
- Segregation according to gender, age and seriousness of the crime, alleged/committed.

Laws dealing with arrest, detention and custody are commonly found within broader criminal procedure laws. Nonetheless, the obligation

[116] For instance, the Committee against Torture proposed that a 15-day period of incommunicado detention for suspected terrorists be abolished in Peru. See Peru, UN Doc. A/55/44, paras.56-63, paras.59 (c) and 61 (b).

[117] Committee Against Torture: Egypt, UN Doc. CAT/C/CR/29/4, para.6 (h) and Yemen, UN Doc. CAT/C/CR/31/4, para.7 (d). Also, Human Rights Committee, *General Comment 20*, paras.6 and 11

[118] Peru, UN Doc. A/50/44, paras.62-73, paras.68 and 73 (a); United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/CR/33/3, paras. 4 (c) and 5 (h) and Report of the Special Rapporteur on Torture, UN Doc. A/57/173, para.3.

to provide such protections is still commonly breached through public security, emergency and anti-terrorism laws. These laws often vest the police and other agencies with overly broad powers that facilitate torture by providing a wide power to detain suspects without warrant[119] and/or allowing forms of detention that remove safeguards or constitute ill-treatment in themselves, such as indefinite,[120] prolonged pre-trial[121] or administrative detention,[122] including incommunicado detention,[123] often without adequate judicial supervision.

Besides providing safeguards in individual cases, the high courts of some countries, notably in South Asia, have ordered the authorities to undertake specific steps to address systemic failures, often with reference to international standards. In the case of *D.K. Basu v. State of West Bengal*, the Indian Supreme Court, finding that the practice of torture violated Article 21 of the Indian Constitution and that existing safeguards were inadequate, issued a list of "requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures", which included a comprehensive set of custodial safeguards.[124] The Supreme Court of

[119] Section 54 of the Bangladeshi Criminal Procedure Code of 1898 as amended.

[120] US Patriot Act of 2001, Military Order signed by the President on 13 November 2001 and UK Anti-terrorism, Crime and Security Act, 2001 (partly replaced by the Prevention of Terrorism Act, 2005 (see Thomas, *9/11*)).

[121] 'Terrorist and Disruptive Activities Ordinance (2004)' in Nepal. The ordinance replaced the Torture and Disruptive Activities (Prevention and Punishment) Act, 2002. See in this respect Asian Human Rights Commission, *Nepal*.

[122] Syria, Emergency Law, Legislative Decree No.51, 22 December 1962 and Egypt, Emergency Law of Law Nr. 162 of 1958 (applied since 1981).

[123] See Visit to Spain, Report of the Special Rapporteur on Torture, paras.17 et seq.

[124] (1997) 1 SCC 416. The requirements consisted of: the police personnel responsible for arrest and interrogation bearing accurate, visible and clear identification and name tags; the preparation of a memo of the arrest to be attested by a witness and countersigned by the arrestee; the right of an arrested or detained person to inform one friend or relative or other person known to him/her about the arrest and location of detention; the notification of time, place of arrest and venue of custody where the next friend or relative lives outside the district or town within a period of 8 to 12 hours after the arrest; informing the arrested person of his right to have someone informed of his arrest or detention; an entry in the diary of the arrest of the person and the name of the person informed about the arrest; examination of the arrestee at the time of arrest upon request and recording of injuries; subjecting arrestees to medical examination by a trained doctor every 48 hours during detention in custody; sending copies of all the documents to the competent Magistrate for his record;

Bangladesh, in the case of *BLAST and others v. Bangladesh and others*, found that section 54 of the Criminal Procedure Code governing arrest procedures allows the police to exercise its powers abusively and issued a list of directions to the Government of Bangladesh.[125] These directions resemble the order by the Indian Supreme Court in the Basu case and include, besides safeguards against arbitrary arrest, the key custodial safeguards, namely medical examination following arrest, informing third persons about arrest and access to a lawyer of the detainee's choice.[126]

4.2. States must undertake to prevent cruel, inhuman or degrading punishment committed with the involvement or acquiescence of officials

The obligation to prevent cruel, inhuman or degrading punishment is set out in Article 16 of the Convention. Paragraph 2 of Article 16 specifies that this obligation is without prejudice to other international instruments or national law, which might contain more extensive provisions. For example, Article 7 of the International Covenant on Civil and Political Rights, which prohibits torture and other forms of ill-treatment has been interpreted to extend to corporal punishment, "including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."[127] The United Nations Human Rights Committee has also emphasised that Article 7 covers, "in particular, children, pupils and patients in teaching and medical institutions."[128] The prohibition on cruel, inhuman or degrading punishment has also been interpreted to

permitting the arrestee to meet his/her lawyer during interrogation; and establishing a police control room to be provided with information about arrest and place of custody within 12 hours of effecting the arrest. See on the relevant jurisprudence of the Indian Supreme Court from the late 1970s to the late 1990s, Mudgal, *Prisons and Custody*.

[125] See *Bangladesh Legal Aid and Services Trust (BLAST) and others vs. Bangladesh and other*, 2003.

[126] Ibid.

[127] UN Human Rights Committee, *General Comment 20*, para.5.

[128] UN Human Rights Committee, ibid.

apply to other forms of corporal punishment, such as flogging or amputations.[129]

Certain domestic courts have also held that corporal punishment violates the prohibition against torture.[130] For example, the South African Constitutional Court held in *Christian Education South Africa v. Minister of Education* that the South African Schools Act prohibiting corporal punishment in schools was constitutional.[131] In its interpretation of the fundamental rights provisions of the Constitution, the Government referred to the Convention in support of the ban and the Court held that corporal punishment is illegal under international law and contrary to South Africa's obligations under international human rights treaties.[132]

The obligation to prevent cruel, inhuman or degrading punishment has also been analysed in relation to the death penalty. Whilst there is movement towards the abolition of the death penalty in a growing number of states, and it does not form part of the allowable penalties

[129] See Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/2001/66, para.1024; Saudi Arabia, UN Doc. CAT/C/CR/28/5, para.4 (b) and decision by the African Commission for Human and Peoples' Rights, 236/2000-*Curtis Francis* Doebbler v. *Sudan*; ECHR, *Tyrer v. UK*, paras. 33-35; Inter-American Court of Human Rights, *Urso Branco Prisons Case*, para.10 and Inter-American Commission Report *on the Situation of Human Rights in the Dominican Republic*, paras.282-286. National examples where flogging has been outlawed include South Africa's Abolition of Corporal Punishment Act of 1997, Kenya's Criminal Law (Amendment) Act, 2003 and in Egypt through legislation banning flogging as a disciplinary penalty for prisoners. See Egypt, UN Doc. CAT/C/CR/29/4, para.3 (a). The Committee against Torture has commented on flogging practices in its concluding observations to the state party reports of Saudi Arabia and Yemen (see Saudi Arabia, UN Doc. CAT/C/CR/28/5, para.4 (b) and Yemen, UN Doc. CAT/C/CR/31/4, para.6 (b)). In Northern Nigeria, several local states have imposed laws allowing for corporal punishments and particularly cruel forms of capital punishment despite the concerns raised by the central Government. See Nigeria country study in REDRESS, *Reparation for Torture*.

[130] There are a considerable number of decisions. See by way of example *Ex Parte Attorney-**General, Namibia In Re Corporal Punishment by Organs of State***, 1991 (Namibia Supreme Court); *The State v Williams and Others*, South Africa Constitutional Court, 1995 [referring to international jurisprudence on the definition of cruel, inhuman and degrading punishment, such as the judgment of the European Court of Human Rights in the case of *Tyrer v. UK*]; *P v Marksman & Anor*, St Vincent & the Grenadines, High Court, 1999; *Parents Forum for Meaningful Education and Another versus Union of India and another*, High Court of Delhi, 2000 (with extensive reference to obligations under the UN Convention on the Right of the Child) and *Naushad Ali v State*, Fiji High Court, 2002.

[131] ***Christian Education South Africa v. Minister of Education*, 2000.**

[132] **Ibid., para.13.**

before international criminal tribunals, the jurisprudence of international human rights bodies has recognised that in those countries that retain the death penalty, states must ensure that it is carried out in a way that causes the least possible suffering. For example, summary and public executions, the 'death row phenomenon' (extensive time and/or conditions on death row), stonings, execution of pregnant women or women who have just given birth have all been interpreted to constitute cruel inhuman or degrading punishment.[133] There is a series of judgments in which domestic courts, including the Judicial Committee of the Privy Council,[134] have found the 'death row phenomenon' and certain methods of execution to be in violation of fundamental rights prohibiting cruel, degrading or inhuman treatment or punishment, albeit without any explicit reference to the prohibition of torture under international law.[135]

4.3. States must train law enforcement personnel and systematically review interrogation rules

Article 10 of the Convention requires states to educate their "law enforcement personnel, civil or military, medical personnel, public officials, and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment" about the prohibition against torture.

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[133] **See, China, UN Doc. A/51/44, para.150 (c) and Jordan, UN Doc. A/50/44, paras.159-182, para.169. For further examples of death penalty and corporal punishment cases see Saudi Arabia, UN Doc. CAT/C/CR/28/5, para.4 (b) and Yemen, UN Doc. CAT/C/CR/31/4, para.6 (b). See also, Ingelse, *Committee against Torture*, p. 283 for additional references.**

[134] The Judicial Committee of the Privy Council is the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. See www.privy-council.org.uk.

[135] *Pratt and Morgan v. A.G. for Jamaica*, 1994; *Henfield v. Attorney-General of Bahamas*, 1997; W.L.R; *Neville Lewis, Patrick Taylor and Anthony McLeod, Christopher Brown, Desmond Taylor and Steve Shaw v. The Attorney General of Jamaica and Another*, 2000.

Training is an ongoing responsibility, and the effective prevention of torture requires consistent and long-term approaches to education targeting the range of organs and departments that may come into contact with persons at risk of torture and ill treatment, including the wide dissemination of training materials, specialised and continuing training courses, and on the job mentoring and positive reinforcement.

The United Nations has adopted a series of practical guidelines, rules of conduct and principles that interpret states' international law obligations, and should be disseminated widely to officials coming into contact with persons deprived of their liberty. These include:

- Standard Minimum Rules for the Treatment of Prisoners
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Code of Conduct for Law Enforcement Officials
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Doctors, prison medics and other health-sector personnel working in detention facilities or otherwise coming into contact with persons deprived of their liberty should be provided instruction on:

- Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Detainees and Prisoners against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

These texts are reproduced in the Annex to this Guide.

Article 11 of the Convention requires states to "keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment." This entails the conduct of systematic reviews of the systems in place

in all detention facilities, without prior notice, supervised by an independent body.[136]

4.4. States should set up independent and effective bodies to inspect places of detention

In 2002, the United Nations Special Rapporteur on Torture issued a series of general recommendations and urged states to reflect upon them as a useful tool to combat torture.[137] Paragraph (f) of the recommendations provides as follows:

> "Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas, detention units of medical and psychiatric institutions and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. In addition, official bodies should be set up to carry out inspections, such teams being composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society. Ombudsmen and national or human rights institutions should be granted access to all places of detention with a view to monitoring the conditions of detention. When it so requests, the International Committee of the Red Cross should be granted access to places of detention. Non-

[136] Committee Against Torture: Russian Federation, UN Doc. CAT/C/CR/28/4, para.8 (e) and Zambia, UN Doc. CAT/C/XXVII/Concl.4, para.8 (e).

[137] UN Doc. E/CN.4/2003/68 of 17 December 2002.

> governmental organizations and other monitoring bodies should also be granted access to non-penal State-owned institutions caring for the elderly, the mentally disabled and orphans as well as to holding centres for aliens, including asylum-seekers and migrants."

The importance of a system of regular inspections is underscored by the invaluable work of the International Committee of the Red Cross and its national societies for more than 80 years, and in Europe, by the work of the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment, a Council of Europe body mandated to conduct visits to places of detention (e.g. prisons and juvenile detention centres, police stations, holding centres for immigration detainees and psychiatric hospitals), to monitor the treatment of persons deprived of their liberty and, if necessary, to recommend improvements to states parties. The Optional Protocol to the Convention against Torture (adopted but not yet in force) will lead to the establishment of a worldwide system of regular visits by independent international and national bodies to places of detention, further strengthening existing national and regional mechanisms.

States should ratify the Optional Protocol to the Convention and establish national supervisory bodies with a mandate to investigate and prevent torture. Such bodies should be permanent, independent and given broad powers including the ability to visit places of detention unannounced. In several states, such as El Salvador, Mexico, Ghana and India, national human rights institutions already have a broad remit to prevent human rights violations, including torture. The Indian National Human Rights Commission, for example, has issued instructions and guidelines to prevent custodial death and rape, and to uphold human rights in prisons, such as ordering the periodical medical examination of detainees.

5. States must not forcibly send, transfer or return a person to a country where he or she is likely to be subjected to torture (Non-*refoulement*)

National legislation and practice should reflect the principle enunciated in article 3 of the Convention against Torture, namely the prohibition on expelling, returning (*refoulement*) or extraditing a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture". The principle of non-*refoulement* is fundamental to the prevention of torture and the sending state will also violate its obligations to prohibit torture when it sends, returns or otherwise transfers a person without respecting this principle. For the purpose of determining whether such grounds exist, the competent authorities must take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[138]

States must make legal provision for the prohibition.[139] The prohibition should be found in legislation, including immigration and refugee laws and extradition provisions, to provide it with the appropriate legal footing.[140] Failing legislation, some states have

[138] The prohibition of *refoulement* is a well-established principle of international human rights law found in several international treaties, affirmed in international jurisprudence and considered to constitute customary international law. Article 33 of the 1951 Convention on the Status of Refugees, states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." In addition to the provision contained in the Convention against Torture, a similar provision is located in Article 13 (4) of Inter-American Convention to Prevent and Punish Torture. The obligation no to expel persons facing a risk to life or of ill-treatment or torture has been recognized by the European Court of Human Rights in *Chahal v. The United Kingdom*, para.74; *Vilvarajah and Others v. United Kingdom*, para. 103 and *Soering v. the United Kingdom*. See also UN Human Rights Committee, General Comment No. 20, para.9. The customary status of the principle of non-refoulement in international law has been affirmed in the *San Remo Declaration on the Principle of Non-Refoulement,* 25th Roundtable of UN High Commissioner for Refugees, 6-8 September 2001.

[139] See for examples of failure to provide: Chile, UN Doc. CAT/C/32/5, para.6 (f) and New Zealand, UN Doc. CAT/C/CR/32/4, para.5 (a).

[140] Canada, UN Doc. CAT/C/CR/34/CAN, paras.5 (a) and (b) and New Zealand, UN Doc. CAT/C/CR/32/4, para.6 (a). For examples of legislation see Azerbaijan, Article 3 of the Surrender (Extradition) of Persons Committing Crimes Act, 2001, referred to in Azerbaijan's report to the

sought to comply with the prohibition through administrative directions.[141] In either case, the prohibition should encompass the following elements:

- A prohibition binding all state authorities not to expel, return or extradite, or transfer in any other way, a person to another state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture;[142]
- There must be no exception to the prohibition, for example for public order or national security and irrespective of whether the individual concerned is alleged to have committed crimes and the seriousness and nature of those crimes; [143]
- 'Another state' must refer to both the state to which the person concerned is being expelled, returned or extradited as well as any state to which the person may subsequently be expelled, returned or extradited;"[144]
- *Refoulement* must be prohibited not only where there is a danger of being subjected to torture by state agents but also

Committee against Torture, UN Doc. CAT/C/59/Add.1, paras.90 et seq. and Cameroon, Act No.97/010 amending certain provisions of the Extradition Act, No. 64/LF/13 of 26 June 1964, referred to in Cameroon's report to the Committee against Torture, UN Doc. CAT/C/34/Add.17, para.23 (b). See also Croatia, Law on Foreigners enacted in 2004 that prohibits deportation where the individual concerned could be subjected to torture upon return to his/her own country, referred to in UN Doc. CAT/C/CR/32/3, para.3 (b).

[141] In some countries, such as the US and Canada, the procedural laws and instructions provide for the application of Article 3 of the Convention in asylum and immigration proceedings. See Regulation 22 C.F.R. Part 95.1 (Implementation of torture convention in extradition cases), effective as of 26 February 1999, issued by the Department of State to implement the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, as required by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277 and sections 97 (1) and 115 of the Canadian Immigration and Refugee Protection Act 2002 recognising that torture as defined in Article 1 of the Convention is a ground for protection and for non-refoulement (excluding, however, categories of persons that are considered to pose security or criminal risks from the protection against non-refoulement), see CAT/C/CR/34/CAN, 4 (c) and (d).

[142] Lithuania, UN Doc. CAT/C/CR/31/5, para.6 (g) and Ukraine, UN Doc. CAT/C/27/Concl.2, para.5 (d).

[143] Such exceptions were found in Albania, UN Doc. CAT/C/CR/34/ALB, para.7 (n) and Canada, UN Doc. CAT/C/CR/34/CAN, para.4 (c) and (d).

[144] CAT, *General Comment No. 1*, para.2.

by factions exercising *de facto* certain prerogatives that are comparable to those normally exercised by legitimate governments;[145]

- States must ensure that authorities deciding whether there are 'substantial grounds' to believe there is a danger of torture, take into account all relevant considerations, including but not limited to the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The test applied in assessing the risk of torture should be one of reasonable grounds, neither mere theory or suspicion on the one hand nor high probability on the other;[146]
- States must not practise or collude in the practice of rendering persons outside of any legal process in order to transfer suspects or prisoners to states where there are substantial grounds for believing the person would be subject to torture, either for interrogation or intelligence gathering purposes or to face trial. Legal procedures (such as deportation or extradition hearings) are not expendable bureaucratic processes that can be lifted with or without the consent of the sending state; these procedures are essential guarantees for the persons deprived of their liberty and must be respected at all times. Such rendition must not occur even where diplomatic assurances are provided by the receiving state that torture will not be committed.[147]

Jurisprudence

There has been a plethora of legal challenges before national courts, regional human rights courts and international treaty bodies brought by individuals alleging that they face a substantial risk of torture on return. Many national courts have applied the principle of non-

[145] CAT, *Sadiq Shek Elmi v. Australia*, para.6.5.

[146] CAT, *General Comment No. 1*, para.6. For too strict a test see Switzerland, UN Doc. CAT/C/CO/34/CHE, para.4 (d).

[147] See REDRESS, *Terrorism and Torture,* pp.27 et seq.

refoulement, either relying on Article 3 of the Convention, for example in South Africa,[148] or by interpreting domestic legislation containing the prohibition of non-*refoulement*, such as in Cameroon,[149] the United Kingdom[150] and the United States.[151] Moreover, courts have applied general international standards on non-*refoulement*, in particular as defined in Article 33 of the Convention relating to the status of refugees of 1951, and have relied on the obligations contained in regional human rights treaties, such as Articles 3 and 6 of the European Convention of Human Rights.[152]

However, the principle of non-refoulement has not been uniformly upheld and several courts have failed to provide adequate protection, in particular against the common practice of extraditing and deporting persons, especially those suspected of terrorism, without sufficient safeguards.[153] Even where reference to international treaty

[148] *Mohamed and Another v President of the Republic of South Africa and Others* 2001. The South African Constitutional Court held, at para.73, 3.1.1., that Mohamed's transfer to the United States without securing a diplomatic assurance that he would not be sentenced to death violated his constitutional right to "human dignity, to life, and not to be treated or punished in a cruel, inhuman or degrading way…" In interpreting the scope of constitutional rights, the Court referred to the obligations contained in Article 3 of the Convention against Torture, see para.59: "The fact that the government claims to have deported and not to have extradited Mohamed is of no relevance. European courts draw no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. Nor does the Convention against Torture… of which South Africa is a signatory and which it ratified on 10 December 1998. Article 3 (1) of the Convention provides … makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case."

[149] Court of Appeal Yaoundé, 1997, at http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/12b9d4cc5085f06bc1256b3b005d0871?OpenDocument.

[150] *The Government of the Russian Federation v. Akhmed Zakaev*, 2003.

[151] See for the situation in the US before 1997 Rosati, *UN Convention against Torture*, and for recent developments, US: UN Doc. CAT/C/48/Add.3, paras.30 et seq.; and for concerns concerning the compatibility of the recent practice with international standards Caruso, *Torture Fears Don't Halt U.S. Deportation of Immigrants* and Bernstein, *Deportation Case Focuses on Definition of Torture*.

[152] See e.g. the Rulings of the Polish Supreme Court of 1997 and 2002 and of the Krakow Appeal Court in 2001 where the courts applied Article 3 of the ECHR, upholding the prohibition of non-refoulement.

[153] See for example REDRESS, *Terrorism and Torture*, pp. 33, 34 for an analysis of Turkish and Austrian extradition cases pending before the European Court of Human Rights at the time of writing, in which courts ordered the extradition of alleged "terrorists" or "extremists" to Uzbekistan and Egypt respectively, in spite of a serious risk, based on documented evidence, that the persons concerned

obligations was made, judgments of national courts have at times provided lesser protection than required by international standards. One example is the decision of Canada's Supreme Court, in the case of *Suresh v. Canada*,[154] where it considered whether expelling a suspected terrorist to a country where he/she faces the risk of torture violates the principle of fundamental justice in contravention of section 7 of the Canadian Charter of Fundamental Rights and Freedoms.[155] The Court confirmed the principle that Canada is generally responsible for torture whenever its actions were a necessary precondition to its occurrence and that it "generally" cannot remove individuals to risk of torture under normal circumstances. However it introduced an exception by holding that, where a risk to its security exists, Canada might in some cases remove individuals to the risk of torture, subject to a balancing of the risks to the state and to the individual when applying fundamental rights provisions.[156] The UN Committee against Torture noted with

would be subjected to torture upon their return. The German Federal Administrative Court, in a decision of 10 December 2004, held that the extradition of Metin Kaplan to Turkey was legal. Kaplan, who had been convicted in Germany for extremist activities, was sought by Turkey on charges of high treason. While regional administrative courts had decided in 2003 that Kaplan could not be extradited to Turkey because of the risk of torture upon his return, the Federal Administrative Court found that, although torture was still prevalent in Turkey, there was a reduced risk for Kaplan because of assurances given by the Turkish Government and the publicity of his case. It also referred to the legal protection that Kaplan enjoyed in Turkey under the European Convention on Human Rights.

[154] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002], subsequently applied in *Sogi v. Canada (Minister of Citizenship and Immigration)* [2004] para.9 and *Dinita v. Canada (Minister of Citizenship and Immigration)* [2003]. See also the similar case of *Ahani v. M.C.I.*, 2002. (Summaries of the Suresh and Ahani case can be found in Canada's report to the Committee against Torture, UN Doc. CAT/C/55/Add.8, 9 January 2004).

[155] Section 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[156] See *Suresh v. Canada*, paras.42 et seq., in particular para.78. In the case of *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005, Judge Dawson held that the decision to issue a security certificate (which means that the person belongs to the group of inadmissible persons) in respect of Mr. Mahjoub who was suspected of being a member of a terrorist organisation, was patently unreasonable in the light of the substantial risk of torture if returned to Egypt. In para.64, Judge Dawson stated:" I acknowledge an issue of importance has been raised which I do not decide: whether circumstances would ever justify deportation to face torture. The Supreme Court of Canada has left the issue open by not excluding the possibility that, in exceptional circumstances, such deportation may be justified, either as a consequence of the balancing process required by section 7 of the Charter or under section 1 of the Charter. There are, however, powerful indicia that deportation to face torture is conduct fundamentally unacceptable; conduct that shocks the Canadian

concern, "The failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever."[157]

The European Court of Human Rights confirmed the absolute nature of the principle of non-*refoulement* in the landmark case of *Chahal v. the United Kingdom*, where the United Kingdom had sought to apply similar balancing considerations. In Chahal, the Court noted at para. 80 that "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[158] The Committee against Torture has taken the same view.[159]

6. Statements extracted as a result of torture must not be allowed as evidence

Article 15 of the Convention provides that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." A similar obligation is contained in Article 10 of the Inter-American Convention to Prevent and Punish Torture.

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conscience and therefore violates fundamental justice in a manner that can not be justified under section 1 of the Charter…"

[157] Canada, UN Doc. CAT/C/CR/34/CAN.

[158] *Chahal v. UK* (1996). See also the recent decision of the European Court of Human Rights in *N. v. Finland* (2005), where the Court reiterated its findings in Chahal that "[a]s the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."

[159] *Tapia Paez v. Sweden*, (1997), para.14.5 and *Pauline Muzonzo Paku Kisoki v. Sweden* (1996).

Statements or confessions made under torture are unreliable and their use in proceedings only encourages interrogation techniques that result in torture. Accordingly any statement or confession which is established to have been made as a result of torture must not be allowed in evidence in any proceedings under any circumstances. In particular:

- States must prohibit the use of evidence obtained under torture. This prohibition is typically achieved through legislation.[160] The prohibition must be unconditional, without exception and must not allow for judges and other decision makers to exercise discretion over whether to accept, or what weight to accord to, such evidence.[161]
- The prohibition must apply to both criminal and non-court proceedings such as administrative and extradition or removal hearings.[162]
- Statements must not be allowed in evidence even if the torture was committed by a third party unconnected to the proceedings in a third country.[163]
- If an allegation of torture is made the state must investigate the truth of the allegation.[164]
- When a credible allegation is raised that a confession or a statement was made under torture, the burden of proof

[160] See e.g. Colombia, UN Doc. CAT/C/CR/31/1, para.3 (d); Finland, UN Doc. A/51/44, paras.120-137, para.137 and Turkey, UN Doc. CAT/C/CR/30/5, para.4 (d). See for examples of failure to expressly prohibit: Albania, CAT/C/CR/34/ALB, para.7 (g); Cameroon, UN Doc. A/56/44, paras.60-66, para.65 (f); Iceland, UN Doc. CAT/C/CR/30/3, 27 May 2003, paras.7 and 9 (b); Kazakhstan, UN Doc. A/56/44, paras.121-129, para.129 (d) and Ukraine, UN Doc. CAT/C/27/Concl.2., paras.5 (h).

[161] See Ingelse, *Committee against Torture*, p.380 for further references.

[162] CAT, P.E. v. France (2001), para 6.3.

[163] United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/CR/33/3, para.4 (i). See case of *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004) A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2005].

[164] CAT, K.K. v. Switzerland (2003). and P.E. v. France, (2001) para 6.3

should be on the prosecution to prove that the evidence was obtained without the use of torture.[165]

States should take additional measures to reduce the likelihood of the use of torture and other forms of ill-treatment to coerce confessions or statements, such as requiring that confessions can only be made to an officer above a certain rank, or better still, only admitting statements made before a judge, as required by the German Criminal Procedure Code.[166] Recognising in law the right against self-incrimination and ensuring detainees are informed of this right also reduces the likelihood for torture.[167]

National jurisprudence

National courts commonly examine the validity of confessions by applying relevant criminal procedural law, often in a separate trial within a trial. The application of international standards in such proceedings depends largely on the content of national law, many if not most of which prohibit the use of illegally obtained evidence though often not unequivocally.[168]

[165] As practised in some Brazilian courts, see Visit to Brazil, Report of the Special Rapporteur on Torture, para.101 et seq. See also *Bouabdallah LTAIEF v. Tunisia*, UN Doc. CAT/C/31/D/189/2001, para.5.12 and *Singara v. Sri Lanka*, in which the Human Rights Committee found, para.7.4. "…that by placing the burden of proof that his confession was made under duress on the author, the State party [Sri Lanka] violated article 14, paragraphs 2, and 3 (g), read together with article 2, paragraph 3, and 7 of the Covenant."

[166] See Section 254 of the German Criminal Procedure Code.

[167] See for an overview of relevant national laws, Harland, *Status of the International Covenant on Civil and Political Rights*, pp. 187-260. See article Article 14 (3) (g) of ICCPR: "Everyone has a right not to be compelled to testify against himself or to confess guilt."

[168] There have been a large number of decisions worldwide where courts have found confessions extracted under torture invalid. See for example a case decided by the US Supreme Court dating back almost fifty years, *Payne v. Arkansas,* 356 U.S. 560 (1958). In a recent judgment, the Frankfurt District Court in Germany held that information extracted under torture was invalid, referring to Articles 1 and 104 I, S.2 of the German Basic Law of 1949 and Article 3 of the European Convention on Human Rights, see Decision AZ.5/22, 2003. See also the following decisions of Jordanian courts as country-specific examples: No. 271/1991; No. 51/1998 and No. 256/1998, all relating to act no. 9 of 1961 of the Court Procedures Code. See for further relevant state practice from Canada, France, Spain, Netherlands and Germany, UK House of Lords, Case of A, 2005, para.37.

In several countries, high courts have been called upon to rule on the admissibility of evidence obtained by torture. In Uzbekistan, the Supreme Court issued a resolution on judicial sentencing in which it clarified, without express reference to Article 15 of the Convention, that confessions obtained through illegal means such as torture are invalid under Uzbek law, albeit with little apparent subsequent impact on the actual practice.[169] In Brazil, the burden of proof is reversed onto the authorities seeking to introduce the evidence where it is alleged that evidence has been extracted under torture, though it does not appear to be a practice followed by all judges. Judges are required to initiate an investigation *ex officio* according to the judicial interpretation of the law by the President of the Federal Court of Appeal and the Federal Supreme Court, though the practice appears to be patchy.[170]

Courts have only rarely made direct reference to Article 15 of the Convention in their rulings. In the French case of *Mme. Elser,* the applicant challenged, unsuccessfully, the legality of an extradition request where it was alleged that the evidence of the crime had been obtained in violation of Article 15.[171] United States courts have expressly declined to apply Article 15 directly, holding that the provision is not self-executing in light of the US' reservation to the Convention and that the Article is therefore not judicially enforceable in proceedings.[172]

Most courts have recognised the principle of the inadmissibility of evidence obtained under torture. However in several instances, courts have failed to exclude evidence seemingly obtained through

[169] Resolution No. 2 of the Plenum of the Supreme Court of Uzbekistan, 2 May 1997, "On Judicial Sentence." See also Mission to Uzbekistan, Report of the Special Rapporteur on Torture, paras.25 et seq.

[170] See Visit to Brazil, Report of the Special Rapporteur on Torture, paras.101, 102.

[171] Conseil d'Etat, *Mme E.*, 2001. See also *French Republic v Haramboure*, Cour de Cassation, 1995.

[172] *In re Extradition of Atuar,* 2003.

torture and dismissed allegations as unfounded, [173] sometimes without further inquiries.

In the UK House of Lords decision in *A (FC) and ors v. Secretary of State for the Home Department,*[174] *the Law Lords held unequivocally that torture evidence is inadmissible in proceedings of the Special Immigration Appeals Commission.* There was broad recognition that to require the individual who is calling into question the evidence to affirmatively prove that it was obtained through torture could not work in SIAC cases, where he or she may not know the name or identity of the author of the statement or know what the statement says. It was also broadly recognised that whilst the initial burden was on the individual seeking to call into question the evidence, this would quickly be displaced to SIAC, as only SIAC would have the wherewithal to undertake such an inquiry.

7. Individuals' right to make a complaint and states' duty to investigate

Articles 12 and 13 of the Convention require states to ensure that any individual who alleges torture has the right to lodge a complaint to competent authorities, who are obliged to examine complaints of torture promptly and impartially. States must also investigate wherever there are reasonable grounds to believe torture has been committed, even if there has been no complaint.

7.1. The right to make a complaint

[173] See the case of *Singarasa v. Sri Lanka decided by the Human Rights Committee,* where Mr. Singarasa had been sentenced for "terrorist" acts solely based on his confession even though he had challenged the legality of the confession on the basis that it was made under torture. The admissibility of the confession was upheld by the High Court and the Court of Appeal under the Prevention of Terrorism Act, where it was held that Mr. Singarasa failed to meet the burden of proof to show that the confession was extracted by means of torture. See also the decision of a Sudanese court in the "Explosives Case" of 1994 where the Court acknowledged that torture had been inflicted but did not rule out the confessions of the defendants, holding that the torture had not influenced the confessions. See Human Rights Watch, *Behind the Red Line.*

[174] [2005] UKHL 71.

The right to complain about torture requires states to guarantee the following elements both in law and practice:

- Individuals alleging to have been tortured, or, their relatives, must have the right to bring a complaint. States must provide for this by adopting laws and administrative measures to set up complaints procedures. Procedures may either relate to a wide range of complaints, which include torture,[175] or alternatively they may be special to torture cases;[176]
- States should designate appropriate authorities which are competent to receive complaints, such as the judiciary, police oversight bodies and national human rights institutions; [177]
- States must provide effective access to the complaints authority, including the right to be informed about available remedies and procedures; the right to have access to lawyers, physicians and family members and, in the case of foreign nationals, diplomatic and consular representatives; the right to have access to external bodies; the right to compel competent authorities to carry out an investigation and the right of effective access to the investigatory procedure;[178]
- There must be no delays in the complaint process as allegations about torture must be investigated 'promptly'. As a guide, Rule 36 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners provides that prisoners must have the opportunity each week day to make requests or

[175] In practice, states only rarely adopt specific implementing legislation on complaints and investigation procedures applying in torture cases, as relevant measures are commonly part of broader reforms, for example in many Eastern European countries after 1990. See Kádár, *Police*.

[176] See Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Services, at **www.saps.gov.za/17_policy/tort.htm**, and Prosecution of Torture Perpetrators Unit set up in Sri Lanka in 2000.

[177] For example the Office of the Procurator for the Protection of Human Rights in El Salvador and the Police Ombudsman in Northern Ireland. Such police oversight bodies have been established as part of a policy to make the police more accountable. See Orentlicher, *Independent* Study, UN Doc. E/CN.4/2004/88, para.41, according to whom a number of other states, including Argentina, Bosnia and Herzegovina, Canada, Chile, Ethiopia, Guatemala, Indonesia, Mexico, the Netherlands, Serbia and Montenegro, Timor-Leste and the United Kingdom have established specialized prosecutors' offices, police investigative units and/or courts that focus on serious violations of human rights.

[178] See REDRESS, *Complaints*, p.11, for further references.

complaints to the director of the institution or the officer authorized to represent the prisoner.

7.2. The duty to investigate

States must not only examine complaints of torture, they must also investigate wherever there are reasonable grounds to believe torture has been committed, even if there has been no complaint. These duties entail the following obligations.

- The complaint need not be formal. The victim only needs to bring the allegation of torture to the attention of a competent authority for the latter to be obliged to treat the allegation as a complaint that must be investigated.[179] The competent authority should also be mandated to commence inquiries *ex officio*;
- Investigations must be undertaken unless a complaint is 'manifestly unfounded';[180]
- Investigations must be prompt.[181] This obligation relates not only to the time taken to commence the investigation, but also the speed with which it is conducted. Although no particular time period is referred to, the case of Abad before the Committee against Torture is illustrative. The complainant alleged that she had been tortured on her first arraignment on anti-terrorism charges. The complaint was not taken up by a judge until fifteen days had passed and it was another four days before an inquiry was commenced. The inquiry then took ten months, with gaps of one to three

[179] CAT, *E. A. v. Switzerland* and *Blanco Abad v. Spain,* para.8.6.

[180] See CAT, *Henri Parot v Spain,* para.10.4; General Recommendations of the Special Rapporteur on Torture, para.26 (k). See also judgments by the Inter-American Court for Human Rights *Maritza Urrutia Case*, para.110; *Velasquez Rodriguez v. Honduras*, para.176; affirmed in *El Amparo* Case, para.61; *Suárez Rosero* Case, para.79.

[181] 'Prompt' should be given its full literal meaning, see CAT, *Halimi-Nedzibi v Austria* and *Encarnacion Blanco Abad v Spain*. See General Comment 20, para.14; ECHR, *Aksoy v Turkey*; General Recommendations of the Special Rapporteur on Torture, para.26 (i).

months waiting for forensic reports. The Committee held that this delay was unacceptable; [182]

- Investigations must be impartial. The investigating body should be autonomous and independent from the alleged torture authority and other state bodies. The procedure when investigations are carried out must also be impartial. It must be free from real and perceived bias in the way it searches for, receives and evaluates evidence of torture;[183]
- Investigations must be 'effective' and 'thorough'. They must genuinely seek to determine the nature and circumstances of the alleged acts and establish the identity of the perpetrators. This includes questioning suspects and all relevant witnesses, seeking evidence at the scene, receiving independent medical reports and, in death in custody cases, carrying out an exhumation and new autopsy.[184] Obstacles to prompt and effective investigations that often result in the closure of investigations of torture cases such as prior administrative authorisation,[185] or a system of preliminary inquiries[186] should be removed. A standard reporting model based on the international standards contained in the Istanbul Protocol is encouraged;[187]

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[182] *Encarnacion Blanco Abad v Spain,* paras.8.7 and 8.8.

[183] Cambodia, UN Doc. CAT/C/CR/31/7; Latvia, UN Doc. CAT/C/CR/31/3, para.6 (b); Lithuania, UN Doc. CAT/C/CR/31/5, para.5 (e) and Moldova, UN Doc. CAT/C/CR/30/7, para.6 (e). See also jurisprudence of the European Court of Human Rights *Aktas v. Turkey*, para.301; *Ilhan v. Turkey*, para.101; *Güleç v. Turkey*, paras.80-82; *Toteva v. Bulgaria, Anguelova v. Bulgaria,* para.138; *Ergi v Turkey*, paras.83-84, and of the Inter-American Court of Human Rights *Marritza Urrutia v. Guatemala*, para.119.

[184] See Committee against Torture, *Radivoje v Yugoslavia*, para.9.6; *Encarnacion Blanco Abad v Spain*, para.8.8; *Hajrizi Dzemajl v Yugoslavia*, para.9.4; Human Rights Committee, *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*; *Wayne Spence v. Jamaica*, *Stephens v. Jamaica, Katombe L. Tshishimbi v. Zaire*; European Court of Human Rights, *Aksoy v. Turkey*, para.98; *Ilhan v. Turkey*, para.92; *Ogur v. Turkey*, para.88, and Inter-American Court of Human Rights, *Blake case*, para.65 and *Paniagua Morales et al. Case*, para.91.

[185] See Turkey, UN Doc. CAT/C/CR/30/5, para.4 (c).

[186] See REDRESS/Article 42, *Georgia*.

[187] As has been done by the Office of the Attorney General in Mexico. See addendum to the Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/56/Add.3, para.177.

- States must protect complainants and witnesses from intimidation and reprisals,[188] and ensure their psychological integrity before, during and after the proceedings;
- Torture survivors, or next of kin where appropriate, must have access to all information relevant to the investigation, be kept informed of the progress and result of the investigation and any subsequent prosecution;[189]
- The general statistics and conclusions in particular cases of investigations, findings, proceedings and measures taken should be published.[190] Complainants and witnesses must not be identified.

[188] For examples of domestic witness protection laws, see Japan, Law concerning Measures Accompanying Criminal Proceedings to Protect Crime Victims, May 2000; the Philippines, the Witness Protection, Security and Benefit Act, Republic Act No.698 and South Africa, Witness Protection Act, 1998. See also Cyprus, UN Doc. CAT/C/CR/29/1, para.4 (b) and state party reports of Moldova, UN Doc. CAT/C/32/Add.4, para.279, Czech Republic, UN Doc. CAT/C/60/Add.1, para.106 as well as comments by the Committee against Torture on the establishment of the Witness and Victim Protection Service of the Police Department in Lithuania, UN Doc. CAT/C/CR/31/5, para.4 (j). For examples of failures to comply, see Australia, UN Doc. A/56/44, paras.47-53, para.53 (e); Azerbaijan, UN Doc. CAT/C/CR/30/1 and Corr.1, para.6 (g); Guatemala, UN Doc. A/56/44, paras.67-76, para.72 (f); Indonesia, UN Doc. CAT/C/XXVII/Concl.3, para.9 (d); Slovakia, UN Doc. A/56/44, paras.99-105, para.104 (f) and Venezuela, UN Doc. CAT/C/CR/29/2, para.10 (e). See on the various shortcomings, REDRESS, *Complaints*, pp.34 et seq. for further country specific references. The right to protection for victims and witnesses has also been increasingly recognised in statutes of international and internationalised courts: see Articles 43(6), 54(1)(b), 57(3)(c), 64(2)(6)(e), 68, 87, 93(1)(j) of the Rome Statute of the International Criminal Court; Articles 15, 20 and 22 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Articles 14, 19(1) and 21 of the Statute of the International Criminal Tribunal for Rwanda) in conjunction with Rules 34, 39(ii), 40(iii), 65(b), 69, 75, 77, 96 of the Rules of Procedure and Evidence of 11 February 1994, as amended; Section 24 of regulation No.15, UNTAET/REG/2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Offences, 6 June 2000, (East Timor Statute) and Article 23 Draft Agreement, 17 March 2003, Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea; as well by regional human rights bodies, see *Assenov and others v. Bulgaria*, para.169 and *Velasquez Rodriguez v. Honduras*, para.39.

[189] See Principle 4 of the Istanbul Protocol. CAT, *Hajrizi v. Yugoslavia,* para.9.5. This right to access and participation has also been recognised by other human rights bodies, see ECHR, *Cakici v Turkey,* para.49; *Ergi v. Turkey*, para. 83; *Mentes v. Turkey,* para. 91 and the Inter-Am. Ct.H.R. in the *Caracazo Case*, para.118.

[190] See Estonia, UN Doc. CCPR/CO/77/EST, para.18; Germany, UN Doc. CCPR/CO/80/DEU, para.16 and UN Doc. CAT/C/CR/32/7, para.4 (c); Israel, UN Doc. CCPR/CO/78/ISR, para.18; Portugal UN Doc. CCPR/CO/78/PRT, para.8 (b) and Togo, UN Doc. CCPR/CO/76/TGO, para.12. See also ECHR, *Anguelova v Bulgaria*, para.139 and Inter-Am. Ct. H.R., *Caracazo* Case, para.181.

Courts in various jurisdictions have ordered the responsible authorities to take particular measures during investigations, such as reopening investigations following an appeal by complainants, albeit with limited practical impact in ensuring the effectiveness of subsequent investigations.[191] The lower courts of most countries have a weak record in calling for, or instituting investigations in those cases where torture allegations have been raised before them, for example in *habeas corpus* proceedings, or where procedural decisions to close investigations are challenged before courts.[192]

The Supreme Courts of both Sri Lanka and India and the Indian High Courts have ordered the national authorities to carry out investigations into allegations of torture.[193] The Supreme Court of Sri Lanka, in 2002, directed the Attorney General "to consider taking steps under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, Act No.22 of 1994, against the respondents and others who are responsible for acts of torture perpetrated on the petitioners."[194] These judgments have, however, largely not resulted in full and effective implementation, thus undermining their impact.[195]

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[191] For example in the Russian Federation pursuant to Articles 125 and 148 of the Code of Criminal Procedure. See REDRESS, *Complaints*, p.47.

[192] See REDRESS, *Reparation for Torture*, p.46.

[193] See for India *Punjab & Haryana High Court Bar Association v State of Punjab and Ors,* 1996, a case concerning the abduction and murder of an advocate, his wife and their two year of child for which the police appeared to be responsible on the basis of the available evidence, where the Supreme Court held that: "The police officers in question must be suspended by the State and the trial is transferred to the Designated Court at Chandigarh. The Court is to direct the trial expeditiously within six months of its commencement. In accordance with the requirements of the Criminal Procedure Code the State of Punjab is to sanction the prosecution of the police officers immediately, within one month of receiving this order." In *Sebastian M. Hongray v. Union of India,* 1984, the Supreme Court issued a mandamus to the Superintendent of Police directing him to take its judgement "as information of cognisable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure." In *State of Punjab v. Vinod Kumar*, 2000, the High Court directed the state Government to sanction the prosecution of the officials in question, as required by Section 197 of the Code of Criminal Procedure, without delay when asked by the investigating Central Bureau of Investigation. See for Sri Lanka *Abasin Banda v. Gunaratne,* SC (FR) 109/95, SCA 623/00; SCA363/00 and *V v Mr. Wijesekara and Others*, Supreme Court, Sri Lanka, 2002.

[194] Ibid.

[195] See REDRESS, *Responses*, p.79.

8. Removing bars to prosecution

Prosecution and punishment for torture remains the exception rather than the rule.[196] There are a combination of factors that impede prosecutions, including the failure to incorporate the Article 1 definition of torture into national criminal codes and a series of challenges impeding the effective and impartial investigation of complaints, discussed earlier. This section will look at additional impediments to prosecution, such as immunities, amnesties and statutes of limitation.

The Inter-American Court of Human Rights has stated that "it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under international human rights law."[197]

8.1. Amnesties violate the obligation to investigate and prosecute torture

Large scale violations of international human rights and humanitarian law, including torture, are often committed during periods of armed conflict or extended repression. States emerging from such a period encounter the difficult question of how to deal with these past injustices. The scale of previous violations means most legal systems would struggle to cope with the large amount of perpetrators and victims of human rights abuses committed over a long period of time.

Measures adopted differ according to circumstances and are usually the result of complex political processes and compromise that have

[196] REDRESS, *Reparation for Torture*, p.41.

[197] *Case of Barrios Altos (Chumbipuma Aguirre and others v Peru)*, para 41.

not always been guided by the international obligations of the state concerned and have, as a result, at times been at variance with them. Steps taken in practice have ranged from criminal prosecutions, either comprehensive ones for as many perpetrators as possible, or prosecution of those carrying only the highest degree of responsibility, for example in Sierra Leone and Iraq, to amnesties and simple inaction.[198]

Amnesties are incompatible with states' absolute duty at international law to prosecute or extradite torture cases.[199] This is irrespective of the reasons given for amnesties. Accordingly, states must ensure that amnesties are not available for acts of torture,[200] and if amnesty laws *are* passed, torture must be excluded from their operation.[201] Finally, states should repeal any existing amnesty laws that do cover torture, as occurred in Argentina. [202]

Although the jurisprudence of national courts has been far from unanimous, and some courts have even recognised the validity of amnesties for serious human rights violations, several courts have recently refused to uphold the legality of amnesties, indicating a

[198] See for an overview Hayner, *Unspeakable Truths*, and country studies on relevant law and practice in REDRESS, Reparation for Torture, available at **www.redress.org**.

[199] The Committee against Torture recommended that to "ensure that perpetrators of torture do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach" in Azerbaijan, A/55/44, paras.64-69, para. 69(c). See also the General Recommendations of the Special Rapporteur on Torture, recommendation (j). The ICTY Trial Chamber in *Prosecutor v. Furundzija*, para.155, stated: "At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, *taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law."* See also the Inter-American jurisprudence, e.g. *Godinez Cruz Case* and *Barrios Altos Case*.

[200] Amnesties must also not be available for crimes that due to their broad definition may also cover torture, see, for example, Croatia, UN Doc. A/54/44, paras.61-71, para.66; Chile, UN Doc. CAT/C/32/5, para.6 (b) and *Amicus on the Legality of Amnesties under International Law*.

[201] See Article 4 of the Cote D'Ivoire Amnesty Law No. 2003-309 and the 1996 Croatian Amnesty Act, see Croatia, U.N. Doc. CAT/C/CR/32/3, para.5.

[202] See Argentina, UN Doc. CAT/C/CR/33/1, para.3 (a) and Spangaro, *Ending Impunity in Argentina*, p.6.

growing trend to find amnesties for serious human rights violations such as torture to be incompatible with states' obligations under international human rights law.

South Africa's amnesty laws were challenged by Apartheid victims in the mid-1990s.[203] In the case of *Azanian Peoples Organization (AZPO) and Others v The President of South Africa and Others*,[204] the South African Constitutional Court upheld the validity of the amnesties without undertaking a thorough analysis of the compatibility of amnesties for serious human rights violations with international human rights law. The Court dismissed the contention that "the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provision of section 20 (7) which authorised amnesty for such offenders constituted a breach of international law."[205] The Court reasoned that, in the absence of an act incorporating an international agreement into municipal law, "an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution" as well as obligations deriving from customary international law.[206] The decision, resting largely on

[203] See in particular section 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[204] *Azanian Peoples Organization (AZPO) and Others v The President of South Africa and Others*, Constitutional Court of South Africa, 1996. The applicants claimed that they had a right to insist that the perpetrators of gross human rights violations "should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further require the state to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the state." Moreover, the applicants contended that section 20(7) of the Act was inconsistent with section 22 of the Constitution ("every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum").

[205] The applicants argued that such a duty under international law followed from the articles of the Geneva Conventions obliging High Contracting Parties to enact legislation necessary to provide effective penal sanctions for persons committing any of the grave breaches. Ibid., para.25. See paras.29-31 for the courts reasoning which questioned the applicability of the Geneva Conventions and found that there is " no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights" if those acts take place in a conflict which does not qualify as war.

[206] Ibid., para.27.

considerations of legal policy, failed to give due weight to South Africa's obligations under international law.[207]

In 2000, the Constitutional Division of the Supreme Court of Justice in El Salvador upheld, with qualifications, the 1993 General Amnesty (Consolidation of Peace) Act that covers political and common crimes committed prior to 1992 if involving at least twenty people, thus potentially including cases of torture. It held that it was not competent to consider the incompatibility of international instruments, such as the Convention.[208] In Honduras and Chile, the respective Supreme Courts recognised exceptions to the national amnesty laws allowing prosecutions in case of ongoing crimes such as involuntary disappearances.[209]

The picture differs in Argentina, where there has been a remarkable development in the jurisprudence of courts grappling with the legality of amnesty laws that provided blanket immunity for serious human rights violations, including torture, committed in the period from 1976 to 1983.[210] In the *"E.S.M.A."* case, the Supreme Court held in 1988 that ratification of the Convention by Argentina in 1987 did not impact upon the validity of the amnesty law *ex post facto*.[211] However, since 2000, Argentina's courts have increasingly acknowledged the applicability of international human rights law. In the *Poblete* case concerning alleged disappearances, the federal Judge Gabriel Cavallo ordered the interim arrest and seizure of properties of a former

[207] See in this respect also critical comments by Dugard, *International Law and the South African Constitution*.

[208] See judgment of the Constitutional Division of the Supreme Court of Justice of El Salvador, 2000.

[209] See Honduras, Corte Suprema de Justicia, Recurso de Amparo en Revisión, No.60-96, case Hernandez Santos y otros (Tegucigalpa 18 January 1996), referred to in Roht-Arriaza, Combating impunity, p.94, who also refers to relevant Peruvian jurisprudence where the decision of a Criminal Court that invalidated Peru's amnesty laws was reversed by a higher court in Lima. See on Chile, the decision of the Supreme Court of 17 November 2004, in which it upheld the guilty verdict of the Appeals Court against Manuel Contreras who had been sentenced to twelve years imprisonment for the enforced disappearance of Miguel Angel Sandoval.

[210] See on the Amnesty Laws, the country study on Argentina in REDRESS, *Reparation for Torture*, and for the legal framework Vinuesa, *Direct Applicability of Human Rights Conventions*, pp.149 et seq.

[211] "*ESMA, Hechos que se denuncarion como ocurridos*", 1988.

member of the security forces during the military dictatorship, referring *inter alia* to the Genocide Convention and the UN Declaration on the Protection of Persons against Forced Disappearances in support.[212] In March 2001, the same judge declared Argentina's amnesty laws void and unconstitutional and in violation of Argentina's obligations under international law, including the Convention. The judge held that, although not a direct breach of the Convention, which had only entered into force 18 days after both amnesty laws were adopted, the passing of these laws amounted to the "non-performance of the international obligation which imposes upon states the duty to refrain from carrying out acts that frustrate the objective and goal of a signed treaty" (Article 18 of the Vienna Convention on Treaties).[213] In December 2003, the Federal Court upheld, with reference to several international conventions, including the Convention, the legality of laws that nullified the amnesty laws which had been enacted by Congress in 2003,[214] and the Supreme Court of Argentina finally nullified the amnesty laws in its decision of 14 June 2005.[215] In a further case concerning criminal proceedings against members of the security forces who had committed human rights violations, including torture, during the dictatorship, the Federal Court invoked, *inter alia*, the Convention and the Inter-American Convention to Prevent and Punish Torture in its decision.[216]

Courts in Mexico, France and Spain have held, in cases concerning torture committed in third countries, that domestic amnesties covering crimes under international law, including torture, cannot

[212] Decision of 1 November 2000.

[213] "*Simón, Julio y otros s/ sustracción de un menor*" - Causa N° 8686/00. Judge Cavallo's decision was upheld by the Federal Court of Appeal in November 2001. Case No. 17.889, "*Incidente de apelación de Simón, Julio*".

[214] "*Suarez Mason, Guillermo y otros s/homicidio agravado, privación ilegal de la libertad agravada*", Federal Court, 2003.

[215] See Goni, *Argentina's junta*.

[216] Case No. 14.216/03, "*procesamientos de La Pampa (I Cpo)*", del registro de la Secretaría No. 6, 2003.

prevent the investigation and prosecution of these crimes in other states.[217]

8.2. The irrelevance of official capacity

The United Nations Set of principles for the protection and promotion of human rights through action to combat impunity recognizes that "the official status of the perpetrator of a crime under international law – even if acting as head of State or Government – does not exempt him or her from criminal or other responsibility and is not grounds for a reduction in sentence."[218] This follows on from the Charters of the Nuremberg and Tokyo Tribunals, the Statutes of the Yugoslavia and Rwanda Tribunals and the Rome Statute of the International Criminal Court, all of which have confirmed this principle. The Statute of the International Criminal Court specifies that it 'shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence…'[219]

The law on immunities in criminal cases is continually evolving, yet, following the decision of the House of Lords that the former head of state of Chile, Augusto Pinochet, could be held criminally responsible by a national court for the crime under international law of torture, following the arrest warrants issued by the International Criminal Tribunal for the Former Yugoslavia for President Milosevic when he

[217] *Case of Ricardo Miguel Cavallo*, Suprema Corte de Justicia de la Nación, 2003; Cour de Cassation, *Ely Ould Dah case*, Crim. 2002, and Audiencia Nacional, Order of the Criminal Chamber, 1998. The Special Court for Sierra Leone, a so-called mixed court with internationalised features, held that the amnesty granted by Sierra Leone cannot cover international crimes that are subject to universal jurisdiction and constitutes a breach of an obligation owned to the whole international community. *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty,* 2004.

[218] Report of Diane Orentlicher to update the Set of principles to combat impunity, E/CN.4/2005/102, para 27 (c).

[219] Article 27(1) of the Rome Statute.

was an acting head of state, and taking into account the decision of the International Court of Justice in Congo v. Belgium, where it determined that Belgium should not have issued an arrest warrant against an acting foreign Minister, the position may be summarized as follows:

- There is a general principle that the official status of the perpetrator of a crime under international law does not exempt him or her from criminal responsibility. This covers both subject matter and personal immunities;
- In the very specific case of national courts conducting prosecutions on the basis of universal jurisdiction, the general principle applies to subject matter immunity. In other words, the personal immunity afforded to a small number of officials whilst they remain in office to ensure that they can carry out their responsibilities (e.g., ministers of foreign affairs, heads of state) will remain in pace until they leave office.

8.3. Statutes of limitation may not apply to torture

Statutes of limitation are laws that prevent courts from hearing a matter once a particular time has passed. There is wide recognition of the inapplicability of statutes of limitations to certain crimes under international law,[220] and as has been recognised by the United Nations Independent Expert that updated the Set of principles for the protection and promotion of human rights through action to combat impunity, "the general trend in international jurisprudence has been towards increasing recognition of the relevance of this doctrine not only for such international crimes as crimes against humanity and war crimes, but also for gross violations of human rights such as torture."[221] Statutes of limitation are inconsistent with states'

[220] UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; Convention on lack of applicability of statutes of limitation in war crimes and crimes against humanity of the Council of Europe, Strasbourg, 1974; Article 29 of the Rome Statute of the International Criminal Court.

[221] Report of Diane Orentlicher to update the Set of principles to combat impunity, E/CN.4/2005/102, para.47.

absolute duty under the Convention to prosecute or extradite torture cases as such laws introduce qualifications to the duty.[222]

Nonetheless, such time limits in the prosecution of torture cases are common. For example in Nepal, the criminal offence covering torture can only be prosecuted if a victim brings a complaint within a period of between 35 days to three months time depending on the offence in question. Even Romania and Mexico, which enacted specific anti-torture legislation, provide for statutes of limitation of eight years and three to twelve years respectively.[223]

In order to ensure full compliance with the Convention and the views of the Committee against Torture:

- States should ensure that there are no statutes of limitations applying to torture and if such laws do exist they must be repealed. The most effective way to achieve this is to explicitly state, preferably in a constitution, that statutes of limitation do not apply to torture.[224]

[222] The Committee against Torture has repeatedly stated that there should be no statutory limitations for torture, e.g. Turkey, UN Doc. CAT/C/CR/30/5, para.7 (c). See also the Inter-American Court of Human Rights *Barrios Altos Case*, para.41: "provisions on prescription … are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture", and the ICTY, *Prosecutor v. Furundzija*, para.157: one of the "consequences" of the jus cogens nature of the prohibition on torture is that "torture may not be covered by a statute of limitations."

[223] See also Serbia and Montenegro, where the crimes most relevant in the context of torture cannot be prosecuted after a lapse of three years and countries such as China, Japan and Uzbekistan where the limitation periods commonly applicable in torture cases stretch from three to ten years. As a result, investigations and prosecutions may not be possible because of the lapse of time where victims of torture are, whether for objective or subjective reasons, not capable of lodging a complaint in time. See respective country studies in REDRESS, *Reparation for Torture* and REDRESS, *Complaints*, p.31.

[224] For examples of providing that the crime of torture is not subject to any prescription: in the constitution see Article 23 (2) of the Ecuadorian Constitution; Article 5 (2) of the Constitution of Paraguay; Article 57 of the Egyptian Constitution and Article 23 of the Ethiopian Constitution; in statutes see Article 99 of the El Salvador Penal Code and Article 8 of the Guatemalan Act of National Reconciliation; and in special courts' statutes see the statutes of the mixed tribunals in East Timor and Cambodia, which do not recognise time limits or considerably extend existing time limits to cover acts of torture committed during a particular period: see Section 17 of Regulation n° 2000/15 adopted by the UN Transitional Administration in East Timor on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences and Article 3 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of the Crimes committed During the Period of Democratic Kampuchea of 10 August 2001.

- Laws that allow for the suspension of the running of statutes of limitation may also comply with the obligation under the Convention.

8.4. The application of the principle of legality should not impede the prosecution of crimes recognised as crimes under international law

The principle of legality (no crime without a prior law) is an important principle of criminal law essential to the guarantee of fair trial rights. The principle has been incorporated into many national constitutions around the world and is reflected in Article 15 of the International Covenant on Civil and Political Rights, which provides as follows:

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

In accordance with Article 15 set out above, the principle of legality does not operate as a bar to torture prosecutions which relate to acts which occurred prior to a state party's ratification of the Convention or prior to the incorporation of a definition of torture within a criminal code. As long as torture was recognized as a crime 'according to the general principles of law recognized by the community of nations' at the relevant time, the prosecution of the offence will not be prejudiced.

9. Reparation for torture

Article 14 of the Convention sets out the obligation of a state party to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.[225] This means that victims must be provided with effective procedural remedies (the ability to have access to justice) as well as substantive reparation, including as appropriate restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In cases of torture resulting in death, the right to reparation passes to dependants.

9.1. States must provide effective procedural remedies

- Judicial remedies must be available to allow victims of torture to claim reparation.[226] Several states provide for administrative remedies for torture victims, such as a National Human Rights Commission or other non-judicial bodies specifically created for the purpose of providing reparation.[227] Although such bodies are important complements to judicial remedies, they cannot be substitutes for them. States wishing to encourage non-judicial remedies must not discourage or limit access to courts but instead make non-judicial avenues attractive alternatives.
- Remedies must be available for all forms of torture. Some states have failed to provide access to remedies for torture

[225] Article 14 continues: "… including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

[226] See Principle 12 of the Basic Principles on The Right to a Remedy and Reparation and views of the Human Rights Committee in *Nydia Erika Bautista* (Colombia), para.8 (2) and *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, para.8 (2).

[227] Compensation schemes for human rights violations, for example in the Philippines, or compensation recommended by national human rights commissions, notably in India, have proved an important albeit incomplete alternative mechanism where, as in the Philippines, laws do not provide for effective judicial remedies. See The Philippines Republic Act No. 7309: An Act Creating a Board of Claims under the Department of Justice for Victims of Unjust Imprisonment or Detention and Victims of Violent Crimes and For Other Purposes and, on India, REDRESS, *Responses*, p.30.

that is purely psychological or mental suffering resulting from physical torture.[228]

- Remedies should be contained in legislation rather than only developed by the courts.[229] Courts have occasionally developed remedies from rights found in the Constitution or through general principles of law, particularly in common law countries. Such remedies however may result in inconsistency, particularly where there is not an established system of judicial precedent.[230]
- Legislation providing for reparation for torture should be clear and specific. In practice, states often include reparation for torture as part of broad provisions providing reparation for victims of unlawful conduct of officials or crimes generally. While this can be effective, such legislation as a result of its wide application often fails to take into account requirements specific to torture such as the inapplicability of statutes of limitation and amnesties.[231] In some states, there is no legislative provision for torture reparation, victims often having to bring civil claims in tort. Such claims are difficult to bring and often ineffective.[232]

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[228] See for example the State Compensation Law of the People's Republic of China, 1994 and the Supreme Court's: "Reply to the Question whether the People's Courts Should Accept Mental Damage Claim by A Victim of A Criminal Case in A Supplementary Civil Lawsuit", issued on 15 July 2002, which asks the People's Court to turn down a claim for mental suffering not only in the supplementary civil lawsuits but also in any independent civil lawsuit. A further example is the Nepalese Torture Compensation Act that fails to define torture in line with the CONVENTION, in particular excluding mental torture. See for an analysis of the further shortcomings of this Act, *Alternative Report*, Nepal and REDRESS, *Responses*, pp.42 et seq.

[229] See for example Brazil, UN Doc. A/56/44, paras.115-120, para.120 (f); Cameroon, UN Doc. A/56/44, paras.60-66, para.66 (a); Luxembourg, UN Doc. CAT/C/CR/28/2, para.6 (c) and Slovakia, UN Doc. A/56/44, paras.99-105, para.105 (i). See also Ingelse, *Committee against Torture*, pp.370 et seq.

[230] See for example the jurisprudence of the Sri Lanka Supreme Court, REDRESS, *Responses*, p.91.

[231] Torture survivors have used laws that provide for state liability, such as the State Compensation Act in China, as well as civil laws, such as in Egypt, and criminal adhesion proceedings, for example in Peru as well as Serbia and Montenegro to obtain compensation but commonly not other forms of reparation. Though important, most of these laws, which are not torture specific, have some flaws that limit their utility, as discussed.

[232] In many states, in particular those following the common law tradition, torture victims are commonly left with recourse to tort claims before civil courts only, which are usually not an effective avenue due to a combination of lack of access to courts, evidentiary hurdles and, where awarded, low

- Remedies must be available against the state, not just against the individual perpetrator(s).[233] In torture cases where by definition the acts involve some action or acquiescence on the part of the state, the liability of the state must not be subsidiary to the liability of the individual.[234] Equally, state liability must not be limited, for example by requiring state consent to suit as is the case in the Philippines.[235]
- States must ensure that victims' access to remedies is effective in practice. States must not place unjustifiable hurdles in the way of victims attempting to exercise their right to a remedy.[236] Such hurdles include (i) passing amnesty laws or statutes of limitation that preclude or restrict recourse to judicial remedies; (ii) having practically insurmountable evidentiary requirements in place, such as having to identify the individual perpetrator(s);[237] and (iii) making the award of reparation dependant on the successful outcome of related criminal proceedings.[238]
- States also have a positive duty to ensure that victims' access to remedies is effective such as providing legal assistance to torture victims and carrying out investigations into torture allegations and allowing for independent medical examinations. States should also take care to ensure that

amounts of damages. See for example the law and practice in Kenya, Nigeria and South Africa in the country studies in REDRESS, *Reparation for Torture*.

[233] Principle 15 of the Basic Principles on the Right to a Remedy and Reparation and, e.g., Brazil, U.N. Doc. A/56/44, paras.115-120, para.120 (f).

[234] The Committee against Torture has also expressed concern in cases where the state has only "subsidiary responsibility" for violations. Paraguay, UN Doc. A/52/44, paras.189-213, para.203. Under the Mexican Anti-Torture Act, the state also has only subsidiary liability.

[235] See Article 16 (3) of the Constitution of the Philippines. Suits under Article 32 of the Civil Code can therefore only be brought against the individual unless the Government consents to being sued. See the case of *Aberca vs. Ver*, 1988.

[236] See e.g. jurisprudence by the European Court of Human Rights, *Aksoy v. Turkey*, para.95.

[237] Special Rapporteur on Torture, Interim Report, UN Doc. A/56/156, para.39 (j) and European Court of Human Rights in *Aksoy v. Turkey*, para.61.

[238] See decision by the Committee against Torture *Dragan Dimitrijevic v. Serbia and Montenegro*.

procedures do not contribute to victim re-traumatisation and put in place mechanisms to deal with threats and reprisals.

- States must ensure mechanisms are in place for victims to enforce reparation awards, both against the state and individual perpetrators.[239] Where recommendations are made by human rights institutions to provide compensation, these should be followed.[240]

9.2. States must award forms of reparation that are adequate, appropriate, proportionate to the gravity of the crime and the physical and mental harm suffered

- Restitution, such as restoration of liberty and employment, in so far as applicable in torture cases;[241]
- Compensation to victims of torture, including their dependants. Compensation comprises pecuniary and non-pecuniary damages.[242] It should be fair, adequate and awarded without discrimination.[243] It should be proportional to the gravity of the violation and the circumstances of each case, reflecting economically assessable damage such as (a) physical and/or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services."[244] Compensation levels

[239] Principle 17 of the Basic Principles on the Right to a Remedy and Reparation.

[240] For an example of recommdations not being followed see Uganda, UN Doc. CAT/CO/34/UGA, para.8.

[241] See Principle 19 of the Basic Principles on the Right to a Remedy and Reparation.

[242] See Principle 20 ibid., and for an overview of international jurisprudence, Shelton, *Remedies*, pp.294 et seq.

[243] See Principle 25 of the Basic Principles on the Right to a Remedy and Reparation.

[244] See Principle 20 ibid. These heads of damage have been recognised and awarded in the jurisprudence of international human rights bodies, including the Committee against Torture, and applied by international compensation mechanisms, see e.g. Turkey, UN Doc. CAT/C/CR/30/5, para.7 (h); *Case of Velásquez-Rodríguez vs. Honduras*, para.27; the Guidelines of the UN Governing Council of the UN Compensation Commission of 1991 and for the mandate of the Eritrea Ethiopia Claims

should not be capped.[245] National legislation should specify these heads of damages and vest courts with the power to award adequate compensation;

- Rehabilitation, which should include medical and psychological care as well as legal and social services.[246] Rehabilitation can be in kind, such as access to rehabilitation services, or monetary.[247] National legislation should spell out a specific right to rehabilitation in case of torture, especially where neither existing legislation nor jurisprudence recognise an independent right to rehabilitation;
- Satisfaction. This category encompasses measures with longer-term restorative aims, such full and public disclosure of the facts, apology, including acknowledgment of the facts and acceptance of responsibility, as well as judicial and administrative sanctions against those responsible.[248] National legislation should specifically stipulate a right to the truth, to an apology and to public accountability. The judiciary must be provided with the power to award the necessary measures;[249]
- Guarantees of non-repetition. This includes an obligation to review laws that contribute to or allow forms of torture, and to reform these laws accordingly with a view to preventing torture.[250]

Commission, Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000. See Shelton, *Remedies*, pp.294 for further references.

[245] Such as section 6 of the Nepalese Compensation for Torture Act, which provides for a cap of a maximum of 100,000 Rupees ($1,388) compensation.

[246] See Principle 21 of the Basic Principles on the Right to a Remedy and Reparation.

[247] See REDRESS, *Reparation: Sourcebook*, p. 19. For example, in its concluding observations on El Salvador's state report, the Committee noted that "the right of torture victims to fair and adequate compensation at the State's expense should be regulated, with the introduction of programmes for as full as possible physical and mental rehabilitation of victims." El Salvador, U.N. Doc. A/55/44, para.167.

[248] See Principle 22 of the Basic Principles on the Right to a Remedy and Reparation.

[249] See in particular the jurisprudence of the Inter-American Court for Human Rights, *Cantoral Benavides Case*; *Case of Bamaca Velasquez v. Guatemala*; *Case of the "Gómez-Paquiyauri Brothers"* vs. *Peru; Tibi v. Ecuardor.*

[250] See Principle 23 of the Basic Principles on the Right to a Remedy and Reparation.

Courts in several countries have awarded compensation and other forms of reparation to victims of torture, either for fundamental rights violations under the Constitution, for example in India and Sri Lanka[251] and the Privy Council on appeal from Trinidad & Tobago,[252] or, less frequently, in civil proceedings, for example in Egypt, Serbia and Montenegro, Egypt and South Africa,[253] or in the course of criminal proceedings, such as in Peru.[254] In a few instances, courts have awarded compensation on the basis of specific anti-torture legislation, such as in Nepal.[255]

The forms of reparation awarded, including the amount of compensation, have differed widely. The Indian Supreme Court has awarded compensation for the infringement of fundamental rights, including torture, in the form of exemplary damages,[256] and both the Indian and Sri Lankan Supreme Court have provided forms of reparation other than compensation, including measures to prevent recurrence, to promote education as well as for investigating acts of torture and taking measures against the perpetrators.[257] In civil and criminal proceedings, courts have provided compensation both for pecuniary and non-pecuniary harm but commonly not punitive damages whereby rehabilitation, i.e. costs for medical and social services and similar measures, has normally not been awarded separately.[258]

[251] See REDRESS, *Responses*, pp. 23 and pp.72 et seq. respectively.

[252] See *Attorney General v Ramanoop*, 2005.

[253] See respective country studies in REDRESS, *Reparation for Torture*, for references.

[254] See the decisions of the Penal Court of Avacucho in 1999 and of the Mixed Court of Huaura-Huacho, 2002.

[255] See Nepal, UN Doc. CAT/C/33/Add.6, paras.111 et seq.

[256] See Justice Anand in *Nilabati Behera v. State of Orissa,* 1993, para.33.

[257] See REDRESS, *Responses*, pp. 23 and pp.72 et seq. respectively.

[258] This has been the practice in countries such as Egypt, Nepal, Serbia and Montenegro and South Africa, supra.

Domestic jurisprudence on the right to reparation lacks coherence and often fails to provide reparation as required and envisaged by international standards because rulings on reparation claims in torture cases have been mainly based on national laws without taking international standards into account. Compensation awards often fail to include damages for mental torture, as the example of Sri Lanka's Supreme Court demonstrates.[259] Moreover, the amount of compensation awarded is often small, as courts fail to take into account the seriousness of torture and the obligation that compensation should be "fair and adequate".[260] In a considerable number of countries courts have awarded compensation only but not other forms of reparation, such as in Egypt, Serbia and Montenegro and South Africa. In other countries, such as Uzbekistan, courts have altogether failed to provide any form of reparation for victims of torture.[261]

9.3. Reparation for torture in the course of political transition

The obligation to ensure that all torture victims are provided with the right to seek reparation still applies during periods of transition. Indeed reparation is often a key component of transitional justice measures, alongside key prosecutions and mechanisms for truth and reconciliation. Nonetheless, ensuring adequate and effective reparations for mass violations, including torture, presents a particular challenge, taking into account that most societies coming out of a period of mass violations, even with the best of will, will have

[259] Press conference held on the occasion of a training seminar on the Implementation of the Istanbul Protocol in Sri Lanka, organised by IRCT and others and held in Kandy, Sri Lanka, from 2-6 December 2004.

[260] This applies to most countries referred to above where compensation has been awarded in torture cases. In Nepal, two lawyers challenged Section 6 of the Compensation for Torture Act, which provides for a cap of a maximum of 100,000 Rupees ($1,388) compensation, arguing that it was incompatible with Article 14 (1) of the Convention. The Supreme Court rejected the petition in September 2003, finding that there was no incompatibility between Section 6 of the CTA and Article 14 (1) of the Convention.

[261] See International League for Human Rights, *Uzbekistan*, on observance of Article 14 of the Convention against Torture and the REDRESS survey of law and practice on the right to reparation for torture in Uzbekistan.

weak legal infrastructures, competing demands for scarce resources, and a vast number of victims with a range of rights and needs.

In response to these challenges, some states have developed policies and specific administrative programmes to deal with reparation for mass claims.[262] Such mechanisms can only ever complement rather than substitute access to the courts. [263]

Administrative reparations programmes invariably outline classes of victims entitled to reparations (e.g., all persons who suffered torture during the 8 year conflict), and the forms of reparation to be provided (e.g., whether individual payments will be made to victims and if so, how these will be determined, how other forms of reparation – rehabilitation, measures of satisfaction… will be delivered). The success of such programmes has been mixed. At times, the classification of victims undertaken by governments has not reflected the true nature of the victimisation and clear categories of persons who suffered fell outside of the programmes.[264] Equally, in many instances the awards have been limited to a single form of reparation, commonly compensation, or are wholly inadequate. [265]

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[262] See Roht-Arriaza, *Reparations*, pp.165 et seq. and Shelton, *Remedies*, pp. 412 et seq.

[263] Ideally, the design of administrative reparation programmes will be sufficiently inclusive, responsive to the wishes and needs of victims, transparent, easy to use, efficient and seen as just, that the advantages of using the programme will outweigh the prospect of gaining reparation before the courts or other established mechanisms.

[264] Schemes that have been set up, such as in Peru, in Chile, at least initially, and most former Communist countries, have not been torture-specific and have consequently excluded those torture survivors not covered by any of the categories recognised therein. There have been recent changes in Chile where the Government agreed in late 2004 to provide some reparation for torture survivors following the publication of the Valech report. See Franklin, *Chile*. The limited scope of beneficiaries often stems from political considerations of who is considered to be a victim, a determination commonly influenced by the prevailing perceptions of who constitutes a victim, e.g. the politically persecuted in former communist countries, the strength of victims' groups in making their case and the cost implications of recognising a group as victims entitled to reparation, for example torture survivors in Chile. See Roht-Arriaza, *Reparations*, pp.177 et seq.

[265] The reparation policies of several countries have been largely confined to providing monetary compensation, ignoring other forms of reparation and relevant international standards. One example is the arbitration commission for the compensation of victims of prolonged illegal detention and relatives of "disappeared" persons in Morocco, which fails to include other forms of reparation. See Royal Directive, *Establishment of the Independent Arbitration Commission for compensation for material and moral injuries suffered by the victims of disappearances or arbitrary detention and their next of kin*, 1999.

Mechanisms such as truth commissions are often effectively utilised to administer administrative reparations programmes, though often these bodies have only had the mandate to recommend measures, and governments have often been slow to implement the recommendations.[266]

Effective transitional justice packages may also comprise broader and longer term forms of reparation. In an attempt to guarantee non-repetition as well as provide satisfaction to victims, officials associated with a violating regime may be stripped of their posts in a process of lustration.[267] With the same aim in mind, law reform measures aimed at preventing torture may be recommended and implemented.[268]

10. Obligations concerning torture committed in third countries

10.1. States must prosecute or extradite

States must prosecute or extradite a suspected perpetrator of torture found on their territory, regardless of where the torture is alleged to have been committed.[269] However, the Convention also

Where compensation has been granted, such as in the former Communist countries, or in Chile following the publication of the Valech report, the amount offered has often been palpably insufficient.

[266] See Orentlicher, *Independent Study*, UN Doc. E/CN.4/2004/88, for an overview of best practices. Yet, structural problems that have recurred in several countries where the respective Governments have failed to comply speedily with recommendations of Truth and Reconciliation Commissions to provide reparations, such as in Nigeria, South Africa and Peru, have underscored the pitfalls of the absence of effective judicial remedies and enforceability mechanisms. See on South Africa, Makhalemele, *Still not talking*, and on Peru Laplante, *Peru: Reparations*, pp.12 et seq. In Nigeria, the Oputa Panel Report, which had been submitted to the Nigerian President in May 2002, had not been published in early 2005, ostensibly because some of the cases covered in the work of the Commission were the subject of several pending law suits.

[267] A number of countries, in particular in Eastern and South Eastern Europe, have adopted lustration laws that prevent officials associated with the previous regime from occupying public positions. See overview in Shelton, *Remedies*, pp.389.

[268] See for example on El Salvador and South Africa, Hayner, *Unspeakable Truths*, pp.165 and on Northern Ireland, Transitional Justice- *Northern Ireland and Beyond.*

[269] Article 5(2) of the Convention provides: 'Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is

prohibits states from extraditing or otherwise sending a person to another state where there is a substantial risk of them being tortured.[270] In such circumstances, states must prosecute, as extradition is not an option. Accordingly, the effect of the Convention as a whole is that states must provide for both prosecution *and* extradition for torture committed outside the state, not prosecution *or* extradition.

Prosecution

In order to comply with the obligation to extradite or prosecute, states must have legislation in place stipulating that those found in the state's territory suspected of committing torture anywhere in the world can be brought to justice, if they are not extradited.[271] Such legislation must comprise the following elements:

- Clear jurisdiction over acts of torture, the definition of which must be in conformity with Article 1 of the Convention;[272]
- Jurisdiction must not be limited by the nationality of the perpetrator, the nationality of the victim or the place where the act of torture has been committed;
- The suspected perpetrator(s) of torture must not be granted subject matter immunity (immunity *ratione materiae*);
- The competent authorities must have the power to take the suspected perpetrator of torture into custody or to take other legal measures to ensure his/her presence;[273]

present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.' At customary international law states may exercise universal jurisdiction over torture, see the ICTY, *Prosecutor v Furundzija*, paras.155 and 156. For a discussion of universal jurisdiction see Benavides, *Universal Jurisdiction Principle*, p. 28 and Hall, *Universal Jurisdiction*, pp. 47-48.

[270] Article 3 of the Convention.

[271] See e.g. Egypt, UN Doc. CAT/C/CR/29/4, para.6 (l); Mauritius, UN Doc. A/54/44, paras.118-123, para.123 (d); Ukraine, UN Doc. CAT/C/XXVII/Concl.2, para.5 (d) and Zambia, UN Doc. CAT/C/XXVII/Concl.4, para.8 (c).

[272] See section IV (2.1) of this report on the definition of torture.

[273] Article 6 (1) of the Convention.

- The relevant organs of the state should be duty-bound to submit the case to the competent authorities for prosecution where the state party does not extradite the suspected perpetrator(s);[274]
- Provide that the state will afford mutual assistance to other states parties in respect of criminal offences of torture.[275]

Extradition

- States must ensure that torture is an extraditable offence;[276]
- States, where extraditions may be carried out in the absence of extradition treaties or other laws, should use the Convention as a basis for extradition;
- States must not extradite where there are substantial grounds for believing that the alleged perpetrator would be in danger of being subjected to torture.[277]

There have been few instances in which perpetrators of torture have been brought to trial in third countries. In 2004, the Rotterdam District Court convicted a Congolese national, Sebastien N., who resided in the Netherlands, of complicity in acts of torture and sentenced him to 30 months imprisonment. The torture had been committed in 1996 on the territory of the then Republic of Zaire against Congolese victims.[278] In July 2005, a French court sentenced a Mauritanian citizen, Ely Ould Dah, *in absentia* to 10 years imprisonment for torturing army officers at the "Jreida death camp"

[274] Article 7 of the Convention.

[275] Article 9 of the Convention.

[276] Extradition acts commonly allow, at least implicitly, the extradition of individuals suspected of torture, and prohibit extradition where extradition is motivated by political factors and may result in persecution. See the relevant sections on extradition laws in the 31 country studies carried out by REDRESS and published in 2003, REDRESS, *Reparation for Torture*. For examples of failure to include torture as an extraditable offence see China's Extradition Law of 2000 and Zambia, UN Doc. CAT/C/XXVII/Concl.4, para.6 (d).

[277] Article 3(1) of the Convention. See e.g. Uzbekistan, UN Doc. A/55/44, paras.76-81, para.81 (e); Poland, UN Doc. A/55/44, paras.82-95, para.89 and Chile, UN Doc. CAT/C/32/5, para.7 (g).

[278] Rechtbank Rotterdam, 2004, available at **www.rechtspraak.nl/default.htm**.

in Mauritania in 1991.[279] In the same month, Faryadi Zardad, a mujahadeen military commander was sentenced by London's Central Criminal Court to 20 years imprisonment for conspiracy to torture for acts committed in Afghanistan between 31 December 1991 and 30 September 1996.[280] Also in mid-2005, a Spanish court convicted the Argentinean ex-naval officer Adolfo Scilingo of crimes against humanity and sentenced him to 640 years imprisonment.[281] The case against another Argentinian former naval officer charged with torture, genocide and terrorism, Miguel Angel Cavallo, who was extradited from Mexico in 2003 was still pending in Spain in 2005.[282]

In the case of Hissène Habré, Chad's former dictator who was charged with complicity in crimes against humanity and torture committed between July 1982 and December 1990, the Chambre d'Accusation (Indictment Chamber) in Dakar declined to prosecute on the grounds that it lacked jurisdiction under the relevant Article 669 of the Senegalese Code of Criminal Procedure. The Chamber held that the Convention did not provide a sufficient legal basis for the exercise of its jurisdiction, holding instead that it is the responsibility of the Senegalese legislature to take the required measures to establish universal jurisdiction.[283] In recognition of these shortcomings, the Chamber called upon the Senegalese legislature to bring the Criminal Procedure Law in line with the requirements of the Convention.[284] This decision was upheld by the *Cour de Cassation* on 20 March 2001, which ruled that "no procedural law gives the Senegalese courts universal jurisdiction to prosecute and to try accused [torturers] who are found on Senegalese territory when the

[279] AFP, *French Court condemns Mauritanian Torturer under 'Universal Competence',* 1 July 2005.

[280] See *Afghan Zardad jailed for 20 years*, BBC News, 19 July 2005.

[281] The Court sentenced Scilingo to 21 years imprisonment for each of the 30 prisoners who were killed by being thrown from planes, and five years imprisonment for torture and illegal detention respectively.

[282] See on this and other relevant cases in Spain, Ryngaert, *Universal Criminal Jurisdiction.*

[283] **http://www.hrw.org/french/themes/habre-decision.html**. Decision of 4 July 2000. The Court also held that Senegalese law did not recognise the crime against humanity, which could therefore, in application of the principle *nulla poena sine lege*, not be prosecuted in Senegal.

[284] Ibid.

acts were committed outside of Senegal by foreigners; the presence of Hissène Habré in Senegal cannot in and of itself be ground for the prosecution against him."[285] In September 2005, a Belgian judge issued an arrest warrant against Habré, requesting the Senegalese authorities to extradite him to be tried under Belgian's universal jurisdiction law. The Dakar Appeals Court, in a decision of 25 November 2005, found that it was not competent to deal with the case, ostensibly on the grounds of immunity enjoyed by Habré. In an unprecedented response, the Senegalese Interior Minister declared that the next steps relating to the case of Habré's should be decided by the African Union.

10.2. Civil remedies for torture committed abroad

Many states do not provide effective remedies for victims of torture committed within their territory. For these victims, judicial remedies in third countries may offer the best avenue to bring claims against the individuals and/or states concerned. The principal challenges to such claims include the high costs associated with civil litigation, immunities, 'best forum' challenges and, particularly where there is no specialised law allowing for such claims, short limitation periods.

Extra-territorial civil claims for torture are more frequently resorted to in common law jurisdictions, as in civil law countries it is usually more simple to attach civil claims to ongoing criminal proceedings through the *constitution de partie civile* system. Most cases have proceeded in the United States where there are specific laws that allow for such claims, but increasingly, cases have been lodged in the United Kingdom, Canada, Switzerland and elsewhere. The jurisprudence has developed separately from the more advanced criminal jurisprudence, and in some instances, different standards have been applied to questions of immunities as well as forum or nexus considerations.

[285] Quoted in Brody, *Using Universal Jurisdiction*, p. 383.

Notably, the United Nations Committee against Torture, addressed the implications of Article 14(1) of the Convention within its consideration of the Canadian legal system, following the Ontario Court of Appeal's decision in the *Bouzari*[286] case. It criticised, "the absence of effective measures to provide civil compensation to victims of torture in all cases"[287] and recommended that Canada, "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."[288]

Following the view of the Committee against Torture on the reach of Article 14 of the Convention, states parties should ensure that it is possible for torture victims to bring extraterritorial civil claims, particularly where there is no avenue for justice in the territorial state.

V. POSITVE ENGAGEMENT WITH THE UN COMMITTEE AGAINST TORTURE

The Committee against Torture, established pursuant to Part II of the Convention, plays a key role in ensuring compliance of states parties with the Convention. The Committee has several means to scrutinise states parties' compliance: the analysis of state party reports; individual communications and state party complaints as well as a further inquiry procedure.

1. State party periodic reports

[286] *Bouzari v. Iran (Islamic Republic)* Ont. C.A. (2004). The civil claim for torture case was brought by an Iranian citizen against the Islamic Republic of Iran. Mr. Bouzari argued, unsuccessfully, that an implied human rights exception to state immunity existed, given the recognition of the peremptory status of the prohibition of torture under international law.

[287] See Canada, CAT/C/CR/34/CAN, para. C (4)(g).

[288] Ibid., at D(5)(f).

The Committee is tasked with the examination of reports that all states parties are obliged to submit at regular intervals.[289] In examining these reports, the Committee may also consider information from other UN organs, such as the Special Rapporteur on Torture, alternative reports produced by civil society groups as well as additional information available to it, and discuss these with representatives of the state concerned during its periodic sessions. Following the consideration of state party reports, the Committee will issue concluding observations.[290] The Committee may appoint one or more rapporteurs to monitor the state's compliance of the Committee's conclusions and recommendations.[291]

In practice, many states parties have failed to submit reports. This results in a failure to comply with their reporting obligations and undermines the effectiveness of the system.[292] Although the Committee has adopted various methods to address the problem, these have been largely ineffective to date.[293] The Committee has recently embarked on a process of appointment of Special Rapporteurs to report on the situation in countries whose initial reports have been overdue for a long time, e.g. Togo, thereby

[289] Article 19 states parties have to submit an initial report "within one year after the entry into force of the Convention for the State party concerned". This initial report is supposed to give an overview of the relevant domestic law and practice. To this end, the Committee against Torture has requested states parties to provide information of a general nature and information in relation to each of the articles in Part I of the Convention. In the subsequent periodic reports, which are to be submitted every four years, states parties are requested, according to the general guidelines issued by the Committee, to provide information on new measures and new developments relating to the implementation of the Convention following the order of articles 1 to 16, as appropriate, additional information requested by the Committee and information on compliance with the Committee's conclusions and recommendations.

[290] Since the mid-1990s, the Committee has been following a consistent practice where the concluding observations are divided into three parts, namely positive aspects, subjects of concern, and recommendations. The state party concerned may reply to the concluding observations.

[291] See rule 68 (1) of the Rules of Procedure of the Committee against Torture, UN Doc. CAT/C/3/Rev.4. The Committee against Torture has now appointed two rapporteurs to follow-up on conclusions and recommendations on states parties reports. See UN Doc. A/57/44, para.16.

[292] Numerous states have, if at all, submitted reports only after substantial delays. See comparative study by Heyns and Viljoen, *Impact of UN Human Rights Treaties*, pp. 20 et seq.

[293] See for the practice of the Committee until 2000 Ingelse, *Committee against Torture*, pp. 137 et seq.

providing an incentive for non-reporting states to engage with the Committee against Torture.[294]

Many state party reports fail to meet the reporting guidelines set out by the Committee, especially concerning information about the practical implementation of their substantive obligations.[295] The Committee has adopted a practice of either commending or criticising states for meeting its reporting guidelines and engaging with Committee members in the consideration of reports. Nonetheless, there is still a striking discrepancy in the quality of reports submitted, many of which fail, even if read together with the summary of proceedings, to provide a clear overview of relevant laws let alone actual practice. This makes it almost impossible to assess what measures states have been taking to ensure compliance and how effective they have been in practice.[296] The Committee is at present addressing these difficulties by drafting guidelines on the structure and content of initial reports.[297] It has also changed its practice and now submits detailed questions to states in advance of meetings and allows NGOs to meet with members of the Committee for discussion before reviewing states' reports.[298]

The concluding observations of the Committee constitute important reference documents and have contributed to legal and other reforms in some countries. However, these observations and recommendations have often been rather general in nature and, unlike the Special Rapporteur on Torture,[299] at times provide

[294] See UN Doc. CAT/C/SR.619/Add.1.

[295] See for example the concerns raised by the Committee against Torture in respect of recent reports of Argentina, UN Doc. CAT/C/CR/33/1, para.6 (e); Bulgaria, UN Doc. CAT/C/CR/32/6, para.5 (g); Greece, UN Doc. CAT/C/CR/33/2, para.5 (a) and Morocco, UN Doc. CAT/C/CR/31/2, para.5 (a) and (e).

[296] Ibid.

[297] See UN Doc. CAT/C/SR.628, paras.21 et seq. for latest deliberations.

[298] See UN Doc. CAT/C/SR.619/Add.1.

[299] See e.g. Report of the Special Rapporteur on Torture, Follow-up to the recommendations made by the Special Rapporteur, Visits to Azerbaijan, Chile, Mexico, the Russian Federation, Spain and Uzbekistan, UN Doc. E/CN.4/2005/62.

insufficient guidance for states on the concrete steps to be taken, although this may change with a more effective follow-up mechanism in place. Moreover, the Committee, unlike the Human Rights Committee, has not regularly utilised general comments to provide states with guidance on the nature and content of their obligations to implement the treaty provisions. To date, it has only issued one general comment on Article 3. A further General Comment on Article 2 is under consideration.[300]

A particular problem faced by the Committee is that many states have only partially implemented its recommendations or ignored them altogether.[301] One possible reason for this situation is the lack of a specified time frame and an effective follow-up mechanism to ensure implementation even though the Committee has recently taken some steps towards ensuring compliance with its recommendations, such as appointing Special Rapporteurs on follow-up of its recommendations.[302]

Some states entirely fail to engage with the Committee against Torture.[303] A state party may not have the resources or expertise to produce an adequate and timely report, may be unable to do so because of a political crisis or may be unwilling to expose itself to outside scrutiny.[304] The failure to submit reports does not in itself mean a state's laws and practice are not in compliance with the

[300] See for the latest developments UN Doc. CAT/C/SR.638.

[301] Survey of states parties reports and concluding observations from 1993 to 2005 carried out by REDRESS for this report.

[302] UN Doc. A/57/44, para.16.

[303] Numerous states parties have failed to submit their reports in time, with some initial reports being overdue for more than a decade in April 2005, such as in the case of Antigua & Barbuda, Burundi, Cape Verde, Ethiopia, Guinea, Guyana, Somalia and the Seychelles. The reporting status of states parties can be found in the annexes of the Annual Reports of the Committee against Torture, see for example Report of the Committee against Torture, A/57/44, 2002.

[304] A glaring example of a state that has failed to submit a report to the Committee against Torture for 12 years (disregarding the "initial report" of 1993 that consisted of one page) is Nepal, which finally submitted a comprehensive report to the Committee against Torture in March 2004. See for generic problems concerning the UN reporting mechanisms and current reform initiatives *Strengthening the United Nations*, at **http://www.ohchr.org/english/bodies/treaty/reform.htm**.

Convention. It does, however, raise the question as to how a state's compliance with its obligations and the status of the Convention in domestic law and practice can be determined without the state's participation in the procedure envisaged by the Convention. In the absence of any official data and scrutiny by the Committee against Torture, it is extremely difficult to establish what, if any, steps the states parties concerned have taken to implement the Convention. As reports by NGOs and surveys of the relevant law and practice indicate, many of the states parties that have not submitted reports or whose reports have been inadequate have indeed failed to comply with their obligations under the Convention by failing to adopt legislation necessary to bring their legal system into line with the Convention. [305]

2. Individual communications and state party complaints

The Committee against Torture may consider individual communications relating to states parties who have made the necessary declaration under article 22 of the Convention. As at August 2005, 56 states parties had recognised the competence of the Committee to hear individual complaints and a total of 277 communications have been made disclosing 32 violations of the Convention.

The right of individual petition is an important complement to the state party reporting obligations. The Committee has a key role to play in giving definitive interpretation to the Convention's provisions, in assisting state parties to comply with these provisions and in making recommendations. Without the individual right of petition, this important task is left essentially to the state party periodic reporting to the Committee which occurs infrequently and where victims have no voice. The Committee's recommendations in themselves, can go some way to fulfilling a victim's right to reparation, given that the Committee can not only make a finding

[305] See for example REDRESS, *Bangladesh*; *Alternative Report*, Nepal, and *Submission of the REDRESS Trust to the Meeting on Bahrain,* The House of Lords, 17 August 2004.

that a particular state party is in breach of its obligations under the Convention but also highlight the offending domestic legislation and/or practice.

Furthermore, Article 21 of the Convention sets out a procedure for the Committee to consider complaints from one state party which considers that another state party is not giving effect to the provisions of the Convention. As at August 2005, 57 states parties had recognised the competence of the Committee to receive inter-state complaints, though the procedure has never been used.

3. The Inquiry Procedure

The Committee against Torture may, on its own initiative, initiate inquiries if it has received reliable information containing well-founded indications of serious or systematic violations of the conventions in a state party. Inquiries may only be undertaken with respect to states parties who have recognized the competence of the Committee in this regard. States parties to the Convention may opt out, at the time of ratification or accession, by making a declaration under article 28.

The inquiry procedure may be initiated if the Committee receives reliable information indicating that the rights contained in the Convention are being systematically violated by the state party. The information should contain well-founded indications that torture is being systematically practised in the territory of the state party. The first step requires the Committee to invite the state party to co-operate in the examination of the information by submitting observations.

The Committee may, on the basis of the state party's observations and other relevant information available to it, decide to designate one or more of its members to make a confidential inquiry and report to the Committee urgently. The findings of the member(s) are then examined by the Committee and transmitted to the state party together with any appropriate comments or

suggestions/recommendations. The procedure is confidential and the cooperation of the state party must be sought throughout.

In order to benefit fully from the procedures and mechanisms of the Committee against Torture, states parties are encouraged to:

- Comply with the reporting guidelines and timelines of the Committee and participate fully in sessions relevant to the state;
- Make declarations accepting the competence of the Committee to examine individual and state party complaints;
- Refrain from making a declaration under article 28.

VI. OVERALL FINDINGS AND RECOMMENDATIONS

Much more needs to be done by states parties to ensure that Convention obligations are fully incorporated into national law. Furthermore, the lack of accompanying institutional reforms and practical measures has in several instances resulted in patchy implementation. Examples are laws making torture a specific offence without providing for procedures for complaints or reparations or the adoption of laws providing compensation for torture without putting into place laws and mechanisms that also ensure accountability.

Effective implementation requires the concerted and coordinated efforts of government, courts, national human rights institutions and civil society.

1. Factors influencing successful implementing legislation

1.1. Political support

The most important factor affecting legislative implementation is probably political: Is the government in question willing and able to take the steps necessary to implement the Convention? This concerns not only legislative reforms but also accompanying measures to ensure implementation of obligations in practice. This process is influenced by such factors as timing of implementing legislation, i.e. before or after ratification/accession; technical questions of reviewing, amending and/or adopting laws; issues of institutional competence, especially in federal countries; consultation and involvement of external actors as well as cost implications. These factors may affect the ability of governments to instigate legislative reform to implement the Convention, however a willing government will usually be able to overcome these challenges.

Irrespective of the initial source of motivation, the subsequent commitment has to be sufficiently strong in order to result in successful implementation. In some cases, governments, or members thereof, may in principle be willing to implement the Convention but refrain from doing so in practice out of political calculus that the disadvantages outweigh the benefits. Factors weighing against taking the necessary steps include other political priorities, especially in relation to ongoing law reform; resistance from institutional constituencies, such as the police or army in relation to removing amnesties or immunities;[306] fiscal reasons, such as reluctance to pay out compensation; foreign policy considerations, e.g. unwillingness to allow the exercise of universal jurisdiction because of perceived political repercussions;[307] institutional resistance to reforming areas of law, e.g. from the legal constituency[308] and lack of technical

[306] As has been the case in Argentina and Chile.

[307] See Luc Walleyn, *The Sabra & Shatila Massacre and the Belgian Universal Jurisdiction*, at **http://www.ssrc.org/programs/gsc/publications/ICA_memos/Panel3.Walleyn.doc**.

[308] For example by the Russian Supreme Court that filed objections against the introduction of Article 117-1 of the Russian Criminal Code that had envisaged to criminalise torture in Russia in line with Article 1 of the Convention against Torture, after it had been approved by the state Duma in the first reading in March 2003. It found draft Article 117-1 to be both redundant and inconsistent with the classification of crimes in the Criminal Code. As the opinion of the Supreme Court was backed by the Administration and the President, attempts to adopt legislation that incorporates the definition of torture as contained in Article 1 of the Convention against Torture (and as recommended by the

expertise and resources to be devoted to such an initiative in the light of competing objectives.

Even where first steps are taken, such as drafting a Plan of Action against Torture, as has been done in countries such as Georgia and Uzbekistan, or setting up an expert committee or even introducing a bill against torture, for example in the Philippines and Russia, political dynamics may change and law-makers may fail to agree on the particulars of the proposed bill whose enactment may be delayed or fail altogether. Moreover, the understanding of what implementing legislation is required by the Convention that prevails amongst the responsible government officials may differ from what is actually required, as the case of Uzbekistan demonstrates.[309] Given these potential obstacles, it often takes strong and sustained political commitment to carry out the necessary reforms. It is evident that the judiciary, human rights groups and the media, as well as international organisations, play an important part in, if need be critically, supporting any such reform initiatives.[310]

1.2. Multiple Actors

The incorporation of the Convention is commonly a process of several phases involving a multitude of actors.

The main responsibility for ensuring the adoption of legislation needed to give effect to international treaty obligations or the repeal of incompatible legislation rests with the Government concerned. The Ministers who assume departmental responsibility for draft bills are in several countries obliged to advise Parliament on whether proposed legislation is in conformity with national human rights acts that incorporate international standards, for example under the New

Committee against Torture in 2002, see UN Doc. CAT/C/CR/28/4, para.8 (a)), ultimately failed. See Shepeleva, *Russia amends its torture laws*, pp.6,7.

309 See the new article 235 (2003) of the Uzbek Criminal Code.

310 One example are the various actors charged with implementing the Plan of Action against Torture in Georgia, which was developed in cooperation with the OSCE. See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region.*

Zealand Bill of Rights Act of 1990 and the UK Human Rights Act of 1998. Opposition parties and parliamentarians can play a vital part in calling upon the government in question to take the action required to act in conformity with the state's international obligations, for example by tabling bills to make torture a criminal offence or providing reparation for torture, such as in Russia[311] or the Philippines,[312] or calling for the repeal or amendment of legislation incompatible with the Convention, for example the amnesty laws in Argentina and provisions in anti-terrorism legislation, such as in the United Kingdom.

Commissions tasked with studying and proposing constitutional or law reform, such as the Constitutional Review Commission in Kenya,[313] or the South Africa Law Reform Commission[314] can suggest, within the limits of their mandate, that any proposed reforms take into account and are in line with the provisions of the international treaty in question. Others, such as the Australian Law Reform Commission, are specifically mandated to ensure that the "laws, proposals and recommendations it reviews, considers or makes … are, as far as practicable, consistent with the International Covenant on Civil and Political Rights."[315] Moreover, " [I]n performing its functions in relation to a matter, the Commission must have regard to all of Australia's international obligations that are relevant to the matter."[316] Law Commissions, for example in India and Bangladesh, have issued reports recommending reforms to combat impunity in torture cases but these proposals have subsequently not been implemented by the governments concerned.[317]

[311] See Shepeleva, *Russia amends its Torture Laws*.

[312] See supra III, 4.

[313] See www.kenyaconstitution.org.

[314] See www.server.law.wits.ac.za/salc/salc.html.

[315] Section 24 (1) (b) of the Australian Law Reform Commission Act, 1996.

[316] Section 24 (2) ibid.

[317] See for Bangladesh, The Law Commission, *Final Report on the Evidence Act*.

The judiciary is one of the most important actors. In several countries, such as in Belgium, Chile or Spain, courts examine whether domestic legislation needs to be changed before international treaties can be acceded to, and there have been a number of recent decisions on the compatibility of national legislation with the Rome Statute of the ICC.[318] Constitutional courts are often competent to review the constitutionality of legislation, either before its enactment, for example in France and South Africa, or following its adoption, such as in Germany, Hungary or Russia.[319] They may therefore declare invalid those provisions or laws that are incompatible with the treaty obligation of the state concerned.

Human rights commissions are often, for example in Nigeria, Senegal, India, the Philippines and Mexico, specifically tasked with promoting international standards.[320] They may recommend reforms necessary to bring domestic laws in line with international standards, comment on any proposed reforms and disseminate information on the legal and practical steps to be taken in order to comply with international human rights treaties, in particular the Convention. One example is the position paper of the Philippines Commission on Human Rights issued in support of an anti-torture bill proposed in 1995 in which the Commission recommended the insertion of an express reference to the Convention and express incorporation of particular articles, namely Articles 1, 2 (3) and 13 of the Convention.[321] In India, the

[318] In Belgium, Opinion of the Council of State of 21 April 1999; in Spain, Opinion of the Council of State of 22 August 1999; in the Ukraine, Opinion of the Constitutional Court 11 July 2001 and in Chile, Constitutional Court, 8 April 2002.

[319] Article 61 of the French Constitution of 1958; Article 93 (1) of the Basic Law of Germany of 1949; Articles 32 A of the Hungarian Constitution of 1949; Article 125 of the Constitution of the Russian Federation of 1993 and Articles 74 (4) (b) and 79, 121 of the South African Constitution of 1996. See also Aboul-Enein, *Emergence of Constitutional Courts*.

[320] See for an overview of the mandates of National Human Rights Commissions, Lindsnaes et al., *National Human Rights Institutions*, in particular pp.233 et seq.

[321] See Philippines CHR, *Position Paper*, *House Bill No.2302*. The Commission declared that "[I]t is high time that the government takes the initial steps in stamping out, if not totally eradicating this scourge [torture] in our criminal justice system. What is needed here is a firm and determined resolve of the government to exercise its political will." This political will has been found wanting thereafter and neither this nor several other anti-torture bills mentioned above have become law in the Philippines at the time of writing.

National Human Rights Commission has repeatedly, albeit unsuccessfully to date, called on the Government to ratify the Convention.[322]

Civil society groups and activists can be influential actors in exposing shortcomings of domestic law and practice, and advocating for the legal and institutional reforms needed to overcome them. Human rights organisations have successfully scrutinised the performance of states in adhering to their international obligations, e.g. by issuing so-called "shadow" reports, and have been instrumental in bringing about legal and institutional reform. A notable example is the bill criminalising torture prepared by the Kyrgyz Committee for Human Rights, a national NGO, which was signed into law in November 2003.[323] Lawyers are also in a unique position to test the effectiveness of existing remedies and to call for reforms where the legal system fails victims of torture. This can be done in particular through bringing legal challenges, such as in the landmark cases mentioned above and others, that have led to enhanced protection, reparation and in some instances legal reforms. Academics can highlight shortcomings and contribute to the search for constructive solutions to bringing existing law into conformity with the Convention.[324] The media also plays an important role in influencing and mobilising public opinion by monitoring and exposing human rights violations as well as the failure of governments to provide justice and reparation as required by international standards. One prominent example is the adoption of Brazil's anti-torture law in which media exposure played an important part in providing the impetus for a speedy passing of the Act.[325]

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[322] See annual reports of the Indian National Human Rights Commission at http://nhrc.nic.in.

[323] See Annual Report of the International Helsinki Federation, 2004, *Kyrgyzstan*.

[324] Numerous academics have, both at the international and national level, contributed to the domestic implementation of international standards on the prohibition of torture See for a specific example referred to by a state party the role of Slovenian experts on criminal law in the discussions concerning incorporation of a criminal offence of torture into the Slovenian Penal Code, as described in Slovenia's state party report to the Committee against Torture, see UN Doc. CAT/C/43/Add.4, paras.7 et seq.

[325] See VI, 2.1, supra.

Civil society groups and others lobbying for legislative reforms may be confronted with three possible scenarios: (1) the government concerned may profess its commitment to law reform and take initial steps or (2) it may be generally reluctant to carry out law reform or (3) completely unwilling. In the first case, it will be important to follow any initiatives closely and to make constructive criticism of any proposals that fall short of what is required by the Convention, as, for example, has been the case in Georgia.[326] In the second instance, any lobbying campaigns have to identify the main stumbling blocks and address their underlying causes. This may often call for mid-to long-term strategies of changing a mindset prevailing in the government and society at large, through legal challenges, advocacy and training, for example when arguing for accountability of public officials that often meets strong institutional resistance.[327] The last scenario of a government unwilling to implement the Convention presents the most serious challenge. Depending on the degree of repression, opportunities for lobbying can be extremely limited. Nevertheless, it is important to identify shortcomings in law and practice, collect evidence of actual violations, prepare a strategy, and enlist the support of domestic, or where this is not feasible, international constituencies with a view to inducing the government to bring domestic laws into line with relevant international standards. Even where governments stifle such moves by repressive means, such activities can help to create an alternative discourse on which any future law reform initiatives can build.[328]

1.3. Applying best practice of other implementation initiatives

[326] See REDRESS/Article 42, Georgia.

[327] See for example the instructive experiences in Northern Ireland, Rawe, *Transitional Policing*, and in South Africa, Bruce/Neild, *The Police that we want* and Berg, *Police Accountability*.

[328] See, for example, the joint initiative in Sudan, a country that has yet to ratify the Convention, by REDRESS and SOAT (Sudanese Organisation against Torture), *National and International Remedies for Torture: Sudan*.

As the above examination of states' records of implementing the Convention demonstrates, governments have often been unwilling to undertake the necessary measures or have pointed to problems such as a lack of expertise and resources that hinder implementation. While a number of interrelating factors can complicate implementation, many states parties have not shown a strong commitment to this process, and the limited international efforts to bolster implementation of the Convention have been largely ineffective. Although such an assessment also applies to other international treaties, there are positive examples where the combination of the will of states and international efforts has resulted in better incorporation and implementation. On the regional level, the incorporation and implementation of the European Convention of Human Rights has been greatly aided by the EU accession requirement of having to comply with the Council of Europe standards, which has provided a considerable political incentive for reforms, for example in Turkey.[329]

On the international level, the most recent, and ongoing, example is the implementation of the Rome Statute of the International Criminal Court. States already engaged in procedures to implement the ICC statute should use the opportunity to ensure compliance with Convention against Torture, which has similar, though not identical, requirements.

As a result of a sustained large-scale campaign by a broad coalition of governments, NGOs and others, 100 states had ratified the ICC Statute as of 10 December 2005.[330] Some states parties have already passed implementing legislation to bring their domestic laws in line with the requirements of the ICC Statute, and many more are actively engaged in the process, either in the form of separate acts incorporating the whole or parts of the ICC Statute or by amending

[329] See e.g. 2004 Regular Report on Turkey's progress towards accession, **at** http://europa.eu.int/com/enlargement/report.2004/pdf/rr_tr_2004_en.pdf.

[330] See website of the International Criminal Court **www.icc-cpi.org**.

relevant aspects of the Constitution and statutory law.[331] In so doing, states have pursued a number of avenues to expedite implementing legislation and to ensure its conformity with the ICC Statute, including setting up of expert committees and/or joint task-forces to review existing constitutional, criminal and procedural laws and to expedite implementation, using bilateral channels for exchanging advice and involving civil society in drafting processes.[332] In Senegal, for example, government representatives, members of the judiciary, parliamentarians and civil society representatives agreed to set up joint implementation committees following the decision of the Supreme Court, in the case against Hissène Habré, that international treaties such as the Convention against Torture are not self-executing in respect of aspects of criminal law such as jurisdiction and the definition of the criminal offence.[333]

One of the defining features of the efforts towards implementation of the ICC Statute is the high degree of NGO involvement. International, regional and domestic NGOs have, parallel to the ratification campaign, employed a series of innovative measures in calling on states to implement legislation. To this end, NGOs have produced ICC Statute implementation manuals, lobbied and brought together national stakeholders to initiate and carry out the necessary law reforms and mobilised international and national opinion to support such projects.[334] It is perhaps premature to evaluate fully the success of this campaign, and it is true that a number of states have taken few, if any, steps towards implementation. However, it is clear that several NGO initiatives have contributed markedly to the speed of adoption and the quality of implementing legislation.[335]

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[331] See the website of the Coalition for the International Criminal Court www.iccnow.org for up to date information on implementation.

[332] See Human Rights Watch, *Status of ICC Implementing Legislation.*

[333] Lawyers Committee for Human Rights, *Conference on Implementation of the Rome Statute in Senegal.*

[334] See the website of the ICC now coalition **www.iccnow.org** and, by way of concrete examples, Human Rights Watch, *Making the International Criminal Court Work,* at **www.hrw.org/campaigns/icc** and *International Criminal Court, Manual for the Ratification and Implementation of the Rome Statute.*

[335] See for an overview of NGO activities the website of the International Coalition for the ICC **www.iccnow.org** and of the Victim's Rights Working Group **www.vrwg.org**.

In looking at these experiences as possible lessons for stepping up the implementation of the Convention, it is important to recognise the differences and to identify features that can be useful in this endeavour. The ICC implementation campaign has been part and parcel of the highly successful ratification campaign that has generated high publicity and continued international interest. Given the nature of the obligations under the ICC Statute, there is general agreement that some aspects of the laws of most, if not all countries needed to be changed in order to bring them into line with ICC requirements.[336] As many countries have publicly committed themselves to supporting the ICC as a policy goal, there is a strong incentive to take the necessary steps to give effect to the Statute in domestic law, also to ensure that domestic courts can exercise jurisdiction over the crimes listed in the Statute.[337]

The situation concerning implementation of the Convention differs in several important respects. The Convention is almost twenty years old and there has not been a concerted implementation campaign, although there have been repeated international and national ratification campaigns.[338] The implementation of the Convention has not attracted a high degree of public international interest and has in most countries not been a policy priority. Accordingly, less work and attention has been devoted to furthering the incorporation of the Convention into domestic law. As a result, states have largely escaped the intense scrutiny that has been characteristic of the implementation of the ICC Statute.

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[336] See International Coalition for the ICC, *ICC Implementing Legislation*, Question and Answers, 3 March 2003.

[337] See e.g. from South Africa contribution of Ms Cheryl Gillwald (MP) Deputy Minister of Justice and Constitutional Development, to Panel Discussion: *Implementing national legislation to support the ICC*, 2003.

[338] See for example the work by the UN, *Issues and Modalities for the effective universality of international human rights treaties*, Working paper, UN Doc. E/CN.4/Sub.2/2003/37; campaigns by the International Coalition against Torture, *Time to root out torture*, 10 December 2000 and, for a country specific example, the campaign to make India ratify or accede to the Convention against Torture, see National Human Rights Commission of India, *Annual Report 2002-2003*, p.75.

NGOs and others campaigning for the ratification of the Convention in countries such as India, Iran or Sudan should make calls for implementing legislation an integral part of such campaigns. Where reform initiatives with a view to implementing the Convention are advocated, or reforms already contemplated by the government, the experiences with implementing the ICC Statute, such as establishing expert committees, joint task-forces, using bilateral expertise and inviting NGO participation in the drafting process could and should be considered and employed, as appropriate. Furthermore, implementation of the Convention should feature as an essential aspect of reform agendas for ongoing initiatives that relate to associated areas of international law.

2. A step-by-step guide to promoting and carrying out law reform

2.1. Sequencing: Carrying out law reform before or after ratification/accession

A state may take steps to ensure compliance with its obligations under the Convention either before or after ratifying or acceding to the Convention. The practice of states is far from uniform. Ideally, the competent government departments and state authorities comprehensively review existing legislation, identify the need for changes and introduce a bill to this effect, with a view to modifying the Constitution, creating new legislation and/or amending existing statutes. A considerable number of states, especially those of a dualist persuasion, follow a procedure of screening existing domestic legislation before ratification with a view to ensuring its conformity with the provisions of the treaty to be ratified so as to avoid a potential breach of treaty and to demonstrate their commitment to it.[339] Several countries, for example Brazil, Canada, Japan and South

[339] See e.g. US, UN Doc. HRI/CORE/1/Add.49, para.140: "When such legislation is required, the United States will not deposit its instrument of ratification until the necessary legislation has been enacted" and para.141: "However, the US does not believe it necessary to adopt implementing legislation when domestic law already makes adequate provision for the requirements of the treaty."

Africa, have carried out studies for all international treaties ratified, including the Convention, on the compatibility of domestic legislation with the treaty requirements before ratification or accession.[340] Such screening is commonly carried out by responsible government bodies and/or, in some countries, by Constitutional Courts, for example in France. Where discrepancies are found, legislation aimed at bringing domestic law into line with the treaty obligations should and often will be enacted.

The practice of those states that ratify or accede to a treaty before adopting any implementing legislation varies, with many states failing subsequently to implement adequate laws.[341] Legal reforms undertaken are often circumstantial and confined to particular aspects of the Convention. One example is Brazil where the passing of Law 9455/97, which made torture a specific offence, was triggered by police violence that was videotaped and broadcast in national and international media and contributed to pressure on Congress to take legislative action.[342]

Against this background, the ideal scenario would be for states to bring their legislation in line before ratifying or acceding to the Convention. This ensures that the legislative framework is in place to comply with the Convention's obligations and that the state concerned does not violate its international obligations by having incompatible domestic legislation on the statute books after becoming a party. Prior screening also allows for a comprehensive review of existing legislation, and, depending on the approach taken, for wide consultation of various stakeholders as to how best to implement the Convention. However, drawn-out prior screening may

[340] Heyns and Viljoen, *Impact of UN Human Rights Treaties*, p.15.

[341] As evidenced by the concluding observations of the Committee against Torture which are full of examples where the Committee has criticised the absence of adequate legislation and/or the existence of legislation incompatible with the Convention, and has called upon states parties to take the necessary legislative measures to bring domestic law into conformity with the Convention.

[342] See Brazil, UN Doc. CAT/C/9/Add.16, para.63.

also delay ratification or accession,[343] and even lead to a lack of ratification where circumstances change subsequently. Moreover, rushing through with legislation in order to comply with the Convention before ratification runs the risk that no thorough screening and consultation process is carried out and can result in incomplete or flawed legislation.

Various stages of law reform

Any law reform initiated and carried out with a view to bringing domestic legislation in line with the Convention will commonly pass through the following stages:

2.2. Identifying the obligations of the State Party under Convention

This step requires a thorough analysis of the obligations imposed by the Convention in light of the practice of the Committee against Torture. It would be helpful if the Committee itself provided for a commentary, possibly in form of a General Comment, which identifies the obligations of the Convention that require specific implementing legislation.

See Part IV of this Report for key areas.

2.3. Analysing domestic law and its compatibility with obligations under the Convention

[343] See for example the Belgian experience, UN Doc. CAT/C/SR.561, para.2: "Mr. DEBRULLE (Belgium), replying to a question as to why the Convention had first been ratified and then transposed into Belgian legislation, said that it had taken much longer to ratify and transpose the Convention into law than had been expected, mainly due to problems with the definition of torture. The drafting phase had also required substantial contributions from federal entities and all texts had had to be translated into the two national languages."

Using the obligations imposed by the Convention as a yardstick, the responsible government agencies and actors should conduct a thorough analysis of domestic legislation and its compatibility with the Convention. This requires evaluating relevant existing legislation for its apparent compatibility with the Convention as well as its practical effects, i.e. whether the practice of implementation, for example with regard to the investigation of torture, conforms to the requirements of the Convention. In carrying out such an analysis, the responsible officials should draw on the concluding observations of the Committee against Torture, advice from other official bodies, such as the UN Special Rapporteur on Torture, the UNDP, OSCE etc., alternative reports by NGOs that highlight any shortcomings in law and practice, as well as surveys by NGOs, lawyers or academics. They should also consult widely with government bodies, including on the state level in federal countries, international bodies, civil society groups and others that have expertise on the question of torture and act on behalf of torture survivors. The analysis should result in a set of recommendations as to which areas of law need to be changed so as to ensure conformity with the Convention.

2.4. Determining which areas of law need reform, if any, and the modalities of implementing legislation

Following the analysis of the law, the responsible government body has to decide on legislation that needs to be enacted, amended or repealed. This should commonly follow the recommendations generated in the previous phase. A more difficult decision concerns the form of implementing legislation: Should a specific, comprehensive or partial, anti-torture law be enacted? If not, which laws should be amended, i.e. constitution, statutory laws, decrees etc.? Moreover, which legislation should be repealed? The decision requires a careful consideration of the legal system and the consequences of the mode of incorporation chosen so as to ensure effectiveness while avoiding anomalies and maintaining the internal consistency of the system. See Part III of this Report.

This may also necessitate complementary institutional reforms to ensure actual implementation, such as establishing a police oversight body to carry out impartial investigations of torture allegations.

2.5. Drafting the necessary legislation

The drafting of legislation is an important step and not a mere technicality. As highlighted above, implementing legislation has often fallen short of what is required by the Convention. Legislation, to be drafted by an expert committee or experts within the responsible government departments, should make it clear, in the preamble, that its purpose is to give effect to the Convention. The implementing Act should use the text of the Convention as much as possible, in particular using the definition of torture contained in Article 1. Where the Convention provides little or no guidance, the text should reflect international standards, such as using the terms "effective remedy" and "reparation" in line with the understanding developed in the context of the work on the basic principles on reparation. Where the Convention allows states discretion in how to implement the particular obligation, such as the duty to investigate alleged acts of torture promptly, impartially and effectively, implementing legislation should ensure that each component of the obligation is adequately addressed and that the law is drafted in such a way that it will have the desired effect in practice. To this end, and this applies to all aspects of implementing legislation, it might be beneficial for those responsible for drafting to consult, at the appropriate stages of the legislative process, with experts, both on the national and international level, to ensure that any draft legislation takes into account and conforms to relevant standards, in particular the terms of the Convention, and with the various actors whose rights will be affected by the legislation.

2.6. Adopting legislation in parliament and publishing it in legal gazettes

Once the draft bill is agreed upon and approved by the government, the adoption process will depend on the system in question. While changes may be required to respond to concerns of various interest groups, and to secure the passing of the bill, it should be made clear that changes will not be allowed to compromise the international obligations that the bill is meant to implement, not least because this would potentially result in a breach of the international obligations of the state concerned. The same considerations apply to private member bills. Such bills should also follow the same steps outlined above in order to comply with international standards. Finally, once adopted anti-torture legislation should be published speedily in the official gazette.

2.7. Follow-up: Ensuring effective implementation following incorporation

Effective law reform does not stop with the publication of the concerned act in the official gazette. As a first step, relevant laws should be widely disseminated to those affected, such as detainees, and the official agents concerned, for example the police and the judiciary, as well as to the public at large, through mass media and educational materials. Though important in and of itself as a reference point, legislation needs to be implemented in practice to ensure compliance with the Convention. In reality, this is often not the case and the discrepancy between law and practice is one of the major failings of states.[344] Effective implementation in practice depends on ensuring supporting legal and institutional structures, such as guaranteeing the independence of the judiciary, access to justice, the integrity of law enforcement services etc. In addition, officials need to be trained on their obligations under the new legislation. As an

[344] See REDRESS, *Reparation for Torture*, p.41.

official measure, it might be beneficial to designate or establish an independent body, such as a national human rights commission, which monitors practical implementation of the law at regular intervals and submits reports to parliament and the public at large for consideration. Lawyers and civil society groups can bring cases to test the effectiveness of the new legislation and, together with the media and others, monitor practice and expose failings of the law.

2.8. Summary of Recommendations

STATES PARTIES TO THE UN CONVENTION AGAINST TORTURE SHOULD:

- Publicly commit themselves to adopt legislation required to give full effect to the Convention in the national legal system

- Conduct a thorough review of existing domestic law and its compatibility with the obligations contained in the Convention. In so doing, take into account the views of international bodies and consult widely with national human rights institutions, experts and civil society. The analysis should result in a set of recommendations as to which areas of law need to be changed so as to ensure conformity of domestic legislation with the Convention

- Decide on the laws that need changes, if any, including existing anti-torture legislation, as well as on the modes of implementing legislation, in consultation with national human rights institutions, experts and civil society

- Draft implementing legislation to give effect to the Convention, using the text of the provisions of the Convention as much as possible, inviting national

human rights institutions, experts and civil society to comment on draft legislation to ensure that it takes into account and conforms to relevant standards

- Promote and adopt legislation in parliament and publish it in legal gazettes

- Ensure effective implementation following incorporation by: widely disseminating the text of the Convention in the national language(s) as well as the text of implementing law(s); providing education about international human rights treaties and implementing legislation at all levels, and in particular training to concerned officials; and giving national human rights institutions or separate independent bodies the task of monitoring effective implementation

THE UN COMMITTEE AGAINST TORTURE SHOULD:

- Adopt a general comment specifying the obligations of states parties to incorporate the Convention in their national legal systems

- In its concluding observations, follow a coherent practice of making concrete recommendations as to legislative changes necessary to give effect to the substantive provisions of the Convention within a realistic timeframe

- In its follow-up procedures, develop a practice of monitoring compliance of states parties with its recommendations, and, where appropriate, expose failure to comply in its annual report and through separate statements

- Develop and maintain, possibly together with the Office of the High Commissioner for Human Rights, resources permitting, a

database detailing implementing legislation, including planned reforms, for each state party

CIVIL SOCIETY, in particular NGOs, lawyers, doctors, academics, the media and others SHOULD:

- Raise awareness and knowledge of international standards on the prohibition against torture, in particular the Convention
- Examine the compliance / compatibility of the national legal system in question with the obligations arising from the Convention
- Publish findings and highlight shortcomings of national laws in widely disseminated reports, including alternative reports to the Committee against Torture or other bodies competent to consider state parties reports of the country concerned
- Draw public attention to concluding observations of the Committee against Torture and/or the Human Rights Committee on relevant state parties reports, as applicable
- Advocate legal reforms to give effect to the Convention in national law on the basis of recommendations of UN bodies and findings of independent studies
- Where relevant legislation is being drafted, engage critically in the process and provide materials and comments both to further adoption and to increase the quality of proposed legislation
- Following adoption of implementing legislation, disseminate text of laws, provide training to lawyers and human rights activists and examine laws with a view to devising a strategy on maximising its actual impact.

3. Promoting application of relevant international standards prohibiting torture in national jurisprudence

Domestic courts often play a vital role in ensuring the protection of arrested and detained persons from (further) torture and in ensuring the implementation of various rights and obligations arising from the prohibition of torture under international law. However, in some countries, especially where the judiciary lacks independence, courts have failed to uphold the rights of detainees, displaying what is widely seen as a deferential attitude to the police and/or prosecution when asked to intervene in torture cases.[345]

Courts in several countries have, while acknowledging the prohibition of torture under international law, issued rulings that at least potentially undermine the absolute nature of this prohibition. A number of judgments by national courts have raised doubts concerning their conformity with the international standards on the prohibition of torture, such as rulings that leave open the possibility that torture may be justified; potentially allow confessions obtained through torture to be used as evidence; undermine the prohibition of *refoulement* by introducing a balancing test that may result in persons judged to be a national security risk being deported even where there are reasonable grounds to believe that they will be subjected to torture; uphold amnesty laws incompatible with the prohibition of torture; recognise statutes of limitation to be applicable in torture cases; fail to prosecute and/or punish perpetrators of torture as required by international standards; award inadequate compensation and fail to provide for other forms of reparation; refuse to exercise universal jurisdiction in criminal cases in the absence of domestic implementing legislation and uphold state immunity in suits brought in relation to acts of torture committed in third countries.

There are several prerequisites for strengthening the role of national courts in applying international standards on the prohibition of torture, namely:

[345] See REDRESS, *Reparation for Torture*, p.46.

- an independent judiciary
- adequate legal powers to apply international standards
- increased awareness of relevant international standards and the will to apply such standards

As a stronger role for courts in upholding the prohibition of torture is desirable, strategies to encourage the judiciary to become more proactive in this regard have to address the legal, institutional and practical obstacles that hinder the emergence of a consistent jurisprudence in line with relevant international standards.

3.1. Evaluation of judicial application of international standards

Domestic courts have a mixed record in the actual application of relevant international standards. Positive examples of "best practices" followed by courts include the following (the list of countries mentioned in brackets is not exhaustive):

- Affirming the absolute prohibition of torture (United Kingdom)
- Banning the use of torture methods (Israel)
- Outlawing corporal punishment or upholding laws outlawing such punishments (South Africa)
- Declaring conditions of detention to be in violation of the prohibition of torture (St. Lucia, Zimbabwe)
- Preventing evidence obtained through torture from being used in court proceedings (UK)
- Declaring confessions obtained through torture illegal and inadmissible (Uzbekistan)
- Safeguarding detainees' rights by declaring legislation incompatible with the prohibition of torture and/or ordering the Government to introduce specific measures designed to prevent torture (India, Bangladesh)
- Recognising the right to non-refoulement (Cameroon, Poland)

- Declaring amnesties for torture null and void because of their incompatibility with the prohibition of torture (Argentina, France, Mexico)
- Holding statutes of limitation inapplicable to international crimes, including torture (Argentina)
- Ordering the competent authorities to carry out investigations and to prosecute the perpetrator(s) of torture (India, Sri Lanka)
- Convicting and sentencing perpetrators to appropriate punishments (Peru)
- Enabling victims of torture to bring their cases before the courts and awarding compensation and other forms of reparation for torture (India, Sri Lanka, Egypt and South Africa)
- Exercising universal jurisdiction over alleged perpetrators of torture (UK; Spain, Netherlands; France)
- Awarding compensation to victims of torture committed in third countries (USA)
- Recognising that individuals have no subject matter immunity (immunity *rationae materiae*) (US, UK)

This jurisprudence has to be contrasted with judgments by national courts that have raised doubts concerning their conformity with the standards contained in the Convention, which concern the following areas:

- Leaving open the possibility that torture may be justified (Israel)
- Undermining the prohibition of *refoulement* by introducing a balancing test that may result in persons judged to be a national security risk being deported even where there are reasonable grounds to believe that they will be subjected to torture (Canada)
- Upholding amnesty laws incompatible with the prohibition of torture (South Africa)
- Failing to prosecute and/or punish perpetrators of torture adequately as required by international standards (Egypt, Turkey, Germany)
- Awarding inadequate compensation and failing to provide for other forms of reparation (Nepal, Egypt)

- Refusing to exercise universal jurisdiction in criminal cases in the absence of domestic implementing legislation (Senegal)
- Upholding state immunity in suits brought in relation to acts of torture committed in third countries (UK, Canada, US)

3.2. Reasons for the failure to give effect to international standards on prohibition of torture in domestic jurisprudence

- Lack of independence of judiciary

There are a substantial number of countries, such as China, Iran, Uzbekistan and Zimbabwe, where there are serious concerns about the lack of independence of the judiciary.[346] In many of these countries, the rule of law is weak or non-existent and torture is often one manifestation of the lack of respect for individual rights. Against this background, judges are often not inclined, not least because of adverse personal consequences that might and have resulted from such a stance, to apply international standards that may call into question state action or grant individuals more rights than they may enjoy under more restrictive national laws.

- Programmatic nature of many of the Convention's provisions and lack of implementing legislation

Many provisions of the Convention do not lend themselves to direct application by courts because their wording implies that the state party should take further implementing measures.[347] As the Bouterse, Habré and the Pinochet cases demonstrate, courts tend to be reluctant to apply provisions relating to torture as a criminal offence

[346] See country studies in REDRESS, *Reparation for Torture*, and on the state of the independence of the judiciary worldwide the Report of the Special Rapporteur of the independence of the judiciary and lawyers, Mr. Leandro Despouy, UN Doc. E/CN.4/2004/60.

[347] Ingelse, *Committee against Torture*, pp.259 et seq.

and universal jurisdiction in the absence of implementing legislation following the legal principle that there be no penalty without pre-existing law. It is in particular in dualist countries that courts will not apply relevant treaties directly, as illustrated in a recent Australian case.[348]

- Sole focus on domestic law and lack of awareness of international standards

National courts are often more inclined to use domestic law for several reasons. Many judges lack familiarity with relevant international standards in general, and the Convention in particular, either due to a lack of adequate training or a lack of texts and commentaries.[349] Even where judges are aware of international standards, there can be a lack of understanding of what the specific standards require, in particular construing them in a narrow fashion when interpreting relevant domestic legislation.[350] Moreover, lawyers and human rights organisations acting in torture cases often fail to invoke and plead relevant international standards and judges may therefore refrain from applying such standards.[351] Judges often

[348] See *Scott v Bowden [2002]*, Decision by the High Court of Australia, Judge McHugh J sitting as single judge. The case concerned the remission of the matter (an offence alleged to constitute torture) to the Federal Court of Australia. In his reasoning that the Federal Court has no jurisdiction to decide on "matters arising directly under a treaty" (Section 75 of the Constitution and Section 38 (a) of the Judiciary Act), Judge McHugh J stated, in para.7: " However, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not part of the municipal law of Australia. It creates no legally enforceable rights. A dispute concerning the application of a treaty that has not been enacted as part of the law of Australia gives rise to no justiciable controversy and is incapable of being the subject of a matter for the purpose of s 75 of the Constitution or s 39 (a) of the Judiciary Act. Whatever the meaning of s 75 (i) of the Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gives no 'immediate right, duty or liability to be established by the determination of the Court'..."

[349] For example in Colombia, Japan and Zambia, see respective country studies in Heyns and Viljoen, *Impact of UN Human Rights Treaties*, pp. 195, 419 and 638 respectively.

[350] See the jurisprudence reviewed above, such as the Suresh case in Canada. Judges in several countries have apparently repeatedly confused notions of international law and made mistakes in the application of international standards, as for example pointed out by Bayefsky, *International Human Rights Law in Canadian Courts*, pp. 325 et seq. and, in the case of India, by Verma, *International Law*.

[351] As has been mentioned by several lawyers and NGOs who provided information about relevant country practice for this study. See also Heyns and Viljoen, *Impact of UN Human Rights Treaties*, p.33, who point to the lack of an international focus of many NGOs and the absence of a domestic human

consider domestic law to be superior to international law, for example, that fundamental rights granted under the Constitution in question as interpreted by domestic courts provide greater protection than the international treaty concerned or because the use of international human rights norms is seen as importing alien standards.[352] It is also due to the reluctance of judges to exercise judicial activism in the form of applying international human rights standards perceived as not legitimated through national law-making, and in matters seen as belonging to the "executive domain", especially in the field of security related legislation.[353]

- Impact of campaign against terrorism

Several rulings that have upheld or applied national anti-terrorism legislation have failed to ensure safeguards for detainees suspected of terrorism. Decisions, such as by the Canadian Supreme Court in the *Suresh* case, give governments room to exercise executive discretion in respect of matters that fall within the absolute prohibition of torture, such as the prohibition of *refoulement.* This development, although there have been some notable exceptions, points to a tendency for judicial restraint in cases relating to the campaign against terrorism that fails to provide those suspected of terrorism with the necessary protection against torture.[354]

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rights culture in countries such as Iran, ibid, p.31, as reasons for the failure to apply international human rights standards in domestic jurisprudence.

[352] So for example in Japan, see Iwasawa, *International Human Rights Adjudication in Japan*, pp. 264 et seq. In countries such as Iran, Saudi Arabia and Sudan, the supremacy of Islamic law is a factor militating against the application of international human rights law. See the respective country studies in REDRESS, *Reparation for Torture* and REDRESS & The Parliamentary Human Rights Group, *Torture in Saudi Arabia*. See on the general point Heyns and Viljoen, *Impact of UN Human Rights Treaties*, p.32 and Iran as mentioned above.

[353] Charlesworth et al., *Deep Anxieties*, pp. 446 et seq.

[354] See the contributions to the Fiji colloquium by The Hon. Mr. Justice John M Evans, *Judicial independence, human rights and the 'war on terror'*; The Hon. Mr. Justice Michael Kirby AC CMG, *Upholding human rights after September 11: The empire strikes back* and by Waldman, *The judiciary after September 11*. Waldman quotes two excerpts that demonstrate how differently British judges interpret their role. Lord Justice Brooke [*A, X and Y v Secretary of State for Home Affairs* (2002) EWCA 1502, para.87: "[B]ut unless one is willing to adopt a purist approach, saying that it is better that this country should be destroyed, together with the ideals it stands for, than that a single suspected terrorist should be detained without due process, it seems to me inevitable that the judiciary must be

3.3. Strengthening the role of the judiciary in applying international standards

Explicitly granting courts the power to apply international law

The legal systems of many countries contain no clear provisions on the application of international human rights law by the judiciary in the domestic sphere.[355] Although this lacuna can give judges considerable leeway in applying international human rights law in domestic proceedings, as the experience in many common law countries shows, express provisions provide direct authority to judges and enhance the status of international human rights law and the legitimacy of courts applying it. This has for instance been recognised in South Africa where the Constitution calls upon the judiciary to apply or take into consideration international human rights law in the exercise of their function.

A further important power is the competence of a court, commonly the Constitutional Court or its equivalent, to scrutinise proposed legislation so as to ensure its compatibility with applicable international human rights standards, a procedure used in several countries. It constitutes a useful mechanism to avoid a situation that may arise where courts would be called upon to resolve a conflict between national laws and international standards and could even be

willing, as SIAC was, to put an appropriate degree of trust in the willingness and capacity of ministers and Parliament, who are publicly accountable for their decisions, to satisfy themselves about the integrity and professionalism of the Security Service" and Lord Steyn (Lord J. Steyn, *Guantanamo Bay: The Legal Black Hole*, ICLQ 53 (2004), pp.1–15): "while the courts must take into account the relative constitutional competence of branches of government to decide particular issues, they must never, on constitutional grounds, surrender the constitutional duties placed on them. Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination. In the context of the war on terrorism without any end in prospect this is a sombre scene for human rights. But there is the caution that unchecked abuse of power begets ever-greater abuse of power. And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response."

[355] See by way of example Bantekas, *International and Uzbek Law*.

compelled to apply legislation that violated international human rights.

Awareness of, and willingness to use relevant international human rights standards

While the relative dearth of jurisprudence of courts applying relevant international human standards is often generally attributed to a lack of awareness of judges, there is considerable variation between countries in relation to: relevant international standards being part of the national curriculum; provision and intensity of human rights training for judges; awareness within the different levels of the judiciary, often with large discrepancies between lower and higher judiciary; tradition of applying or referring to international human rights standards in national jurisprudence; the willingness of judges to turn to international human rights standards in deciding cases and the practice of litigants, in particular human rights groups or lawyers, of invoking international human rights standards when arguing cases.[356]

Sustained efforts are required not only to train judges on the substance of international human rights standards but also their significance and field of application when translated in the domestic context. This requires a change in mindset that entails giving international law a more prominent place at all levels of legal education so that it becomes an accepted part of judicial reasoning, instead of being seen as a set of standards that has to be promoted by institutions and organisations vis-à-vis an at times seemingly reluctant judiciary. The willingness of the judiciary to apply relevant international standards in its jurisprudence is a crucial prerequisite for any best practice in this regard. The degree of independence, awareness and the powers accorded to the judiciary in legislation are important factors influencing the attitude of judges towards the application of international standards. A further factor is the general climate pervading in a country that may prompt the judiciary either not to apply or not to construe liberally those international human

[356] See country studies in Heyns and Viljoen, *Impact of UN Human Rights Treaties.*

rights standards that may call into question security legislation, as has been witnessed in the current international campaign against terrorism. Human rights organisations and lawyers play an important role in this process not only through advocacy but also by invoking international human rights standards and jurisprudence in domestic proceedings.

3.4. Summary of recommendations

JUDGES WORLDWIDE SHOULD:

- Be mindful of their responsibility in ensuring that international standards on the prohibition of torture are given due recognition in judicial proceedings

- Recognise the need to uphold torture survivors' rights in all judicial proceedings

- Making clear that torture is prohibited under all circumstances in general and in relation to particular torture methods, corporal punishment, modalities and conditions of detention and forms of the death penalty that amount to cruel, inhuman or degrading punishment

- Declaring legislation that facilitates torture to be incompatible with fundamental rights provisions and/or the country's international obligations

- Recognising that forces operating outside of the country's territory are bound by the prohibition of torture

- Upholding and ordering safeguards against torture

- Not recognising confessions that may have been obtained through torture whereby the burden of proof should be placed on the state authorities

- Ensuring the right of non-*refoulement* by prohibiting the deportation, extradition or expulsion of persons to countries where there are reasonable grounds to believe that the person will be subjected to torture, notwithstanding diplomatic assurances

- Acting upon complaints of torture with a view to preventing further torture and ordering investigations where a credible allegation of torture is brought before them in the course of proceedings

- Calling upon the government in question to introduce a specific offence of torture where existing laws are inadequate

- Not recognising any immunities or amnesties for torture

- Holding statutes of limitation to be inapplicable to international crimes, including torture, or not recognising statutes of limitation for the period where the victims could not exercise their right to complain or where the judicial system was dysfunctional

- Ordering the competent authorities to carry out investigations and prosecute the perpetrator(s) of torture, or carrying out such investigating themselves where they have the powers to do so

- Convicting and sentencing perpetrators of torture found guilty of torture to proportionate punishments taking into account the gravity of the crime

- Enabling torture survivors to bring their cases before courts with a view to claiming reparation and removing as much as possible existing barriers to access to justice

- Awarding forms of reparation recognised in international law, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition

- Ensuring enforcement of awards for torture victims, whether made by domestic courts or international courts or bodies

- Exercising universal jurisdiction over alleged perpetrators of torture in criminal cases, either on the basis of existing legislation or by applying international standards directly where possible. Where domestic law does not allow either, calling for legal reforms to bring the legal system into conformity with international obligations

- Not recognising amnesties, immunities or statutes of limitation that may hinder or bar the prosecution of the alleged perpetrator(s) of torture committed abroad

- Interpreting existing law so as to allow victims of torture committed abroad to claim reparation against the alleged perpetrator(s) of torture before domestic courts, or, where this is not possible, calling for legal reforms to allow such suits to be brought

- Awarding compensation and other forms of reparation to victims of torture committed in third countries

- Ensuring enforcement of awards, including by means of attachment in the course of proceedings

CIVIL SOCIETY in particular NGOs, lawyers, doctors, academics, the media and others SHOULD:

Develop a strategy aimed at encouraging the judiciary to take a stronger role in the application of relevant international standards on the prohibition of torture. In so doing, lawyers, human rights activists and others, seeking the support of the judiciary, should combine the following measures, as required in the given circumstances:

- Advocating legal and institutional reforms aimed at strengthening the independence of the judiciary by highlighting the importance of judicial independence for the protection of human rights through the judiciary

- Advocating legislative changes to enhance the status of international human rights standards, in particularly relating to torture, in the domestic legal order, be it through implementing legislation or direct applicability and giving judges the powers, and duty, to apply these standards in their jurisprudence

- Advocating the introduction relevant international human rights standards (origin of the prohibition of torture, purpose, content, implementation etc.) as part of the general compulsory curricula of legal education at all levels

- Conducting training on relevant international standards for judges, prosecutors, lawyers and other jurists, including overview and analysis of jurisprudence of courts and human rights bodies as well as comparative approaches

- Making relevant resources easily accessible in language(s) of the country concerned

- Calling upon the UN High Commissioner for Human Rights to establish database providing information about standards, jurisprudence of regional and international bodies and comparative practice in all official UN languages

- Invoking international standards in domestic proceedings, either directly or indirectly by using arguments in line with such standards or by referring to examples of countries with a similar legal system

- NGOs and others campaigning for ratification in countries that are not yet parties to the Convention should make calls for implementing legislation an integral part of such campaigns.

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VIII. ANNEX: LEGAL DOCUMENTATION- INTERNATIONAL STANDARDS

UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Recognizing that those rights derive from the inherent dignity of the human person,
Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,
Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,
Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,
Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to

have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12
Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
(a) Six members shall constitute a quorum;
(b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including

reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article s hall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after

consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;
(a) If a State Party considers that another State Party is not giving effect to the provisions ofthis Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months afler the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
(d) The Committee shall hold closed meetings when examining communications under this article;
(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.
In every matter, the report shall be communicated to the States Parties concerned.
2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective reliefto the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24
The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1 . Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from thc date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Con vention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of- the notification by the Secretary-General .
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:
(a) Signatures, ratifications and accessions under articles 25 and 26;
(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

Standard Minimum Rules for the Treatment of Prisoners (Extracts)

Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

Preliminary Observations

1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.
2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

3. On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.

4. (1) Part I of the rules covers the general management of institutions, and is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge.
(2) Part II contains rules applicable only to the special categories dealt with in each section. Nevertheless, the rules under section A, applicable to prisoners under sentence, shall be equally applicable to categories of prisoners dealt with in sections B, C and D, provided they do not conflict with the rules governing those categories and are for their benefit.
5. (1) The rules do not seek to regulate the management of institutions set aside for young persons such as Borstal institutions or correctional schools, but in general part I would be equally applicable in such institutions.
(2) The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment.

PART I
RULES OF GENERAL APPLICATION

Basic principle
6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
(2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.
Register
7. (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
(a) Information concerning his identity;
(b) The reasons for his commitment and the authority therefore;
(c) The day and hour of his admission and release.
(2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.
Separation of categories
8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,
(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;
(b) Untried prisoners shall be kept separate from convicted prisoners;
(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;
(d) Young prisoners shall be kept separate from adults.
Accommodation
9. (1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.
(2) Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.
10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
11. In all places where prisoners are required to live or work,
(a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.
14. All pans of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.
Personal hygiene
15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.
16. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.
Clothing and bedding
17. (1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.
(2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.
(3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.
18. If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the institution to ensure that it shall be clean and fit for use.
19. Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.
Food
20. (1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.
(2) Drinking water shall be available to every prisoner whenever he needs it.
Exercise and sport
21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.
Medical services
22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health

administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
(3) The services of a qualified dental officer shall be available to every prisoner.
23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be torn in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.
24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.
25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
26. (l) The medical officer shall regularly inspect and advise the director upon:
(a) The quantity, quality, preparation and service of food;
(b) The hygiene and cleanliness of the institution and the prisoners;
(c) The sanitation, heating, lighting and ventilation of the institution;
(d) The suitability and cleanliness of the prisoners' clothing and bedding;
(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.
(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.
Discipline and punishment
27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.
28. (1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.

(2) This rule shall not, however, impede the proper functioning of systems based on self-government, under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment.
29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
(a) Conduct constituting a disciplinary offence;
(b) The types and duration of punishment which may be inflicted;
(c) The authority competent to impose such punishment.
30. (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.
(2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.
(3) Where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.
31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.
32. (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.
(2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.
(3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.
Instruments of restraint
33. Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
(a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
(b) On medical grounds by direction of the medical officer; (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.
34. The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.
Information to and complaints by prisoners
35. (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary

requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.
(2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.
36. (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.
(2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.
(3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.
(4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.
Contact with the outside world
37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.
38. (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong. (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.
39. Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.
Books
40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.
Religion
41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.
(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.
42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.
Retention of prisoners' property
43. (1) All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition. (2) On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him.
(3) Any money or effects received for a prisoner from outside shall be treated in the same way.
(4) If a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.
Notification of death, illness, transfer, etc.
44. (1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.
(2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.
(3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.
Removal of prisoners
45. (1) When the prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.
(2) The transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited.
(3) The transport of prisoners shall be carried out at the expense of the administration and equal conditions shall obtain for all of them.
Institutional personnel
46. (1) The prison administration, shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.

(2) The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and of the public the conviction that this work is a social service of great importance, and to this end all appropriate means of informing the public should be used.
(3) To secure the foregoing ends, personnel shall be appointed on a full-time basis as professional prison officers and have civil service status with security of tenure subject only to good conduct, efficiency and physical fitness. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.
47. (1) The personnel shall possess an adequate standard of education and intelligence.
(2) Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests.
(3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.
48. All members of the personnel shall at all times so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.
49. (1) So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors.
(2) The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers.
50. (1) The director of an institution should be adequately qualified for his task by character, administrative ability, suitable training and experience.
(2) He shall devote his entire time to his official duties and shall not be appointed on a part-time basis.
(3) He shall reside on the premises of the institution or in its immediate vicinity. (4) When two or more institutions are under the authority of one director, he shall visit each of them at frequent intervals. A responsible resident official shall be in charge of each of these institutions.
51. (1) The director, his deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.
(2) Whenever necessary, the services of an interpreter shall be used.
52. (1) In institutions which are large enough to require the services of one or more full-time medical officers, at least one of them shall reside on the premises of the institution or in its immediate vicinity.
(2) In other institutions the medical officer shall visit daily and shall reside near enough to be able to attend without delay in cases of urgency.
53. (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.
(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.

54. (1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

(2) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.

(3) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

Inspection

55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

PART II ***RULES APPLICABLE TO SPECIAL CATEGORIES*** [omitted]

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Adopted by General Assembly resolution 43/173 of 9 December 1988

Scope of the Body of Principles
These principles apply for the protection of all persons under any form of detention or imprisonment.
Use of Terms
For the purposes of the Body of Principles:
(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;
(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;
(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;
(d) "Detention" means the condition of detained persons as defined above;
(e) "Imprisonment" means the condition of imprisoned persons as defined above;
(f) The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1
All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.
Principle 2
Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.
Principle 3
There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.
Principle 4
Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.
Principle 5
1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or

religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.
2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.
Principle 6
No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.
Principle 7
1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently. of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.
2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.
3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.
Principle 8
Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.
Principle 9
The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.
Principle 10
Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.
Principle 11
1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:
(a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
(c) The identity of the law enforcement officials concerned;
(d) Precise information concerning the place of custody.
2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.
3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left with out supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

Code of Conduct for Law Enforcement Officials

Adopted by General Assembly resolution 34/169 of 17 December 1979

Article 1
Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession. Commentary:
(a) The term "law enforcement officials', includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.
(b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.
(c) Service to the community is intended to include particularly the rendition of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid.
(d) This provision is intended to cover not only all violent, predatory and harmful acts, but extends to the full range of prohibitions under penal statutes. It extends to conduct by persons not capable of incurring criminal liability.
Article 2
In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
Commentary:
(a) The human rights in question are identified and protected by national and international law. Among the relevant international instruments are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners and the Vienna Convention on Consular Relations.
(b) National commentaries to this provision should indicate regional or national provisions identifying and protecting these rights.
Article 3
Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.
Commentary:

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.
(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.
(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.
Article 4
Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential , unless the performance of duty or the needs of justice strictly require otherwise.
Commentary:
By the nature of their duties, law enforcement officials obtain information which may relate to private lives or be potentially harmful to the interests, and especially the reputation, of others. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper.
Article 5
No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment .
Commentary:
(a) This prohibition derives from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly, according to which: "[Such an act is] an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights [and other international human rights instruments]."
(b) The Declaration defines torture as follows:
". . . torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person

for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."
(c) The term "cruel, inhuman or degrading treatment or punishment" has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.
Article 6
Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.
Commentary:
(a) "Medical attention", which refers to services rendered by any medical personnel, including certified medical practitioners and paramedics, shall be secured when needed or requested.
(b) While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgement of such personnel when they recommend providing the person in custody with appropriate treatment through, or in consultation with, medical personnel from outside the law enforcement operation.
(c) It is understood that law enforcement officials shall also secure medical attention for victims of violations of law or of accidents occurring in the course of violations of law.
Article 7
Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.
Commentary:
(a) Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and within their agencies.
(b) While the definition of corruption must be subject to national law, it should be understood to encompass the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.
(c) The expression "act of corruption" referred to above should be understood to encompass attempted corruption.
Article 8
Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Commentary:

(a) This Code shall be observed whenever it has been incorporated into national legislation or practice. If legislation or practice contains stricter provisions than those of the present Code, those stricter provisions shall be observed.

(b) The article seeks to preserve the balance between the need for internal discipline of the agency on which public safety is largely dependent, on the one hand, and the need for dealing with violations of basic human rights, on the other. Law enforcement officials shall report violations within the chain of command and take other lawful action outside the chain of command only when no other remedies are available or effective. It is understood that law enforcement officials shall not suffer administrative or other penalties because they have reported that a violation of this Code has occurred or is about to occur.

(c) The term "appropriate authorities or organs vested with reviewing or remedial power" refers to any authority or organ existing under national law, whether internal to the law enforcement agency or independent thereof, with statutory, customary or other power to review grievances and complaints arising out of violations within the purview of this Code.

(d) In some countries, the mass media may be regarded as performing complaint review functions similar to those described in subparagraph (c) above. Law enforcement officials may, therefore, be justified if, as a last resort and in accordance with the laws and customs of their own countries and with the provisions of article 4 of the present Code, they bring violations to the attention of public opinion through the mass media.

(e) Law enforcement officials who comply with the provisions of this Code deserve the respect, the full support and the co-operation of the community and of the law enforcement agency in which they serve, as well as the law enforcement profession.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Whereas the work of law enforcement officials * is a social service of great importance and there is, therefore, a need to maintain and, whenever necessary, to improve the working conditions and status of these officials,
Whereas a threat to the life and safety of law enforcement officials must be seen as a threat to the stability of society as a whole,
Whereas law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights,
Whereas the Standard Minimum Rules for the Treatment of Prisoners provide for the circumstances in which prison officials may use force in the course of their duties,
Whereas article 3 of the Code of Conduct for Law Enforcement Officials provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,
Whereas the preparatory meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Varenna, Italy, agreed on elements to be considered in the course of further work on restraints on the use of force and firearms by law enforcement officials,
Whereas the Seventh Congress, in its resolution 14, inter alia, emphasizes that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights,
Whereas the Economic and Social Council, in its resolution 1986/10, section IX, of 21 May 1986, invited Member States to pay particular attention in the implementation of the Code to the use of force and firearms by law enforcement officials, and the General Assembly, in its resolution 41/149 of 4 December 1986, inter alia, welcomed this recommendation made by the Council,
Whereas it is appropriate that, with due regard to their personal safety, consideration be given to the role of law enforcement officials in relation to the administration of justice, to the protection of the right to life, liberty and security of the person, to their responsibility to maintain public safety and social peace and to the importance of their qualifications, training and conduct,
The basic principles set forth below, which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention

of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.

General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimize damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

Special provisions

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to

prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.
10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.
11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:
(a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
(b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
(c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
(e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.
Policing unlawful assemblies
12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.
13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.
14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.
Policing persons in custody or detention
15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.
16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

Qualifications, training and counselling

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

Reporting and review procedures

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse

to carry out an order to use force and firearms, or who report such use by other officials.
26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

Note:
* In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted by General Assembly resolution 37/194 of 18 December 1982

Principle 1
Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.
Principle 2
It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.**<1>**
Principle 3
It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.
Principle 4
It is a contravention of medical ethics for health personnel, particularly physicians:
(a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments; **<2>**
(b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.
Principle 5
It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the

prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.
Principle 6

There may be no derogation from the foregoing principles on any ground whatsoever, in public emergency.

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<1> See the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment (resolution 3452 (XXX), annex).
<2> Particularly the Universal Declaration of Human Rights (resolution 217 A (111)), the International Covenants on Human Rights (resolution 2200 A (XXI). annex), the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (resolution 3452 (XXX), annex) and the Standard Minimum Rules for the Treatment of Prisoners (First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report by the Secretariat (United Nations publication, Sales No. E.1956.IV.4, annex I.A).