REDRESS

Seeking Reparation for Torture Survivors

WAITING FOR JUSTICE

The Politics of Delay in the Administration of Justice in Torture Cases: Practice, Standards and Responses

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1. Introduction

Delays are a persistent cause for concern in the administration of justice worldwide. The timely disposition of cases is seen as an elementary part of justice; conversely, unduly prolonged investigations and trials deny justice. Delays are detrimental to those seeking justice and the system of justice as a whole. For those seeking justice, delays can mean prolonged detention and drawn out criminal trials. In civil proceedings, delays mean higher costs, adverse impacts on the enjoyment of rights and a sense of frustration and anxiety due to the uncertainty of the outcome of the case. Delays may also result in cases being time-barred, are likely to make evidence more difficult to obtain and/or less reliable to use and can undermine public confidence in the system of justice as a whole. This can jeopardise the peaceful resolution of disputes and make people seek justice on their own terms, and can lead to violence.

Delays in the administration of justice impact on all cases, whatever the type of crime or wrong that is involved. However, delays pose particular challenges in respect of the handling of torture cases. Torture is recognised as one of the most serious crimes; it is often committed behind closed doors against persons who are at the mercy of state authorities for long periods of time. Time is therefore of the essence: (further) torture can only be prevented if detainees are brought before a judge promptly; complaints and investigations into allegations of torture are more likely to succeed if they are commenced speedily; and, remedies will only be effective in re-building lives if they are timely..

Systemic delays produce invisible and pernicious though not necessarily unintended effects by sending a twofold message:

- to torture survivors that it is not worthwhile pursuing cases, thereby acting as a powerful inhibitor to justice; and
- to those responsible for torture that they do not have to fear adverse repercussions, at least not at anytime in the near future;

This simultaneously undermines the right to an effective remedy, including the right to complain and having one's complaint investigated, as well as the obligation to take all possible measures to prevent torture.

This Report was prompted by REDRESS' work with torture survivors around the world and organisations that support them. We and the organisations we work with have seen first hand the detrimental impact of delays on the practical realisation of justice, and are conscious of the need to take decisive action to redress this situation.

The Report reviews international standards on 'timeliness' as well as court judgments and procedures from a number of countries around the world. It formulates a number of important litigation and advocacy strategies for the benefit of lawyers working with torture survivors which are designed to help mount effective responses to both systemic delays and delays in individual torture cases.

The Report:

- Provides an overview of the nature and main causes of, and factors contributing to delays;
- Examines the adverse impact of delays in various proceedings on the right to an effective remedy and reparation for torture survivors;
- Identifies relevant international human rights standards governing delays in various proceedings, namely in relation to the investigation and prosecution of torture cases and in relation to reparation claims;

- Considers states' records in implementing such standards, as well as litigation experiences, with a particular focus on best practices; and
- Sets out in detail the measures which can be taken to tackle the issue of delays more effectively at the various stages of proceedings.

The Report draws on case studies and interviews provided by a number of REDRESS' partner organisations in Peru, Russia, Sri Lanka, Sudan and Uganda. It also draws on the findings of REDRESS' extensive comparative research over the years, complemented by a review of the jurisprudence and practice of international human rights treaty bodies on the subject. The full citation of cases, UN documents and other relevant sources used in this Report can be found in the annexed bibliography.

REDRESS is extremely grateful to all those who contributed in the research of this Report by sharing information and insights, in particular Basil Fernando, Asian Commission for Human Rights; Juliet Nakyanzi, Foundation for Human Rights Initiative, Uganda; Anton Ryjoy, Nizhny Novgorod Committee against Torture; Hayley Reyna Hidalgo and Victor Alvarez, Coordinadora Nacional de Derechos Humanos, Peru; Professor Mohamed Ibrahim Khalil and Professor Farouk Mohamed Ibrahim El Nur, Sudan, and to Tom Siebertz and Anatoly Vlasov for their invaluable research assistance.

The Report was written by Lutz Oette and edited by Carla Ferstman.

2. Delays in the investigation and prosecution of torture cases

2.1. Delays and impunity: Nature, causes, consequences

Country practice

- Overview

The failure to promptly open and carry out torture investigations contributes to ineffective investigations in many parts of the world.

The examination of the investigation practice in torture cases shows several types of delays occurring at different stages of proceedings:

- Inaction following the receipt of the complaint (which initially constitutes a delay that may turn into complete inaction over time where there is no reasonable prospect of any action being taken);
- Formal opening of investigations without any further action being taken, due to legal obstacles such as amnesties or immunities that potentially block investigations indefinitely or result in substantial delays (where amnesty legislation is subsequently repealed and immunities are lifted) or simple inaction.
- Formal opening of investigations followed by limited steps taken at the beginning of the investigation without any further action, with the investigation remaining open;
- Opening of investigation only to be closed after brief preliminary investigations or after inadequate investigations;
- Re-opening, closing and re-opening of investigations resulting in delays;
- Formal opening of investigations with substantial gaps between investigatory steps taken throughout proceedings;
- Inaction following completion of investigations and/or substantial gaps between completion of investigations and indictment;
- Delays in conducting the trial, including the fixing of hearing dates, postponements, time taken to deliver judgments.

Human rights treaty bodies have repeatedly expressed their concerns at the lack of prompt and expeditious investigations and the concomitant impunity. Both international and regional human rights treaty bodies and courts have ruled that the lack of prompt investigations and undue delays in torture proceedings violate states parties' obligations to an effective remedy.[1] The UN Special Rapporteur on Torture and other UN human rights mechanisms have raised concerns about the prevalence of delays in the investigation of serious human rights violations, including torture.[2] Human rights bodies have also dealt with the issue of delays in the context of countries' capacity to administer justice, in particular in relation to the effectiveness of police and prosecution services and judicial administrations.

[1] See infra at 2.2.2. II.

[2] Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Mongolia, UN Doc. E/CN.4/2006/6/Add.4, 20 December 2005, para.41 (highlighting the lack of institutional capacity of the investigation office) and Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Georgia, UN Doc. E/CN.4/2006/6/Add.3, 23 September 2005, paras.34, 35 (noting shortcomings in complaints procedure and delays in the early stage of investigations, in particular "with respect to medical examinations.")

Africa

The lack of prompt and expeditious investigations in torture cases is a marked problem in many African countries. The African Commission on Human and Peoples' Rights has issued the *Robben Island Guidelines*,[3] which specify in detail states parties' obligations to investigate torture cases promptly and effectively. The Commission has also issued several decisions in which it urged states parties to investigate torture cases though state compliance has been weak.[4]

Sudan

Farouk Mohamed Ibrahim El Nur, a professor at Khartoum University, was arrested on 30 November 1989. He was taken to the National Security Headquarters and was blindfolded and driven to a 'ghost house' where he was kicked, beaten and flogged and subjected to sleep deprivation. He sent a complaint to the President of Sudan on 29 February 1990 which detailed the torture and the names of those responsible. The complaint also requested his immediate release and for an investigation to be opened against the crimes that had been perpetrated against him "in violation of custom, morality, religion and law." [5]

In spite of strong medical evidence and a number of witnesses to the torture, no investigation was opened, not least because the alleged perpetrators, including some high-ranking officials, enjoyed immunity. Under Sudanese law, a criminal offence committed by an official can only be investigated and prosecuted if the head of the relevant authority grants approval and lifts immunity.[6]

Professor El Nur sent a letter to President Bashir in November 2000, in which he asked the President to take action, outlining three options, namely,

i) truth, apology and mutual reconciliation;
ii) prosecution before national courts; or
iii) prosecution before international human rights courts.

The letter went unheeded. In 2006, after the establishment of a new Constitutional Court in Sudan, Professor El Nur's lawyers sent a letter to the Attorney-General of Sudan, requesting him to prosecute those responsible, notwithstanding immunity laws and statutes of limitation which they argued where contrary to constitutional rights and international human rights standards. As there was no reply, Professor El Nur instructed his lawyers to file a constitutional petition challenging the legality of the immunity and prescription laws that blocked investigations and prosecutions in his case. The Constitutional Court of Sudan declared his case admissible in March 2006. At the time of writing, the case was still pending.

In practice, immunity is rarely lifted or investigations remain open indefinitely without a decision on the lifting of immunity. The perverse result in cases such as Professor El Nur's is

[3] *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002, Banjul, The Gambia.

[4] Frans Viljoen and Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1993-2004,* in 1 American Journal of International Law, Vol. 101 (January 2007), pp.1-34.

[5] Letter sent by Professor Farouk Mohamed Ibrahim to President Omar El Beshir on 13 November 2000, in: Amin Mekki Medani, *Crimes against International Humanitarian Law in Sudan*, 1989-2000, pp.276 et seq.

[6] See in particular Article 46 of the Police Forces Act of 1999 and Article 33 of the National Security Forces Act of 1999.

that any criminal prosecution is now time-barred. There are no apparent legal avenues for victims to challenge the lack of prompt investigations, police inaction and delays in the course of proceedings in Sudan. It is only recently that victims have been able to challenge the immunity legislation itself before the new Constitutional Court. However, as the petition in Professor El Nour's case shows, proceedings before that Court are also likely to take several years.

The African Commission on Human and Peoples' rights, in considering a case brought against Sudan, stressed the importance of

> "effective remedies under a transparent, independent and effective legal system, and ongoing investigations into allegations of torture."[7]

The United Nations Human Rights Committee, in its concluding observations of 2007 on Sudan's state party report under the ICCPR, expressed its concerns over:

> "…the immunity provided for in Sudanese law and untransparent procedures for waiving immunity in the event of criminal proceedings against state agents."[8]

Uganda

A student was arrested in Kampala in October 2005 by members of the Presidential Guard Brigade on allegations of treachery and exposure of classified information. He was taken to a 'safe house' (secret place of detention where detainees are held *incommunicado*) where he was held for two weeks during which he was subjected to torture. He continued to be held in other places until March 2006 when he was taken before a military body. He was later transferred to Luzira prison where he has been held ever since. By June 2007, when his lawyers filed a motion for *habeas corpus*, he had still not been produced before any competent court. This prompted authorities to charge him with another offence. He was released from prison in September 2007 after being granted an amnesty but has refrained from filing a complaint about his torture due to his fear of reprisals.

The case illustrates a common practice in Uganda where detainees are deprived from making timely habeas corpus applications. There is particularly poor access to habeas corpus remedies during the critical time immediately after arrest in instances where detainees are held incommunicado in 'safe houses', where they are most likely to be tortured.

There are also problems during the investigation process resulting in further delays. The Ugandan Police Force has a poor track record with investigations, as a result of staff shortages in several regions, inadequate resources, poor investigation techniques (including the lack of qualified forensic doctors and pathologists to take the required medical evidence) and susceptibility to bribes.[9] The police have received training on investigation techniques though this has not been torture specific and does not appear to have impacted on practice.[10]

In **Egypt**, the Prosecution service (DPP) has apparently opened investigations into several torture cases. However, in a number of cases it is still unknown what investigatory measures have been conducted, if any, since no information has been publicly released. In most cases,

[7] *Amnesty International and others vs. Sudan*, para. 56 (see table of authorities below for full citation of cases).

[8] Concluding observations of the Human Rights Committee: The Sudan, UN Doc. CCPR/C/SDN/CO/3, 29 August 2007, para.9.

[9] REDRESS, Torture in Uganda, *A Baseline Study on the Situation of Torture Survivors in Uganda*, 2007, p. 30.

[10] Ibid., pp.29, 30.

torture survivors are referred to medical experts for examination a long time after the injuries were inflicted. This makes it difficult to prove that any injuries resulted from torture and were inflicted during a specific period, especially during detention. Investigations often last indefinitely without a conclusive outcome, apparently due to inadequate investigation methods and a lack of vigour on the part of the DPP. The Committee against Torture expressed its concern about the excessive length of many of the proceedings initiated in cases of torture and ill-treatment.[11]

In **Kenya**, investigations proceed slowly, if at all. Many complaints are apparently not recorded or acted upon. Police often close investigations, citing lack of evidence, or keep the files open indefinitely without taking any action and/or informing complainants about the state of affairs. The delays in the collection of evidence in torture cases have meant that in some cases, crucial evidence is lost. Perpetrators of torture and their colleagues, who are usually not suspended or arrested, are also said to have manipulated evidence or obstructed complainants' attempts to obtain evidence.[12]

Asia

In Asia, impunity for torture remains a systemic problem, perpetuated *inter alia* by the lack of prompt and expeditious investigations. In the absence of regional human rights treaty bodies and limited access to individual complaints procedures, UN Charter bodies such as the Special Rapporteur on Torture, national courts and NGOs have played an important role in highlighting the practice and impact of delays, and in recommending remedial action.

Sri Lanka

In July 2003, 17 year-old **Chamila Bandara** was severely tortured following his arrest on fabricated charges of theft.[13] The trial against the police officers accused of Chamila Bandara's torture began in 2007, more than four years after the incident. Judging by the average duration of trials in torture cases, the proceedings can be expected to last at least another 5-8 years if the High Court verdict is appealed. Bandara's fundamental rights case filed before the Supreme Court in 2002 has been suspended until the completion of the High Court case, adding another layer of delay.

Chamila Bandara was still subject to criminal proceedings relating to three charges of theft brought against him in 2002. These charges were being heard by the Kandy Magistrates Court in 2007, despite the lack of evidence to support the charges. At the time of writing it was unclear when a verdict would be expected.

[11] Conclusions and recommendations of the Committee against Torture: Egypt, UN Doc. CAT/C/CR/29/4, 23 December 2002, para.5 (h).

[12] See REDRESS, *Reparation for Torture, A Survey of Law and Practice in Thirty Selected Countries: Kenya*, May 2003. See also Concluding observations of the Human Rights Committee: Kenya, UN Doc. CCPR/CO/83/KEN, 29 April 2005, para.18.

[13] According to the Asian Human Rights Commission: "During the incidence of torture he was beaten on the soles of his feet with a wicket and cane, had a shopping bag with petrol residues placed over his head and was suspended 4ft in the air from a beam on the ceiling with him thumbs tied together behind his back. As a result of the extreme pain, Chamila Bandara admitted to the thefts for the police officers had threatened that if he did not they would keep him hanging and tie a stone to his legs. On July 31 he entered the Kandy hospital and remained under treatment for six days, where doctors told him that a nerve in his left hand had been stretched. His legs were swollen, his hands were numb and he had headaches. A complaint was made to the hospital police. Since making further complaints to the Sri Lankan authorities, the victim and his family were forced into hiding after Chamila Bandara was discharged."

Chamila Bandara told the Asian Human Rights Commission that the delays in adjudication continue to have adverse consequences. Over the last three years, he has not been able to go home due to fear. He stated,

> "The people who hurt me are still the people hurting my family and pressuring my family. These people are allowed to interfere because of the delays."

Bandara also commented that when the time comes to give evidence, he is worried that because of the delays he might forget to tell something of vital importance to the case. He is trying to sit for his 'O level' and 'A level' examinations, however the stress of the cases is negatively impacting his education. His mother also indicated that the delays have allowed her family to be susceptible to interference. She expressed that:

> "in the last four years, I have changed from one place to another, my children have stayed in another place, we cannot stay together because of this delayed judiciary system."

This is but one of a series of cases that illustrates the impact on victims of delays in the Sri Lankan justice system. Sri Lanka, unlike many other states, has implementing legislation that makes torture a specific crime to be tried by the High Court.[14] Yet, chronic delays in investigations have left victims and witnesses vulnerable to threats and harassment, and other deficiencies in the investigation and prosecution of torture cases have rendered the Act largely ineffective.

The case of Chamila Bandara also highlights the pernicious effects of delays in the resolution of criminal charges pending against torture survivors. This is a common feature in several countries. These pending charges can relate to crimes to which the individuals confessed under torture, or counter-charges brought by law enforcement personnel as a result of having complained about torture. Counter-charges, in particular are often used as bargaining tools, i.e. officials promise to drop the charges if the torture survivor agrees to give up his or her claims regarding torture.

Several UN bodies have expressed concerns about the deleterious impact of delays in the investigation, prosecution and resolution of torture cases in Sri Lanka and have ruled that these constitute a violation of the right to an effective remedy. The UN Committee against Torture, in its concluding observations on Sri Lanka's state party report of 2005:

> "expresse[d] its deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances, mainly committed by the State's police forces. It is also concerned that such violations by law enforcement officials are not investigated promptly and impartially by the State party's competent authorities (art. 12).
>
> The Committee is concerned about the undue delay of trials, especially trials of people accused of torture."[15]

The UN Human Rights Committee, in the case of torture of *Rajapakakse v. Sri Lanka*:[16]

> "… observes that, as the delay in the author's fundamental rights application to the Supreme Court is dependant upon the determination of the High Court case,

[14] CAT Act No.22 of 1994.
[15] Conclusions and recommendations of the Committee against Torture: Sri Lanka, UN Doc. CAT/C/LKA/CO/2, 15 December 2002, paras. 12 and 14.

[16] *Rajapakse v. Sri Lanka*, para. 9.4.

> the delay in determining the latter is relevant for its assessment of whether the author's rights under the Covenant were violated. It notes the State party's argument that the author is currently availing himself of domestic remedies. The Committee observes that the criminal investigation was not initiated by the Attorney General until over three months after the incident, despite the fact that the author had to be hospitalised, was unconscious for 15 days, and had a medical report describing his injuries, which was presented to the Magistrates Court on 17 May 2002. While noting that both parties accuse each other of responsibility for certain delays in the hearing of this case, it would appear that inadequate time has been assigned for its hearing, viewed in light of the numerous court appearances held over a period of two years, since the indictments were served (four years since the alleged incident), and the lack of significant progress (receipt of evidence from one out of 10 witnesses). The State party's argument on the High Court's large workload does not excuse it from complying with its obligations under the Covenant. The delay is further compounded by the State party's failure to provide any timeframe for the consideration of the case, despite its claim that, following directions from the Attorney General, Counsel for the prosecution requested the trial judge to expedite the case."

In **India**, complaints about torture and deaths in custody resulting from torture are in most cases not given due attention because of the closed and protective police culture. Upon receiving complaints, the police often fail to prepare a first information report. For investigations or prosecutions, evidence is generally difficult to obtain because the alleged perpetrators and members of the police close to them refrain from co-operating, victims find it hard to identify the persons responsible and co-prisoners tend to be too afraid to become prosecution witnesses. Independent medical examinations of detainees and victims are often not carried out immediately or adequately, if at all, in disregard of existing Supreme Court directions and NHRC guidelines. As a result, investigations in torture cases are often unduly prolonged, ultimately resulting in a lack of prosecution.[17]

In **Israel**, the investigation of complaints against soldiers in torture cases is conducted by the Military Police Investigation Unit (MPIU) subject to prior authorisation by the Judge Advocate General's Office. According to a recent report by Israeli human rights organisations:

> "a considerable period of time passes between the filing of the complaint and the Judge Advocate General's Office's order to open an investigation, making it difficult for MPIU investigators to conduct an effective investigation: no physical evidence remains in the field, it is hard to locate eyewitnesses and the soldiers involved, witnesses who are located and are willing to give a statement have difficulty recalling the details of the event, and so forth." [18]

The report details a case of a beating of a Palestinian at a checkpoint and possible ill-treatment in custody, in which it took four and a half months to give the order to investigate and another two years to interview the complainant. Almost four years after the complaint was lodged, "the Judge Advocate General's Office informed HaMoked that it had been decided to close the file since 'the soldiers involved in the alleged incident were not located."[19]

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[17] See REDRESS/Commonwealth Human Rights Initiative, *Responses to Human Rights Violations: The Implementation of the Right to Reparation for Torture in India, Nepal and Sri Lanka,* February 2003, pp.21, 22 and Asian Human Rights Commission, *The State of Human Rights in Eleven Asian Nations-2006,* December 2006, pp.85, 86.

[18] Hamoked/B'Tselem, *Absolute Prohibition: The torture and ill-treatment of Palestinian detainees*, May 2007, p.83.

[19] Ibid.

In **Nepal**, investigations tend to be slow and are not seen as being carried out impartially or thoroughly. Complainants are faced with a hostile reaction, ranging from deliberate inaction to outright threats and physical attacks, including further torture, also of family members. Police officers have in numerous cases refused to allow injured detainees to see a doctor, to consult a doctor in their absence or have delayed access to a doctor, resulting in the loss or lack of evidence.[20]

In the **Philippines**, torture investigations often last for several years without conclusion. In a recent case, a panel of prosecutors ruled that the Department of Justice would not carry out any further investigations into the allegations of torture pending review of the death penalty imposed on the accused in 1999 by the Supreme Court as the matter was *sub judice*. As a result, the investigation into this case remained pending for more than six years after the victims had initially brought a complaint against named police officers.[21] The Commission on Human Rights may investigate torture cases but suffers from difficulties in obtaining access to army premises and inadequate resources. Moreover, where it has recommended prosecutions, requests have been pending with the Ombudsman or not been acted upon otherwise, resulting in further delays and ultimately lack of prosecution.[22]

Europe

In Europe, investigations in torture cases have repeatedly suffered from delays as evidenced by cases concerning Spain[23] and the jurisprudence of the European Court of Human Rights, in particular relating to violations in Russia and Turkey.[24] In spite of the repeated finding of violations by the Court, the lack of prompt and expeditious investigations remains a systemic problem in many countries.

Russia

Police officer **Aleksey Yevgenyevich Mikheyev**[25] was detained and questioned on 10 September 1998 by the police in Nizhny Novgorod in relation to the reported disappearance of a teenage girl whom he and his friend had met on 8 September while off duty. He was interrogated and tortured, with electric shocks administered to his ears. Unable to bear the

[20] See REDRESS/Commonwealth Human Rights Initiative, *Responses to Human Rights Violations*, pp.47, 48 and Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Nepal, UN Doc. E/CN.4/2006/6/Add.5, 9 January 2006, para.20, 26.

[21] See for details Amnesty International, *Philippines: Torture persists: appearance and reality within the criminal justice system*, AI Index: ASA 35/001/2003, 24 January 2003, pp.30 et seq.

[22] REDRESS, *Action against Torture, A practical guide to the Istanbul Protocol for lawyers in the Philippines*, November 2007, pp. 35, 36.

[23] See in particular the cases decided by the Committee against Torture, *Encarnacion Blanco Abad v. Spain* and *Henri Parot v Spain*.

[24] See in particular *Mikheyev v. Russia* and *Aksoy v. Turkey*, as well as further cases concerning the respective countries contained in the annexed Table of Authorities.

[25] *Mikheyev v. The Russian Federation*, Application No.77617/01, European Court of Human Rights, Judgment of 26 January 2006.

torture, Mikheyev tried to jump out of the window and broke his spine in the process. On the same day, the supposedly disappeared girl returned home unharmed.

Between September 1998 and 2005, investigations were opened, discontinued and reopened more than fifteen times after repeated decisions by various supervising prosecutors and district courts. Most of these investigations were short. In several cases they were carried out by the same investigators, and tended to rely on the findings and line of inquiry of earlier investigations. It was only due to the persistence of Mikheyev and the NGO Nizhny Novgorod Committee against Torture working on his behalf, which had submitted his case to the European Court of Human Rights in November 2001 that the authorities proceeded with the case and finally brought charges against two individuals in 2005. During the trial, the Court for the first time sought to assess comprehensively all the available evidence, including expert testimony. On 30 November 2005, two officers were found guilty of abuse of office and sentenced to four years imprisonment.

The European Court of Human Rights found that Russia had violated Articles 3 and 13 of the European Convention on Human Rights. In examining the investigations, it found, *inter alia*, that:

> "(para.113) … A number of investigative measures were taken very belatedly;
>
> (para.114) Not until 2000, following the transfer of the case file to another investigator, did the investigation move forward and new arguments and information appear in the investigator's decision. However, precious time had been lost, and in the Court's view, this could but not have a negative impact on the success of the investigation;
>
> (para.120) The Court emphasises furthermore that the case did not reach the trial stage until seven years after the events complained of. The pre-trial investigation was closed and then re-opened more than fifteen times, and it is clear that during certain periods the investigative process was no more than a formality with a predictable outcome….;
>
> (para.121) In the light of the very serious shortcomings identified above, especially during the course of the investigation, the Court concludes that it was not adequate or sufficiently effective. The Court thus dismissed the Government's objection based on non-exhaustion of domestic remedies and holds that there has been a violation of Article 3 of the Convention under its procedural limb in that the investigation into the alleged ill-treatment was ineffective."

The judgment of the European Court of Human Rights has not changed torture investigations in Russia. Investigations continue to be delayed and ineffective as a result of procedural circularities. Complaints about torture are regularly met with a hostile reaction by the police or inspection authorities that have in several reported cases failed to register the complaints or not acted upon them. If an investigation is opened, it is often delayed by several days if not weeks. The measures taken by the police and prosecution are often cursory. The *Prokuratura* has apparently limited its investigations to requesting information from the superior of the suspect and, when a general reply is made that no torture or ill-treatment had been committed, it is decided to close the case. Cases have been closed without victims being questioned and sometimes even in spite of available evidence indicating the commission of torture. In the face of a deficient practice of securing medical evidence, torture

survivors find it difficult to challenge the decision of the investigation body or prosecutor to close the investigation for lack of evidence.[26]

The United Nations Committee against Torture, in its concluding observations on Russia's state party report of 2007, expressed its concern about:

> "The insufficient level of independence of the Procuracy…and the failure to initiate and conduct prompt, impartial and effective investigations into allegations of torture or ill-treatment."[27]

Torture survivors and their relatives have reported a heightened state of anxiety and health problems at least partly attributed to the ongoing uncertainty about their pending cases.[28] Many have lost faith and trust in the authorities and bodies meant to dispense justice within the system.

In **Serbia**, investigating judges have often limited their investigations to requesting information from the police without taking into consideration any other evidence that might be available. In cases where investigations have been undertaken, they have either been unduly prolonged or have often been half-hearted.[29] In many cases, inaction and obstruction result in delays that lead to the expiry of the statutes of limitation by the time the charges over police maltreatment are finally filed in court. In the *Ristic*[30] and *Nikolić*[31] cases, state authorities failed at the initial stage of the inquiry, to undertake further independent investigations to establish the facts and the role of the police in the events. Shortcomings were also apparent in the *Danilo Dimitrijevic*,[32] *Jovica Dimitrov*[33] and *Dragan Dimitrijevic*[34] cases that related to police torture, including the failure of the State to investigate promptly and fairly as in the Dimitrov and Dragan Dimitrijevi, taking 34 months and 23 months respectively before any investigation was initiated.

The Prosecutor's Office has repeatedly failed to take any action at all or notify the complainant of the dismissal of the complaint. Since there is no time limit for the Prosecution in deciding whether to undertake a prosecution, and since the institution of a private prosecution in such cases is directly dependant on the said notification of the complainant, the inaction on the part of the Prosecutor's Office prevents torture victims from using the remedies envisaged by law.[35]

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[26] This paragraph is based on the assessment of the Nizhny Novgorod Committee against Torture and REDRESS, in *Taking Complaints of Torture Seriously, Rights of Victims and Responsibilities of Authorities*, September 2004, pp.48 et seq.

[27] Conclusions and recommendations of the Committee against Torture: The Russian Federation, UN Doc. CAT/C/RUS/CO/4, 6 February 2007, para.12.

[28] Based on the result of a series of interviews carried by a member of the NGO Nizhny Novgorod Committee against Torture in August 2007.

[29] See Written Comments of the Humanitarian Law Center concerning FR Yugoslavia For Consideration by the United Nations Committee against Torture at its 27th Session, 12-23 November, 2001, 6 November 2001, Articles 11 and 12.

[30] UN Doc. CAT/C/26/D/113/1998.

[31] UN Doc. CAT/C/35/D/174/2000.

[32] UN Doc. CAT/C/35/D/172/2000.

[33] UN Doc. CAT/C/34/D/171/2000.

[34] UN Doc. CAT/C/33/D/207/2002.

[35] REDRESS and Belgrade Centre for Human Rights, *Action against Torture, A practical guide to the Istanbul Protocol for lawyers in Serbia*, September 2007, pp.30, 31, and Concluding Observations of the Human Rights Committee: Serbia, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, paras.14, 15.

In **Turkey**, torture investigations are regularly delayed.[36] Police have reportedly failed to co-operate in investigations by not disclosing custody records, which are often not produced in the first place contrary to existing regulations, shielding perpetrators or manipulating evidence, resulting in delays and the lack of evidence. Several torture cases that have come to trial were so prolonged that they were subsequently discontinued on the grounds that statutes of limitation have come to apply.[37] The European Court of Human Rights has issued a series of judgments over the years detailing the lack of prompt investigations and delays in conducting proceedings.[38]

Latin America

In many Latin American countries, torture investigations have been slow, drawn-out and inconclusive. Delays in the course of investigations are a major factor contributing to impunity as the systemic problems have not been addressed, notwithstanding a series of judgments by the Inter-American Court of Human Rights ordering states to investigate allegations of torture effectively.[39]

Peru

Amalia Tolentino Hipolo was a young woman when, in 1994, she and her husband were stopped by a military patrol in the Huallaga region of Peru. The military conducted a series of 'counter-subversive' operations in this region in the context of the then conflict pitting the Fujimori Government against the Shining Path. Her husband Jesus Vera Vigilio was shot by the soldiers and Amalia Tolentino herself was gang-raped by 10-12 men. She lodged a verbal complaint with the local authorities at the time but no action was taken. It was only following a change in the regime and with the setting up of the Peruvian Truth and Reconciliation Commission, which investigated the case in 2003, that the provincial prosecutor in Aucayacu took up the case. In 2005, Amalia Tolentino provided her testimony to the Prosecutor who in turn ordered a psychological examination to be taken. The examination report found that Amalia Tolentino suffered from post traumatic stress disorder as a result of her husband's death. However, the psychological examination did not reach any affirmative findings on the relationship between the psychological suffering and the gang-rape. No physical examination was undertaken given that more than eleven years had passed since the event. The Prosecutor did not pursue the case further on the grounds that there was insufficient evidence and that it was impossible to identify the perpetrators.

The case illustrates the extraordinary obstacles that victims encounter in Peru, in particular where the violations were committed in the course of the armed conflict. A number of factors, such as the lack of resources, corruption, insufficient medico-legal expertise, high evidentiary thresholds and the lingering influence of high-ranking perpetrators, compound the difficulties already present as a result of the lengthy delays. In practice, even though there have been a few prosecutions for past violations, most of the perpetrators do not have to account for their crimes and victims face a permanent denial of justice.[40]

[36] See for example *Aydin v. Turkey*, para.105 and *Ilhan v. Turkey*, para.100.

[37] See *Bati and others v. Turkey*, para.145 and Human Rights Foundation of Turkey, *Torture and Impunity*, 2005, pp.61 et seq.

[38] See the cases of *Aksoy v. Turkey*, *Aydin v. Turkey*, *Bati and others v. Turkey* and *Ilhan v. Turkey*.

[39] See on the jurisprudence of the Inter-American Court of Human Rights, infra at 2.5.1. (c).

[40] See the Concluding comments of the Committee on the Elimination of Discrimination against Women: Peru, UN Doc. CEDAW/C/PER/CO/6, 2 February 2007, para.20.

The United Nations Committee against Torture, in considering Peru's state party report, recently expressed its concern over the "excessive length of such proceedings" in investigating torture cases.[41]

In **Brazil**, the agencies overseeing police conduct who investigate abuses frequently encounter difficulties, such as resistance from police officers, lack of good will and lack of cooperation from the heads of police stations (delegados). Consequently, torture investigations suffer from undue delays and are generally inadequate. Investigations carried out by the police are often abandoned or filed away and do not even reach the judicial authorities, especially in torture cases.[42]

In **Mexico**, the prosecutors and the judicial police are not seen to be vigorous in their investigation of torture complaints. Investigations are often closed or archived for lack of sufficient evidence. Victims have a right to challenge the decision to close an investigation but in any case, the available procedures are time-consuming and have therefore not provided an effective remedy to secure the timely reopening of investigations.[43]

2.2. International standards: prompt investigations and the right to an effective remedy

2.2.1. Rationale for prompt investigations and expeditious prosecutions

The purpose of torture investigations is to establish the facts and to identify the perpetrators in order to ensure accountability, provide justice to victims and deter future wrongdoing.

International standards recognise that investigations must be of a certain quality to achieve their objectives, namely they must be prompt, impartial and effective. Promptness is crucial from the receipt of the initial allegations about torture and throughout the investigation and prosecution. In the words of the United Nations Committee against Torture, there is a need to have a prompt investigation "to ensure that the victim cannot continue to be subjected to such acts,"[44] and because "the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear."[45] Delays also allow increase the opportunities for the harassment and intimidation of victims and witnesses.

Prompt investigations play a significant role in the arsenal of measures taken to prevent torture. They demonstrate the determination of the responsible bodies to act decisively against torture and those responsible for it. The promptness of investigations is thus a good

[41] Conclusions and recommendations of the Committee against Torture: Peru, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para.16.

[42] Concluding observations of the Human Rights Committee: Brazil, UN Doc. CCPR/C/BRA/CO/2, 1 December 2005, para.12 and Report by the Special Rapporteur [on Torture], Sir Nigel Rodley, submitted pursuant to Commission of Human Rights resolution 2000/43, Addendum: Visit to Brazil, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001.

[43] REDRESS, *Reparation for Torture, A Survey of Law and Practice in Thirty Selected Countries: Mexico*, May 2003. See also Conclusions and recommendations of the Committee against Torture: Mexico, UN Doc. CAT/C/MEX/CO/4, 6 February 2007, para.16.

[44] *Encarnación Blanco Abad v. Spain*, para. 8.2.

[45] Ibid.

indicator of the existence and effectiveness of any official policy to hold perpetrators of torture accountable. Moreover "[a] prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts [footnote omitted]."[46]

2.2.2. International standards: Prompt and effective investigation of torture allegations

I. International Treaties and Customary International Law Sources

Article 13 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment stipulates a right for every individual who alleges that he or she has been subjected to torture in the territory under the jurisdiction of the State party to a) bring a complaint to the competent authority and b) have the complaint investigated by the authorities promptly and impartially. Article 8 of the Inter-American Convention to Prevent and Punish Torture expressly requires states to guarantee individuals a channel through which they can submit their complaints of torture, and to have these complaints impartially examined through an immediate and proper investigation and criminal process.

The United Nations Human Rights Committee has identified a right to complain and have one's complaint heard promptly as part of the requirements of the International Covenant on Civil and Political Rights (ICCPR). According to this Committee, the prohibition of torture should be understood together with the obligation to guarantee a means of redress to victims whose rights have been violated. The Committee further stipulated the unequivocal obligation of States to provide victims with the right to complain under their domestic law and to investigate complaints promptly and impartially.[47] Regional courts have equally recognised a right to complaint and have one's complaint investigated promptly and effectively as integral element of the prohibition against torture in conjunction with the right to an effective remedy. [48]

The United Nations Special Rapporteur on Torture[49] and instruments such as the Istanbul Protocol,[50] the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,[51] the *Standard Minimum Rules for the Treatment of Prisoners*[52]

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[46] *Bati and others v Turkey*, para.136.

[47] See General Comment 20 Concerning the Prohibition of Torture and Cruel Treatment or Punishment (Art. 7) 10/3/1992 at para 14. See, also, Concluding Observations of the Human Rights Committee: Egypt, UN. Doc. CCPR/CO/76/EGY, 28 November 2002; Viet Nam, UN. Doc. CCPR/CO/75/VNM, 26 July 2002; Yemen, UN. Doc. CCPR/CO/75/YEM, 26 July 2002; Georgia, UN. Doc. CCPR/CO/74/GEO, 19 April 2002; Hungary, UN. Doc. CCPR/CO/74/HUN, 19 April 2002; Azerbaijan, UN. Doc. CCPR/CO/73/AZE, 12 November 2001; Uzbekistan, UN. Doc. CCPR/CO/71/UZB, 26 April 2001; Venezuela, UN. Doc. CCPR/CO/71/VEN, 26 April 2001; Syria, UN. Doc. CCPR/CO/71/SYR, 24 April 2001; Kyrgyzstan, UN. Doc. CCPR/CO/69/KGZ, 24 July 2000; and Congo, UN. Doc. CCPR/C/79/Add.118, 27 March 2000.

[48] See *Mikheyev v. Russia, Cantoral Benavides v. Peru* and other cases discussed in more detail infra at II (ii) and (iii).

[49] Report of the Special Rapporteur on Torture, Sir Nigel Rodley, UN Doc. E/CN.4/2004/56, 23 December 2003, para.39; General Recommendations of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, para. 26(i); See also Resolution Adopted by the General Assembly on the report of the Third Committee: "all allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place, and that national legal systems should ensure that the victims of such acts obtain redress and are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation" at para. 2.

[50] Principle 2 of the Istanbul Principles, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 55/89 Annex, 4 December 2000.

[51] Adopted by General Assembly resolution 43/173 of 9 December 1988. Principle 33 (4): "Every request or complaint shall be promptly dealt with and replied to without undue delay."

[52] Rule 36 (4): "Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay."

and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[53] equally stipulate that complaints about torture should be investigated 'promptly.'

II. Substantive rights and obligations

(i) Timely access to complaints procedures, including prompt access to a judge

Anyone alleging torture must have effective access to complaints procedures. To this end, detainees and others need to be promptly informed about available remedies and complaints procedures,[54] and need to have prompt access to lawyers, physicians and family members[55] and, in the case of foreign nationals, diplomatic and consular representatives.[56] They must be able to lodge complaints with appropriate bodies in a confidential manner[57] in any form and without delay.

The right to be promptly brought before a judge (*habeas corpus*) is particularly important to ensure the right to complain of torture. While the immediate purpose of *habeas corpus* is to prevent arbitrary detention, it is often the first or only opportunity for a detainee to complain of torture to an independent body. As held by the Inter-American Court of Human Rights:

> "In cases concerning deprivation of liberty, …the *habeas corpus* remedy constituted, among indispensable judicial guarantees, the most suitable means to ensure freedom, oversee the respect for life and personal integrity and avoid disappearances or lack of information about detention centres, as well as to protect the individual from torture or other forms of cruel, inhumane or degrading treatment."[58]

The right to *habeas corpus* is expressly guaranteed in Article 5 (3) and (4) of the European Convention on Human Rights and Article 7 (5) of the Inter-American Convention on Human Rights. The African Commission on Human and Peoples' Right has recognised that the right

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[53] *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, UN Doc. A/RES/60/147, 16 December 2005.

[54] Concluding Observations of the Human Rights Committee: Bolivia, UN Doc. CCPR/C/79/Add.74, 1 May 1997, para.28; Principle 13 of the Body of Principle for the Protection of All Persons under any Form of Detention or Imprisonment (hereinafter Body of Principles) and Rule 35 of the Standard Minimum Rules for the Treatment of Prisoners. According to the European Committee for the Prevention of Torture, "Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are expressly informed of their rights without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights." European Committee for the Prevention of Torture The CPT Standards, 12th General Report, Council of Europe, October 2001, CPT/Inf (2002) 15, para.44.

[55] CPT, 12th General Report, para.40: "As from the outset of its activities, the CPT has advocated a trinity of rights for persons detained by the police: the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice." Principles 15-19 of the Body of Principles.

[56] Principle 16 (2) of the Body of Principles; Rule 38 of the Standard Minimum Rules for the Treatment of Prisoners. The International Court of Justice has in the *LaGrand Case (Germany v United States of America)*, para.77 and the *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, recognised that Article 36 (1) of the Vienna Convention on Consular Relations creates individual rights for the national concerned.

[57] See CPT, Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 22-30 May 2000, CPT/Inf (2003) 1, para.41: "The right for prisoners to have confidential access to appropriate authorities is an important additional safeguard against ill-treatment. In this respect, the CPT's delegation noted that the prison authorities have installed locked boxes through which inmates may have direct access to the Director of Nicosia Central Prisons and to the Prison Board. This is a welcome development, which should be extended to allow prisoners direct access to bodies which are entirely independent of the prison system." See also Principle 33 (3) of the Body of Principles: "Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant."

[58] *La Cantuta v. Peru*, para.111, and *Advisory Opinion, Judicial guarantees in states of emergency (Article 27 (2), 25 and 8 American Convention on Human Rights*, para.35.

to *habeas corpus* forms part of the right to trial under Article 7 (1) (d) of the African Charter on Human and Peoples' Rights.[59] Article 9 (3) of the ICCPR stipulates that: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

The Human Rights Committee, in interpreting this right:

> "…recalls that …anyone arrested or detained on a criminal charge has to be brought promptly before a judge or other officer authorized by law to exercise judicial power, and that … such delays must not exceed a few days."[60]

This Committee has regularly found that the period between arrest and being brought before a judge has been prolonged, in violation of the ICCPR. In a series of findings, it determined that: 3 days,[61] 5 days,[62] 6 days,[63] 7 days,[64] 11 days,[65] 3 weeks,[66] 6 weeks,[67] and 218 days,[68] were too long, and that the ICCPR had been violated. The European Court of Human Rights found that periods of four days and six hours;[69] 14 or more days;[70] and at least 16 and 23 days of detention[71] "without being brought before a judge or other judicial officer did not satisfy the requirement of promptness in Article 5(3)."[72] The Inter-American Court of Human Rights, in a case concerning the exercise of the remedy of *amparo*, which is similar to *habeas corpus,* considered that ruling on the remedy 21 days after it was filed was "clearly an excessive time."[73]

The following standards can be deduced from the relevant jurisprudence:

- The right to *habeas corpus* is a non-derogable right and cannot be suspended in times of emergency;[74]
- Anyone arrested or detained needs to be brought before a judge as soon as possible, and the latest within a few days;[75]

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[59] *Zegveld and Ephrem v. Eritrea*, paras.55, 56 and *Article 19 v. Eritrea*, para.96.

[60] *Willy Wenga Ilombe and Nsii Luanda Shandwe v. Democratic Republic of the Congo*, para.6.3; *Rawle Kennedy v. Trinidad and Tobago,* para.7.6; *Silbert Daley v. Jamaica*, para.7.1; *Louisa Bousroual v. Algeria*, para.9.6; *Abdukarim Boimurodov v. Tajikistan*, para.7.4; *Rafael Marques de Morais v. Angola*, para.6.3; *Ali Medjnoune v. Algeria*, para.8.7.

[61] *Rostislav Borisenko v. Hungary*, para.7.4.

[62] *Abdumalik Nazarov v. Uzbekistan*, para.6.2.

[63] *Rawle Kennedy v. Trinidad and Tobago*, para.7.6.

[64] *Safarmo Kurbanova v. Tajikistan*, para.7.2.

[65] *Dennis Lobban v. Jamaica*, para.8.3.

[66] *Beresford Whyte v. Jamaica*, para.9.1.

[67] *Silbert Daley v. Jamaica*, para.7.1.

[68] *Ali Medjnoune v. Algeria*, para.8.7

[69] *Brogan v United Kingdom*, para.62.

[70] *Aksoy v Turkey*, para.66.

[71] *Demir and others v Turkey*, para.40.

[72] *Aksoy v. Turkey*, para.66.

[73] *Tibi v. Ecuador*, para.134.

[74] Human Rights Committee, General Comment 29, para.16; IACHR, Advisory Opinion, Judicial guarantees in states of emergency (Article 27 (2), 25 and 8 American Convention on Human Rights, paras.25, 26; *Castillo-Petruzzi et al. v Peru*, para.188; Aksoy v. Turkey, paras.76 et seq.; *Article 19 v. The State of Eritrea*, para.96.

[75] See jurisprudence referred to in the preceding paragraph.

- Incommunicado detention lasting for more than a very short time will normally violate the right to be brought promptly before a judge;[76]
- It is not sufficient to advise a detainee of the charges, the state must put him/her before an individual with judicial authority;[77]
- It is not sufficient to obtain confirmation of the detention from the public prosecutor, as such confirmation must come from a person exercising judicial authority.[78]

The United Nations Human Rights Committee also found a violation of Article 9 (3) in those cases where domestic rules of criminal procedure only allow an appeal to a higher prosecutor, and where detention cannot be challenged in court,[79] including those cases where such detention took place under the authority of anti-terrorism laws.[80]

With regard to the period between filing a *habeas corpus* application and the decision on such application, the ECHR found that a delay of 23 days was in violation of Article 5 (4).[81] The Inter-American Court of Human Rights has ruled on the effectiveness of *habeas corpus* remedies in several disappearance cases, considering the timeliness as one factor in assessing overall effectiveness.[82] In the case of *Juan Humberto Sanchez v. Honduras*, the Court found that the fact that it took the serving judge 8 days to report back to the court in charge of deciding on the *habeas corpus* remedy constituted a delay that contributed to rendering the remedy ineffective.[83]

(ii) Commencing an investigation

As a general rule there is "…an obligation on the authorities to proceed automatically to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture or ill-treatment has been committed, no special importance being attached to the grounds for the suspicion."[84] As held by the European Court of Human Rights "…whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used"[85] The use of the words 'automatically' and the phrase 'as soon as' implies that states must open investigations into credible allegations of torture as a matter of course upon receiving such information.

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[76] *Teran Jijon v Ecuador*, para.5.3; *Rafael Marques de Morais v. Angola*, para.6.3; *Fatma Zohra Boucherf v. Algeria*, para.9.5; *Ali Medjnoune v. Algeria*, para.8.7 and *Louisa Bousroual v. Algeria*, para.9.6; *Abdukarim Boimurodov v. Tajikistan*, para.7.4. As for regional jurisprudence, see the judgment of the Inter-American Court in *Cantoral Benavides v. Peru*, paras.81 et seq.; *Kurt v. Turkey*, paras.122 et seq. and *Article 19 v The State of Eritrea*, para.100.

[77] *Beresford Whyte v. Jamaica*, para.9.1.

[78] *Platonov v. Russian Federation*, para.7.2: "The Committee observes that article 9, paragraph 3, is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. [Footnote omitted] In the circumstances of the present case, the Committee is not satisfied that the public prosecutor may be characterized as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9, paragraph 3." See also *Kulomin v. Hungary*, para.11.3; *Darmon Sultanova v. Uzbekistan*, para.7.7 and *Yuri Bandajevsky v. Belarus*, para.10.3.

[79] *Saimijon and Malokhat Bazarov v. Uzbekistan*, para.8.2.

[80] *Yuri Bandajevsky v. Belarus*, para.10.3; *Marlem Carranza Alegre v. Peru*, para.7.3.

[81] *Rehbock v Slovenia*, paras.85, 86.

[82] *Serrano-Cruz Sisters v. El Salvador*, paras.75 et seq. and *Gomez-Paquiyauir Brothers v. Peru*, para.97 and *La Cantuta v. Peru*, para.111.

[83] *Humberto Sanchez v. Honduras*, para.122.

[84] *Dhaou Belgacem Thabti v. Tunisia*, para.10.4. See also *Bouabdallah Ltaief v. Tunisia*, para.10.4; *Imed Abdelli v. Tunisia*, para. 10.4.

[85] *Bati and others v Turkey*, para.133.

There are no hard and fast rules as to what constitutes 'prompt' or 'immediate.' The jurisprudence indicates that the words would normally be given their literal meaning. However, human rights treaty bodies provide limited guidance as to when a delay becomes unacceptable. There are no clear rules on a specific timeframe or the factors to be taken into account when considering delays. Nor is there consistent reasoning why a particular delay is in violation of a state party's obligations, many decisions simply stating that a particular period for taking certain measures constitutes a violation. Instead, guidance must be deduced from the case-by-case approach taken by human rights bodies.

The United Nations Committee against Torture found that delays in opening an investigation following a complaint about torture or other ill-treatment violated the Convention. The number of days of delay related to these findings was as follows:

- 14 days; [86]
- 10 months[87] and 15 months respectively;[88]
- 34 months;[89]
- 7 years.[90]

The Committee against Torture held that the "lack of any protest" from the torture victim about the long period of delay does not excuse delays in examining complaints.[91]

The Human Rights Committee declared in its General Comment 20 that, "complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective." It has not specified the meaning of promptness but has dealt with it on an individual case-basis, finding, for example, that a delay of three months in opening an investigation failed to meet this obligation.[92]

The European Court of Human Rights has found in several cases that the authorities failed to carry out prompt and timely investigations but has neither defined the meaning of "prompt" nor developed uniform criteria. In its consideration of the investigation of torture cases, the Court has applied the test of whether "the authorities reacted effectively to the complaints at the relevant time."[93] As elaborated in the case of *Bati v. Turkey*:

> "It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context…While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, it may generally be regarded as essential for the authorities to launch an investigation promptly in order to maintain public confidence in their adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[94]

[86] *Encarnación Blanco Abad v. Spain*, paras.8.4, 8.5.

[87] *Khaled M'Barek v. Tunisia*, para.11.5.

[88] *Qani Halimi-Nedzibi v. Austria*, para.13.5.

[89] *Jovica Dimitrov v. Serbia and Montenegro*, para.7.2.

[90] *Ali Ben Salem v. Tunisia*, para.16.7.

[91] *Blanco Abad v. Spain*, para.8.7.

[92] *Rajapakse v. Sri Lanka*, para.9.4.

[93] *Labita v Italy*, para.131.

[94] *Bati and others v Turkey*, para.136.

The Court's jurisprudence indicates that there should be no unnecessary delay in beginning the investigation, which should be carried out within reasonably short succession after receiving the complaint.[95]

The Inter-American Court of Human Rights, in the case *Cantoral Benavides v Peru*, referred to Article 8 of the Inter-American Convention to Prevent and Punish Torture, which "clearly sets forth the obligation of the State to proceed as a matter of routine and immediately in cases such as the present case [which concerned a torture investigation]," thus implying a literal meaning.[96] In an important clarification of the scope of the obligation to promptly commence investigations ex officio, the Inter-American Court of Human Rights held in the Maritza Urrutia case that:

> "Article 8 of the Inter-American Convention against Torture[97] establishes expressly the State's obligation to proceed, de officio, and immediately in cases such as this, regardless of the inactivity of the victim. In this respect, the Court has stated that 'in proceedings on human rights violation, the State's defense cannot rest on the impossibility of the plaintiff to produce evidence that, in many cases, cannot be obtained without the cooperation of the State.' In the instant case, the State did not act in accordance with these provisions."[98]

(iii) Expediency of investigations

In the case of *Encarnacion Blanco Abad v Spain,* the investigation took 10 months, with gaps of between one and three months between the taking of statements and the consideration of forensic evidence. The United Nations Committee against Torture found this to be an unacceptable delay. The European Court of Human Rights summarised its position on the expediency of investigations in the case of *Mikheyev v. Russia*:

> "The investigation must be expedient. In cases under Articles 2 and 3 of the Convention, where the effectiveness of the official investigation was at issue, the Court often assessed whether the authorities reacted promptly to the complaints at the relevant time (see *Labita v. Italy* [GC], no.26772/95, § 133 et seq., ECHR 2000-IV). Consideration was given to the starting of investigations, delays in taking statements (see *Timurtaş v Turkey*, no. 23531/94, § 89, ECHR 2000-VI, § 67), and the length of time taken during the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001).[99]"

The European Court of Human Rights found a lack of effectiveness and expediency in *Mikheyev* on several grounds:

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[95] *Çlçek v. Turkey*, para.149; *Timurtas v. Turkey*, para.89. See also *Tekin v. Turkey*, para. 67; and *Labita v. Italy*, para.133.

[96] *Cantoral Benavides v. Peru*, para.189 and*, Gutierrez-Soler v Colombia*, para.54: "The Court considers that, in the light of the general obligation of the State Parties to respect and guarantee the rights of all persons subject to its jurisdiction, contained in Article 1(1) of the American Convention, the State has the obligation to commence immediately an effective investigation that may allow the identification, the trial and the punishment of those liable, whenever there is an accusation or well-grounded reason to believe that an act of torture has been committed in violation of Article 5 of the American Convention. Furthermore, this action is specifically regulated in Articles 1, 6 and 8 of the Inter-American Convention against Torture, which Articles bind the State Parties to take all steps that may be effective to prevent and punish all acts of torture within the scope of their jurisdiction, as well as to guarantee that all torture cases be examined impartially."

[97] Article 8 of the Inter-American Convention to Prevent and Punish Torture stipulates that: "… if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed ex officio and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."

[98] *Maritza Urrutia v. Guatemala*, para.128. See for more recent jurisprudence also *Castro-Castro v Peru*, paras.378 et seq.

[99] *Mikheyev v Russia*, para.109.

(i) in the absence of the investigation file, the Court was not in a position "to know when and how the evidence was obtained";
(ii) there were a "number of significant omissions in the official pre-trial investigation" relating to the search of the alleged scene of torture and lack of questioning of potential witnesses;
(iii) "a number of investigative measures were taken very belatedly," such as the report on the forensic medical examination of *Mikheyev*, which was only produced more than five weeks after the alleged torture; a time lapse of two years for holding an identification parade; questioning of witnesses more than two years after the incident; carrying out a psychiatric examination after more than two years;
(iv) the loss of "precious time" as a result of repeated discontinuance of investigations following orders to reopen proceedings, often on "almost identical evidence and reasoning."[100]

The reasoning of the Court yields several important findings:

(i) Reliable information of investigative steps taken has to be provided by the state party to show that investigations met the required standard;
(ii) Omissions or the failure to take certain investigative measures do not strictly speaking constitute delays but simple inaction. However, where investigations are ongoing, it is often impossible to distinguish between permanent inaction and delays;
(iii) The reasoning of the Court shows the close link between prompt and effective investigations according to which national authorities "must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence etc…"[101]
(iv) Delays due to procedures relating to the opening and discontinuance of proceedings, and lack of compliance therewith can also constitute violations.

The Inter-American Court of Human Rights elaborated on the 'respect for the principle of reasonable time' in the case of *Serrano-Cruz Sisters* where proceedings had "remained at the investigation stage for approximately 7 years and 10 months…"[102] The Court:

> "has established that three elements should be taken into account in determining whether the time in which proceedings was conducted was reasonable [in terms of Article 8 (1) of the American Convention]: a) the complexity of the case; b) the procedural activity of the interested party, and c) the conduct of the judicial authorities."[103]

In the case of *Maritza Urrutia* (Guatemala), an investigation into the alleged abduction and torture was opened in August 1992. The victim was summoned to appear through her father who was, however, not in contact with her. Upon her failure to appear, the national authorities did not initiate a criminal investigation. The Office of the Attorney General

[100] *Mikheyev v. Russia*, paras.111 et seq.

[101] Ibid., para.108.

[102] *Serrano-Cruz Sisters v. El Salvador*, para.68.

[103] Ibid., para.67. *Las Palmeras v. Colombia* (Merits), para.63; *19 Tradesmen v. Colombia*, paras.189 et seq; *Pueblo Bello Massacre v. Colombia*, para.171and *Ximenez-Lopez v. Brazil*, paras.196 et seq.

received the case file in June 1995 but failed to take any action subsequently. The Inter-American Court of Human Rights held that:

> "(para.125) By not investigating the human rights violations effectively for more than 11 years, and not punishing those responsible, the State violated the obligation to respect the rights established in the Convention and to guarantee their free and full exercise to the victim [and] (para.127) … in this case it has been proved that Maritza Urrutia was tortured, a situation that imposes a special obligation on the State to investigate. In this respect, as indicated in the proven facts, the administrative and judicial authorities abstained from adopting any formal decision to initiate a criminal investigation of the alleged perpetration of the crime of torture, even thought the Resolution of the Guatemalan Ombudsman of October 6, 1992, concluded that, among other rights, the right of Maritza Urrutia to humane treatment had been violated [footnote omitted] and demanded from the Government 'an effective investigation and a prompt clarification of the facts.'"

The case is an important illustration of the lack of follow-up in systems where national human rights institutions, such as the Ombudsman, may initially investigate a case and recommend further action but the national authorities fail to act on such recommendations. This results in a delay in opening criminal investigations that may become indefinite where there is a lack of will to proceed.

Judge Sergio Garcia Ramirez reviewed and commented on the jurisprudence of the Inter-American Court of Human Rights on delays in his concurring opinion in the case of *Mack Chang v Guatemala*:

> "[P]rotracted delay may, in itself, fragrantly violate the principle of reasonable time, irrespective of these indicative considerations. In one case, the Inter-American Court considered that five years would more than correspond to reasonable time (Genie Lacayo case, Judgment of January 29, 1997, Series C No. 30, para. 81) and, in another, it considered that a period of fifty months 'far exceeds the 'reasonable time' contemplated in the American Convention' (Suárez Rosero case, Judgment of November 12, 1997, cit., Series C No. 35, para. 73). As I have already said, the principle of reasonableness, with its natural temporal references, encompasses not only the proceeding against any individual, but also the proceeding to comply with the obligation of criminal justice entailed by a judgment on reparations. In the instant case, the duration of the proceeding, with all its implications and different aspects, has been more than double these periods, without a final decision being pronounced. At 'the time of this judgment, after more than 13 years, the criminal proceeding is underway and the remedy of cassation is pending a decision, so that the final judgment that will decide on and punish those responsible for the extrajudicial execution of Myrna Mack Chang has still not been rendered.'"[104]

2.3. Effective prosecution and punishment of those responsible for torture

International law imposes a duty on states to ensure that acts of torture are recognized as offences under national criminal law. It also obliges states to investigate with a view to prosecuting suspects against whom there is credible evidence of torture, where the suspects

[104] *Myrna Mack Chang V. Guatemala,* Reasoned Concurring Opinion Of Judge Sergio García Ramírez To The Judgment In Mack Chang V. Guatemala of November 25, 2003, para.272.

are found on its territory, unless the suspects are extradited.[105] As stated by the United Nations Human Rights Committee:

> "State Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) …".[106]

There are no express provisions on the right and concomitant duty of states to try those responsible of torture expeditiously. As was determined by the Human Rights Committee in *Andreu v. Colombia*:[107] "… the Covenant does not provide a right for individuals to require that the State criminally prosecute another person…The Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified."

As held by the Human Rights Committee in *Rajapakse v. Sri Lanka* in respect of a torture case:

> "Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The general information provided by the State party on the workload of the domestic courts would appear to indicate that the High Court proceedings and, thus, the author's Supreme Court fundamental rights case will not be determined for some time. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when it is clear that the remedies relied upon by the State party have been prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated article 2, paragraph 3, in connection with 7 of the Covenant."[108]

Courts have also considered cases in which the delay in the proceedings impinged upon statutes of limitation. In such cases the delays were so significant that they resulted in a denial of justice to victims.[109]

2.4. The absence of effective investigations, prosecutions and punishment as a form of torture or ill-treatment in its own right

The Inter-American Court of Human Rights has held in several cases of disappearances that the lack of effective investigations and the impunity which results constitutes a violation of the right to humane treatment of the next of kin. This is due to the impact on the security and

[105] See in particular Articles 4-9 of the UN Convention against Torture.

[106] UN Human Rights Committee, General Comment 31, para.18

[107] *Federico Andreu v. Colombia*, para.8.6.

[108] *Rajapakse v. Sri Lanka*, para.9.5. See also case of *Dingiri Banda v. Sri Lanka*, para.7.3. where the HRC found that proceedings in a torture case that were ongoing after more than seven years were unduly prolonged and ineffective, also taking into consideration that the state party did not provide any timeframe for the consideration of the case.

[109] See in particular the jurisprudence of the Inter-American Court of Human Rights, *Montero-Aranguren et al v Venezuela*, para.141; *Trujiloo-Oroza v Bolivia* (Merits), para.102 and *Las Palmeras v Colombia* (Merits), para.69.

mental well-being of the victims, including the anxiety, anguish and grief caused by the denial of justice.[110]

The European Court of Human Rights has mainly considered the failure to effectively investigate and prosecute allegations of torture as falling under the procedural limb of the substantive prohibition of torture (Article 3). However, it has also found that shortcomings in the investigation of enforced disappearances, such as procedural delays, including the failure to provide information to relatives, "are elements contributing to the applicant's suffering" and may constitute ill-treatment violating Article 3 of the Convention.[111]

The prospect that delays in proceedings, in particular prolonged arbitrary detention may in itself constitute torture or ill-treatment has been raised in relation to the detention practice in Guantánamo Bay.[112] Human rights bodies have considered prolonged detention as a possible violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in their the jurisprudence on the so-called death-row phenomenon (waiting for one's execution for a prolonged period of time in special detention units).[113] The European Court of Human Rights have also found violations in cases where the detention conditions were such that, combined with the length of detention, they constituted degrading treatment.[114] The Human Rights Committee held in *Mr. C v. Australia* that the continued detention of a detainee suffering from severe mental illness constitutes a violation of article 7 where the State party fails "to take the steps necessary to ameliorate the author's mental deterioration."[115]

These cases do not directly address the question whether, and if so under what circumstances, prolonged detention without trial *per se* amounts to a violation of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. A convincing argument can be made that the use of such detention, in particular where it is used as a strategy to wear down detainees in order to make them confess or to punish them, causes such a level of pain and suffering that it can, depending on the circumstances, in and of itself constitute ill-treatment if not torture. The rationale of the Human Rights Committee's decision in *Mr. C v. Australia* must apply even more so in cases where prolonged detention without trial is used to, or inevitably results in causing mental suffering without the state in question taking any steps either to expedite proceedings or to lessen the mental suffering through other appropriate measures, in particular release.

[110] *Mapiripán massacre v Colombia*, paras.145, 146; *19 Tradesmen v Colombia*, para.215.

[111] *Kukayev v Russia*, para.108; *Magomadov and Magomadov v. Russia*, paras.119, 120; *Alikhadzhiyeva v. Russia*, paras.81, 82; *Orhan v Turkey*, paras.358 et seq. and *Kurt v. Turkey*, paras.133, 134.

[112] Human Rights Council, 'Situation of Detainees at Guantánamo Bay,' E/CN.4/2006/120 (27 February 2006), para.87.

[113] See the decision by the Human Rights Committee in *Wilson v Philippines,* para.7.4 (with further references to the jurisprudence of the Committee).

[114] *Alver v. Estonia*, para.56 and *Dougoz v. Greece*, para.48.

[115] *Mr. C. v. Australia*, para.8.4.

2.5. Tackling delays in torture cases: Ensuring prompt and effective investigations and prosecutions

2.5.1. Bringing a case before an international human rights treaty body

a) Admissibility: Unreasonably prolonged domestic remedies

Victims of torture whose complaints are not promptly investigated or whose cases are not dealt with expeditiously may invoke the international standards just outlined in requesting the national investigating or prosecuting body concerned to take the requisite action and in requesting any court seized with the matter to expedite proceedings. This is in line with the general rule according to which international complaints procedures require that complainants exhaust domestic remedies for a case to be admissible.

As explained by the African Commission on Human and Peoples' Rights in *Jawara v. Gambia*

> "The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort."[116]

A complainant is expected to exhaust remedies that are:

> "… available, effective and sufficient… A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."[117]

Conversely, remedies need not be exhausted if they are 'unduly prolonged.'[118] As a general rule, it is not sufficient for a complainant simply to state that domestic remedies will be unduly prolonged. A complainant must try to exhaust existing remedies unless there is clear evidence that remedies are prolonged and/or ineffective.[119] Once it is demonstrated that the proceedings are *prima facie* unduly prolonged, the burden shifts to disprove this.[120]

Domestic remedies may be unduly prolonged and hence ineffective:

- Where investigations and/or prosecutions of allegations of torture have been delayed substantially or even indefinitely;[121]
- In cases of massive human rights violations;[122]

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[116] *Jawara v Gambia*, para.31.

[117] *Ibid.*, paras.31, 32.

[118] This is expressly recognised in Article 22 (5) (b) CAT, Article 5 (2) of the Optional Protocol to the ICCPR, Article 46 (2) (b) of the Inter-American Convention on Human Rights and Article 56 (5) of the African Convention on Human and Peoples' Rights. Although not explicitly stipulated in Article 35 of the European Convention on Human Rights, the European Court of Human Rights has recognised that remedies that are unduly prolonged are not effective and need not be exhausted. See for example the admissibility decision in *Mikheyev v. Russia*, Application no. 77617/01.

[119] See *Las Palmeras v. Colombia* (Preliminary Objections), para.38; *Aksoy v. Turkey*, paras.52 et seq,; *Amnesty International v. Sudan*, paras.29 et seq; *Dingiri Banda v. Sri Lanka*, para.6.4.

[120] This is according to the general principle applied in the jurisprudence of all international human rights bodies that the state party has to show that remedies are available and effective, see e.g. Velasquez Rodriguez v. Honduras, paras.63, 64. See also *Rajapakse v. Sri Lanka*, paras.6.1, 6.2.; *Las Palmeras v. Colombia* (Preliminary Objections), para.38; *Ilhan v. Turkey*, paras.56 et seq.; *Jawara v. The Gambia*, paras.33, 34.

[121] *Jovica Dimitrov v. Serbia and Montenegro*, para.6.1; *Dragan Dimitrijevic v. Serbia and Montenegro*, para.6.2.

- Where proceedings have been pending for a substantial time, often for several years, without there being a convincing explanation for the length of time taken towards reaching a decision.[123]

What length of time is reasonable in the circumstances depends on the particulars of the case. The Human Rights Committee, for example, found that the passage of eighteen months in proceedings relating to torture and conditions of detention that were pending before the Magistrates Court and the Supreme Court in the case of *Fernando v. Sri Lanka* did not amount to 'unduly prolonged' remedies.[124] In the case of *Pimentel v. the Philippines*, the Committee held that domestic proceedings relating to the enforcement of a foreign judgment awarding damages to torture survivors were not 'unduly prolonged' on the ground that the Supreme Court of the Philippines had rendered a favourable decision and reinstated the case.[125] On the other hand, a delay of three years in determining a fundamental rights case for torture in the case of *Rajapakse v Sri Lanka*, and a period of eight years for deciding on the issue of a filing fee in a proceeding forming part of *Pimentel v the Philippines* was considered as rendering the respective remedy 'unduly prolonged.'[126]

b) Merits: Proving a violation

Once a case has been declared admissible, the applicant(s) must demonstrate that there has been a delay for which the state party concerned is responsible. This can be done by demonstrating that the national authorities knew about an allegation but failed to act and/or that they had not taken specific investigatory measures by a certain date, or only very belatedly. Showing that such investigative failings are common in similar cases and part of a widespread if not systematic practice would further strengthen the case of the applicants. The state party would then have to refute the argument, showing why such a delay was not unreasonable notwithstanding the duty to investigate promptly and to conduct investigations expeditiously.

c) Provisional measures and reparation awarded by human rights bodies

Lawyers may seek a range of remedies where a breach is found. The availability of such remedies will depend on the national legislation in place and the practice of the regional human rights court or international human rights body concerned. The Inter-American Court of Human Rights, in particular, has ordered far-reaching remedies that include the obligation to conduct effective investigations and make legislative changes.[127] This contrasts with the practice of the European Court of Human Rights, which tends to confine itself to some measures of restitution and compensation when awarding 'just satisfaction.'[128] Against this

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[122] *Amnesty International and others v Sudan*, paras.29 et seq.

[123] See in particular the jurisprudence of the Human Rights Committee in *Rajapakse v. Sri Lanka*, paras.6.1, 6.2., and *Bandara Dingi v. Sri Lanka*, para.6.4.

[124] *Fernando v Sri Lanka*, para.8.2.

[125] *Pimentel v the Philippines*, para.8.2.

[126] Ibid., para.8.3. and *Rajapakse v Sri Lanka*, paras.6.1, 6.2.

127 Article 63 (1) of the American Convention of Human Rights. See for the rich jurisprudence of the Inter-American Court on remedies, for example, *Castro-Castro v Peru*, paras.410 et seq.; *Tibi v Ecuador*, paras. 222 et seq. and *Blanco-Romero v Venezuela*, paras.66 et seq.

[128] Article 41 of the European Convention on Human Rights. See for compensation in torture case, *Mikheyev v. Russia*, paras.146 et seq. and *Selmouni v. France*, paras.120 et seq. In cases of torture or inhuman or degrading treatment or punishment where detainees are unlawfully detained, the European Court of Human Rights may, in addition to compensation, order the release of the person thus detained, see *Assanidze v. Georgia*, paras.202, 203 and *Ilascu and others v. Russia and Moldova*, para.490.

background, lawyers may request the following measures and remedies in cases of delays relating to the investigation of torture:

Provisional measures:

- Urging the court or human rights body concerned to adopt provisional measures. Regional human rights courts and international human rights treaty bodies may order such measures where there is a prima facie case and a risk that the applicant would suffer irreparable harm if no action is taken, which cannot be remedied by the payment of compensation or other measures at a later stage.[129] Such provisional measures are mostly applied in relation to an imminent violation, such as refoulement in violation of the prohibition of torture[130] or to seek protection against threats.[131] It may also be argued that the lack of any effective investigations in the period between the application to the human rights body and the final decision cannot be remedied where crucial evidence is bound to be lost as a result of the delay. A human rights court or body may be open to such reasoning where there is credible evidence of a violation and where it can be demonstrated that the timely collection of particular evidence, such as medical reports, is essential to ensure the applicant's right to an effective remedy. The provisional measure may thus consist of an order to preserve certain types of key evidence that may not be available at a later stage if no action was taken.

Final Awards:

- Pecuniary (material) damages for any costs incurred as a result of the delay in commencing or conducting an investigation (such as expenses incurred for collecting evidence that had not been collected by responsible authorities);[132]
- Non-pecuniary (moral) damages for any pain and suffering resulting from delays, such as heightened anxiety and sense of injustice triggered by the conduct of responsible national authorities;[133]
- Ordering the commencement of investigations and/or the carrying out of effective investigations and prosecutions, including by specifying that these steps should be taken without any (further) delays;[134] providing the victims of violations with effective access to investigation procedures;[135]

[129] See e.g. Article 63 (2) of the American Convention on Human Rights and *Shamajev and others v. Georgia and Russia*, para.473.

[130] Ibid.

[131] See e.g. *Digna Ochoa and Placido et al.* (Mexico), Provisional Measures.

[132] The Inter-American Court of Human Rights has awarded pecuniary damages for denial of justice even where not pleaded as it assumed pecuniary damages, see *Las Palmeras v Colombia* (Reparations and Costs) para.53 (a) and *Trujillo-Oroza v Bolivia* (Reparations and Costs), para.74 (a) and (b) (forced disappearances case). The Human Rights Committee and the Committee against Torture do normally just hold that the state party concerned provide compensation, without differentiating between pecuniary and non-pecuniary damages and, in cases of a violation of Article 7 or provisions of the UN Convention against Torture, for what type of pecuniary harm the amount of compensation is awarded for.

[133] It has been the consistent practice of the Inter-American Court of Human Rights to award non-pecuniary damages for delays in cases of extrajudicial killings, disappearances and torture, see in particular 19 *Tradesmen v Colombia*, para. 250 (b); *Gutierrez-Soler v Colombia*, para.84 (a); *Mapiripán Massacre v Colombia*, para.284; *Pueblo Bello Massacre v Colombia*, para.256; *Serrano-Cruz sisters* v. *El Salvador*, paras.113 et seq.; *Moiwana community v Suriname*, para.94; *Caracazo v Venezuela*, para.66*; Castro-Castro v Peru*, para.432 (i) and *Bulacio v Argentina*, para.101.

[134] See *Tibi v Ecuador*, para.258 and *José Antonio Coronel et al. v. Colombia*, para.10: "The Committee urges the State party to conclude without delay the investigations into the violation of articles 6 and 7 and to speed up the criminal proceedings against the perpetrators in the ordinary criminal courts."

[135] *Tibi v. Ecuador*, para.258. See also *Aksoy v. Turkey*, para.98 (as an obligation of the state party under Article 13 of the European Convention on Human Rights).

- Instituting legislative and administrative changes needed to minimise delays in the future. This may include removing immunity legislation and (unduly short) statutes of limitation as well as introducing clear rules and time limits pertaining to the conduct of investigations.[136] The latter may also include judicial remedies of complainants to seek timely and speedy investigations. The nature of administrative measures sought will depend on the causes of the delays in the country concerned but may include institutional reforms, such as setting up special units to investigate torture complaints, and practical measures, such as training on investigation methods.[137]

2.5.2. States' responses to comply with obligations

The lack of prompt investigations and delays throughout proceedings is often due to a multitude of causes, encompassing *inter alia* policy, legislation, procedures, institutional set-up and resources. These deficiencies are frequently just one aspect of broader systemic shortcomings that affect the effectiveness of complaints procedures and investigations. This means that responses to such shortcomings must normally have a wider reach than solely addressing the issue of delays.

Adoption of policy

An important starting point to tackle delays in investigations with a view to combating impunity for torture, is the adoption of policy ideally as part of a comprehensive anti-torture policy/plan. Such a policy would serve as an important official acknowledgment of shortcomings within the system and the willingness of the Government and/or relevant national authorities to take action to address such shortcomings.

Based on the jurisprudence of regional and international human rights treaty bodies, this policy should compel national authorities to take the following measures in response to torture allegations with a view to complying with their international obligations and, by so doing, to set examples of best practice in combating impunity for torture:

- Automatically commence an investigation upon receiving a complaint of torture or upon receiving credible information that torture has occurred;
- Take investigative steps as expeditiously as possible. Searching premises where the torture allegedly took place, ordering a medical examination, interrogating the alleged perpetrators and obtaining witness testimony are some of the most important steps that need to be taken immediately, if possible within the first weeks of an investigation in torture cases;
- To keep files that specify the date when any such measures were taken;
- To comply with any orders to reopen investigations and take the requisite additional measures as expeditiously as possible;
- To suspend any officials against whom there is a reasonable suspicion that they are responsible for torture;
- To establish the identity of those responsible for torture by such means as checking of custody records, witness statements and identity parades, and to bring charges against them for crimes carrying appropriate punishments as soon as possible.

Legislative reforms

[136] See in particular *Montero-Aranguen et al. v. Venezuela*, para.141.

[137] See, for example, the order to disseminate and implement the Istanbul Protocol, *Gutierrez-Soler v. Colombia*, paras.109, 110.

Legislation plays a crucial role in setting the framework for complaints procedures and a system of timely and effective investigations. Relevant legislation should include the following:

- Instituting or facilitating complaints procedures, in particular by obliging authorities to respond to complaints within a specified timeline;
- Providing that the competent authorities commence investigations *ex officio*;[138]
- Abolishing any legislation that may result in delays or lack of investigations, such as amnesty or immunity provisions and the need for prior administrative authorisation to investigate;[139]
- Setting timelines for the completion of investigations, including for specific steps to be taken;[140]
- Providing investigating bodies with adequate powers to carry out speedy and effective investigations, such as effective access to police and army facilities;
- Granting procedural rights and remedies to victims so as to enable them to challenge inaction or expedite proceedings;[141]
- Introducing a criminal offence of dereliction of duty where investigating officers fail to take the requisite measures.[142]

Legislation should be complemented by administrative rules, such as circulars, guiding the role of national authorities, including in particular:

- clear instructions on prompt action in torture cases;
- clear instructions concerning the taking of investigative steps;
- disciplinary measures against those failing to take requisite steps.

Institutional and procedural reforms

The reform of investigating and prosecuting bodies must seek to ensure that investigating bodies are sufficiently independent, have the requisite capacity to investigate, are vested with the necessary powers and are subject to adequate oversight.

- Independence: Any body set up or responsible to investigate torture cases should be free of any conflict of interest that may arise from close institutional links and should be able to operate independently of political considerations.[143]
- Resources: The lack of sufficient resources frequently results in a lack of action or resort to short-cuts by investigating bodies. Officials working for under-resourced bodies will also be more susceptible to bribery that may slow down or halt investigations.[144] Investigating bodies must therefore be given sufficient resources to conduct investigations effectively.

[138] See for example in Georgia, Articles 24 (4), 261, 263, 264 of the recently adopted Criminal Procedure Code of 2005 and for further information, REDRESS/Article 42, *Georgia at the Crossroads: Time to ensure justice and accountability for torture*, August 2005.

[139] *Barrios Altos v. Peru* (Reparations and Costs), para.44 (b) and Concluding Observations of the Committee against Torture: Turkey, UN Doc. CAT/C/CR/30/5, 27 May 2003, para.4 c (positive aspects): "…the elimination of the requirement to obtain administrative permission to prosecute a civil servant or public official…"

[140] See, for example Article 271 of the Georgian Criminal Procedure Code of 2005.

[141] See in particular the jurisprudence of the European Court of Human Rights on the unreasonable length of proceedings under Article 6 and the need to provide domestic remedies for breaches in this respect flowing from Article 13 of the European Convention on Human Rights whose rationale could also be applied to investigations and prosecutions, see *Kudla v. Poland*, paras.150 et seq.

[142] See e.g. Article 203 of the Revised Criminal Code of the Philippines.

[143] See for example the Police Ombudsman for Northern Ireland, www.policeombudsman.org.

[144] So for example in Russia, see Demos, *Reforming law enforcement: overcoming arbitrary work practices*, Moscow, 2005.

- Capacity: Investigators should receive training on how to take the requisite investigative steps in a skilled and timely manner without resorting to unlawful means, in particular any forms of ill-treatment. To this end, special investigators and/or special investigating units should be assigned and/or set up to investigate torture cases. The responsible investigators and prosecuting bodies should be provided with training on adequate investigation methods in torture cases, such as those contained in the Istanbul Protocol.[145]
- Powers and procedures: Investigating bodies must be vested with the powers to carry out timely and effective investigations, backed up by procedures that ensure accountability and which give the complainant the right to be informed and to seek the timely taking of investigative steps (see above on legislation).
- Procedures and oversight: Investigating bodies should establish in-built mechanisms to ensure prompt and effective investigations of torture throughout, such as by making the failure to take the requisite measures subject to disciplinary measures. Such internal mechanisms should be complemented by external monitoring bodies, such as oversight bodies tasked with examining whether investigations had been carried out in a timely and effective manner in conformity with national and international standards.[146]

Role of the judiciary

The judiciary plays a crucial role in ensuring prompt investigation and prosecution as well as speedy trials of those responsible for torture. In the investigation phase, courts may, depending on the system, be called upon to receive complaints, order investigative measures, monitor investigations and decide on appeals made in the course of investigations or on the discontinuance of proceedings or the bringing of charges. As stated by the Inter-American Court of Human Rights:

> "The function of the judicial bodies that intervene in the proceedings does not end with providing a due process that guarantees the defense in the trial, but it must also ensure, in a reasonable period of time, the right of the victim or his next of kin to know the truth of what happened, as well as the punishment of the responsible parties. The right to an effective judicial protection demands that the judges that direct the process avoid unnecessary delays and obstructions, which lead to impunity and frustrate the due judicial protection of human rights [footnotes omitted]."[147]

Legislation should enable courts to:

- hear timely *habeas corpus* applications of all detainees and act on any complaints of torture made in such proceedings, in particular by opening an investigation or ordering the responsible authorities to do so;
- order the requisite investigative measures to be carried out;
- rule on complaints that certain investigative measures have not been undertaken in a timely manner;
- rule on the appropriateness of decisions to refuse to open an investigation or to discontinue an investigation;
- fast-track torture cases where the interests of justice so require.

[145] Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Submitted to the UN High Commissioner for Human Rights, 9 August 1999. See also *Gutierrez-Soler v Colombia*, para.110.

[146] REDRESS, *Taking Complaints of Torture Seriously*, pp.40 et seq.

[147] *Serrellon-Garzia v Honduras*, para.151.

These powers and procedural rights need to be backed up with measures that seek to strengthen the capacity of courts, in particular case management, which enable courts to deal with their caseload efficiently.[148]

Victims' rights

In parallel, legislation should provide complainants with the right to:

- bring timely complaints of torture, be it in habeas corpus or other proceedings;
- be informed about the status of investigations and relevant proceedings throughout;
- appeal to the court to challenge investigative decisions by the investigating authorities;
- seek court orders compelling the authorities to undertake certain investigative measures, including expediting the taking of such measures;
- challenge any motion during trials that may result in substantial delays.

3. Delays in the resolution of reparation claims

3.1. Prolonged court proceedings

a) Lack of effective investigations resulting in delays

In some systems, courts cannot by law award reparation for torture pending the outcome of a criminal prosecution. This is the case in *partie civile* proceedings (civil suits brought in the course of criminal trials). A claim for reparation will in such instances remain pending as long as any criminal investigations or trials are pending.

Even where the outcome of a civil or constitutional case is in principle independent of any criminal investigation, the lack of prompt and effective investigations can delay or altogether frustrate the pursuit of reparation claims. A torture victim may not be able to identify the perpetrator, which may be a precondition for bringing a suit. In the absence of effective investigations, victims also face major hurdles in obtaining evidence to prove their case, which may result in delays in obtaining medical and other types of evidence where the victim has to secure such evidence him or herself. Furthermore, the lack of effective investigations often means that the perpetrators are still in office or emboldened by the apparent impunity, which can increase the likelihood that they will harass or threaten victims or witnesses to withdraw their claims or to accept out-of-court settlements.[149] The perpetrators or those close to them may equally put pressure on the lawyers of torture victims or other human rights defenders supporting a claim.[150] Such threats may cause lawyers to drop the case, may make victims and witnesses reluctant to give evidence and may produce a climate that adversely impacts on their willingness to pursue claims.

Case Study: Rajapakse v. Sri Lanka

[148] See for an example of a review of a national system in Sri Lanka, *The Eradication of Law Delays, Final Report, Committee appointed to recommend amendments to the practice and procedure in investigations and courts*, 2 April 2004.

[149] For example in Bangladesh, see REDRESS, *Torture in Bangladesh 1971-2004, Making international commitments a reality and providing justice and reparations to victims*, August 2004, p.38.

[150] See for an overview, *Report of the Special Representative of the Secretary-General on human rights defenders, Hilal Jinani, Addendum, Summary of cases transmitted to Governments and replies received*, A/HRC/4/37/Add.1, 27 March 2007.

In April 2002, **Sundara Arachchige Lalith Rajapakse** was detained by several police officers and charged with robbery. In detention, the police officers subjected him to various forms of torture to force a confession. As a result of the torture, Rajapakse had to be taken to several hospitals where he remained unconscious for over two weeks. In May 2002, he "was produced before a magistrate, along with a medical report issued by the National Hospital. The medical report, undated, states that the 'most likely diagnosis alleged to assault due to traumatic encephalitis'."[151] In spite of the evidence, it took another three months before a criminal investigation was commenced. Indictments were served over two years after the torture had taken place and the criminal case was still pending after more than four years when the Human Rights Committee issued its views on the complaint.

Rajapakse had also filed a fundamental rights petition in the Supreme Court of Sri Lanka. Hearings in the fundamental rights proceedings were repeatedly adjourned, ostensibly on the grounds that no judgment could be delivered in the case in advance of the verdict of the High Court in the criminal case because any ruling adverse to the defendants in the former would be prejudicial in the latter.[152] As a result, the fundamental rights case was kept pending for over four years. The Human Rights Committee found that this delay constituted a violation of Article 2 (3) in connection with Article 7 of the ICCPR.

The Rajapakse case is not an isolated occurrence; it reflects a pattern of frequent and substantial delays in fundamental rights proceedings before the Supreme Court in instances where parallel criminal investigations have been pending for years on end. Systemic shortcomings in the investigation of torture cases have thus come to frustrate fundamental rights petitions. The prolonged delays cause insecurity to the torture victims and have a detrimental impact on access to justice when considering the time and effort spent on pursuing such cases and the eventual reparation that can be expected. Given that the Supreme Court has not adjusted its compensation awards to the substantial rate of inflation (persistently over 10% and 13.7% in 2006), a perhaps inadvertent but inevitable result of the delay is that the real value of any award is less than it would have been had the Supreme Court issued its judgment earlier. The linkage between prolonged criminal investigations and the ruling on fundamental rights petitions is for these reasons prone to seriously undermine the effectiveness of constitutional remedies in Sri Lanka.

b) Delays in the adjudication of torture cases

Claims for reparation in torture cases may be subject to the same delays as ordinary compensation claims in civil cases where the system suffers from systemic shortcomings in the administration of justice. The efficient administration of justice is a constant challenge even in the most sophisticated and resourceful judicial systems; it is therefore unsurprising that many systems fail to deliver timely justice.[153] This failure is probably most pronounced in instances where the justice system has collapsed, such as during or following armed conflict.[154] In other countries, inordinate delays, such as an average of eleven years in cases going on appeal in the Philippines,[155] are often due to a combination of factors. These include inadequate legislation, "the unnecessary complexity of judicial procedures combined

[151] *Rajapakse v. Sri Lanka*, para.2.3.

[152] Ibid., para.9.4.

[153] *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, Leandro Despouy, UN Doc. A/HRC/4/25, 18 January 2007, paras.18 et seq., in particular para.20.

[154] Ibid. See for a country example, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, Preliminary Note on the mission to the Democratic Republic of Congo*, A/HRC/4/25/Add.3, 24 May 2007.

[155] Judge Dolores Español, *The Philippines: Towards Significant Judicial Reform*, in Transparency International, 'Global Corruption Report 2007: Corruption and Judicial Systems,' p.260.

with an excessive volume of cases reaching the highest courts,"[156] and the lack of procedures or remedies to speed up proceedings.[157] Another major factor is the lack of sufficient resources, resulting in particular in a low judge-population ration, a shortage of personnel, facilities and technology, corruption (administrative court staff, judges, lawyers)[158] as well as contributing to poor case management.[159] As a result, a huge backlog of cases is often allowed to accumulate and prolonged delays are, if only reluctantly, accepted as an inevitable feature of the judicial process.[160] In turn, such developments erode confidence in the judicial system, undermine access to justice and may foster a culture either of alternative mediation that is inadequate in dealing with serious violations such as torture and out-of-court settlements or resort to self-help and violence.[161]

Case study: *Aberca v Ver,* Philippines

In February 1983, twenty political prisoners brought a civil suit for damages on the grounds that their rights, including the freedom from torture, had been violated by twelve military officers, in particular Major General Fabian Ver as the head of the Task Force allegedly responsible for these violations during the Marcos regime. The plaintiffs were seeking actual/compensatory damages, moral damages and exemplary damages of at least 3,339,030.00 Pesos (around $72,000). The motion was dismissed by a regional trial court in November 1983 on the grounds that, *inter alia*, the defendants enjoyed immunity. After several unsuccessful attempts to challenge the dismissal, the Supreme Court of the Philippines, in 1988, reversed the dismissal and remanded the case to the regional trial court for further proceedings.

In 1993, the Quezon City Trial Court awarded actual, moral and exemplary damages, as well as attorneys' fees to the plaintiffs, holding that the defendants were jointly and solidarily liable for torture and other human rights violations. The defendants appealed the ruling and, ten years later, in 2003, the Court of Appeals reversed the judgment of the Quezon City Trial Court.[162] In 2007, the review of the Appeals Court's ruling was pending before the Supreme Court. No final decision has been reached in a staggering period of more than 24 years since the case was initially brought.

The problem of the lack of effective and speedy access to justice is not confined to the Marcos victims. Serious delays are systemic in the Philippines justice system resulting from a

[156] *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, Leandro Despouy, UN Doc. A/HRC/4/25, 18 January 2007, para.20.

[157] See in this regard the jurisprudence of the European Court of Human Rights, in particular in the case of *Kudla v. Poland*.

[158] See Transparency International, *Global Corruption Report 2007: Corruption and Judicial Systems* and Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, UN Doc. A/HRC/4/25, 18 January 2007, para.19.

[159] Ibid., para.20.

[160] See for example in TI India, *Indolence in India's judiciary*, in Transparency International, 'Global Corruption Report 2007: Corruption and Judicial Systems,' pp.215, 216 according to which, in February 2006, 33,635 cases were pending in the Supreme Court (26 judges); 3,341,040 in the high courts (670 judges) and 25,306,458 in the 13,204 subordinate courts. The article also quotes a report of a conference and workshop on 'Delays and Corruption in Indian Judicial System and Matters Relating to Judicial Reforms', organised by IT-India and Lok Sevak Sangh, in New Delhi, 18-19 December 1999: "At the current rate of disposal it would take another 350 years for disposal of the pending cases even if no other cases were added." As increasingly recognised, the backlog and delays in resolving cases is itself a factor that fosters corruption in relation to the speeding up of cases. See for example S.I. Laskar, *Bangladesh: Justice in Disarray*, Transparency International, 'Global Corruption Report 2007: Corruption and Judicial Systems,' p.181.

[161] See on recourse to mediation, alternative dispute settlement and customary justice, REDRESS, *Torture in Uganda, A Baseline Study*, p.46.

[162] TFDP, *Breaking Impunity*, 2006, pp.1, 2 and Cheryl M. Arcibal, *Victims of rights abuses struggle to keep cases alive*, Manila Times, Special Report, 28 February 2005.

large case load in the face of an explosion in litigation that is not matched by the required judicial infrastructure and resources.[163]

c) Delays in enforcement of awards

Delays and non-enforcement of awards against state entities

The swift enforcement of awards is an integral element of the rule of law. Most litigants readily understand that they will have to prove their case in court. However, they will often find it incomprehensible that there are difficulties in the enforcement of judgments that is frequently taken for granted. This is particularly true in cases of human rights violations, such as torture, where the recognition of liability carries a public acknowledgment that the torture victim's version of events was true or at least partly true and that the state was, either directly or indirectly, responsible. Prolonged delays in the enforcement of judgments are therefore not only a source of frustration preventing torture survivors from enjoying the benefits deriving from a judicial award but are also prone to undermine if not negate altogether the acknowledgment inherent in the judgment.

Litigants in torture cases will often face the same difficulties in enforcing judgments against those personally responsible for torture as litigants seeking enforcement of other civil claims. Debtors may have insufficient assets or seek to evade enforcement by a variety of means. The same difficulties might not be expected when it comes to enforcing judgments against the state as the latter should be in a position to honour judgments. However, in reality it is often even more difficult to enforce judgments against the state.

The lack of effective enforcement procedures is a systemic problem in countries around the world. There are frequently no procedures for enforcing judgments against the state and the state may fail to comply with judgments as a means of showing disrespect for particular decisions, for budgetary reasons or out of administrative malpractice. In Georgia, for example, the amount of compensation that can be awarded for illegal conduct of state authorities, including torture, is limited as the state has set aside an annual budget of 50,000/100,000 Lari (approx. $ 28,000/56,000) out of which all compensation awards made against the state are to be paid.[164] In some cases, the amount of compensation awarded against the state has been reduced upon appeal by reference to budgetary constraints.[165] Furthermore, state authorities have apparently routinely failed to comply with adverse court rulings. This has left successful plaintiffs at the mercy of the government and often empty-handed.[166]

Case study: Marcos case, Philippines

[163] See Jan Willem Bakker, The Philippine Justice System, The Independence and Impartiality of the Judiciary and Human Rights from 1986 to 1997, PIOOM, Leiden, 1997 and Judge Dolores Español, *The Philippines: Towards Significant Judicial Reform*, in Transparency International, 'Global Corruption Report 2007: Corruption and Judicial Systems,' pp.258 et seq.

[164] This is not laid down by law but adopted as administrative practice. The sum allocated for rehabilitation purposes was 59 000 Lari in 2001, 50 000 Lari each in 2002 and 2003 and 100,000 Lari in 2004.

[165] *Tamaz Shapatava v Georgia*, an application pending before the European Court of Human Rights relating to a judgment of the Supreme Court of 18 June 2002 is a case in point. He demanded rehabilitation and compensation of 1 000 000 USD for the moral damage resulting from his unlawful detention that had lasted one year. The Supreme Court of Georgia awarded him 14 000 Lari as rehabilitation on the grounds that there is a social-economic crisis in Georgia and that the sum of money (50 000 Lari) set aside in the budget is envisaged for dozens of persons and cannot be spent on one person only. Article 42 has brought this case before the European Court of Human Rights arguing that the low amount of damages awarded signifies a lack of effective remedies for such breaches in violation of Article 13 of the European Convention on Human Rights.

[166] Complaints against public officials tasked with enforcing judgments brought under Article 18 of the Law on Enforcement Proceedings of 1999 challenging the lack of action to enforce awards against the Government have to date been unsuccessful. The lack of effectiveness of enforcements is at present being challenged by Article 42 before the European Court of Human Rights in the case of *Kokashvili v. Georgia*.

The victims of serious violations committed by the Marcos regime brought an action for damages in the United States in 1986. After obtaining a favourable judgment before the US courts in 1996, the victims sought to enforce the judgment in the Philippines. However, enforcement has been significantly delayed on the technicality of court fees. The victims challenged these delays before the UN Human Rights Committee, which adopted its views on the case in April 2007. It set out the facts as follows:

> "2.5 On 20 May 1997, five class members, including the third author, filed a complaint against the Marcos estate, in the Regional Trial Court of Makati City, Philippines, with a view to obtaining enforcement of the United States judgment. The defendants counter filed a motion to dismiss, claiming that the PHP 400 (US$ 7.20) paid by each plaintiff was insufficient as the filing fee. On 9 September 1998, the Regional Trial Court dismissed the complaint, holding that the complainants had failed to pay the filing fee of PHP 472 million (US$ 8.4 million), calculated on the total amount in dispute (US$ 2.2 billion). On 10 November 1998, the authors filed a motion for reconsideration before the same Court, which was denied on 28 July 1999.
>
> 2.6. On 4 August 1999, the five class members filed a motion with the Philippine Supreme Court, on their own behalf and on behalf of the class, seeking a determination that the filing fee was PHP 400 rather than PHP 472 million. By the time of submission of the communication to the Committee (11 October 2004), the Supreme Court had not acted on this motion, despite a motion for early resolution filed by the petitioners on 8 December 2003…
>
> 4. On 12 May 2005, the State party submitted that the communication is inadmissible for failure to exhaust domestic remedies. It submits that, on 14 April 2005, the Supreme Court handed down its decision in Mijares et al. v. Hon. Ranada et al., affirming the authors' claim that they should pay a filing fee of PHP 410 rather than PHP 472 million with respect to their complaint to enforce the judgment of the United States District Court in Hawaii. The State party denies that the authors were not afforded an effective remedy."[167]

The UN Human Rights Committee found that the length of proceedings in the case of enforcing the US judgment had violated the right to equality before the Courts and the right to an effective remedy:

> "the Committee recalls that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principle of fairness. [footnote omitted] It notes that the Regional Trial Court and Supreme Court spent eight years and three hearings considering this subsidiary issue and that the State party has provided no reasons to explain why it took so long to consider a matter of minor complexity. For this reason, the Committee considers that the length of time taken to resolve this issue was unreasonable, resulting in a violation of the authors' rights under article 14, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant."[168]

[167] *Pimentel et. al. v. The Philippines*, paras.2.4, 2.5., 2.6. and 4.

[168] Ibid., para.9.2.

3. 2. Administrative Proceedings/Proceedings before National Human Rights Institutions

National human rights institutions often play a vital role in investigating torture and recommending compensation and other forms of reparation. They are often the only realistic hope for victims to obtain some form of reparation, in particular where there is no effective access to the judicial system.

Many national human rights institutions have the power to investigate and to recommend reparation, in particular compensation. However, investigations have often been slow and incomplete, due to a lack of powers and capacity.[169] Where these bodies recommend reparation, the relevant authorities often fail to implement, or only comply after substantial delays, such as in Nepal.[170]

In one case before the Ugandan Human Rights Commission (UHRC), a man in his forties was tortured in a safe house during 'Operation Wembley'[171] in 2002. He brought his case to the UHRC in 2003. In September 2005, he was awarded 7 million Ugandan Shillings in compensation against the Attorney-General to be paid within one month, by agreement between the parties and witnesses by the Tribunal. Two years after the decision, the compensation had still not been paid.[172]

More than one billion Ugandan shillings in awards was outstanding in 2007. A group of victims interviewed by REDRESS reported that they have little faith in the UHRC because of slow procedures and the delay in and lack of enforcement. They questioned the seriousness of the Government's commitment to the UHRC for these reasons, and because the UHRC was under-staffed and under-resourced. Observers have also identified the lack of transparency in the appeal procedure against the UHRC's decisions and the lack of funds set aside by the Government for the purpose of compensation as major factors contributing to delays.[173]

4. Recommendations

A sustained effort is needed to minimise delays and their adverse impact on torture victims' right to a remedy and reparation.

Lawyers, Bar Associations and NGOs

- ***Prompt and expeditious investigations and prosecutions:***

[169] See for example in Uganda, REDRESS, *Torture in Uganda, A Baseline Study*, p.29 and REDRESS, *Action against Torture, Philippines*, pp.35,36.

[170] Conclusions and recommendations of the Committee against Torture: Nepal, UN Doc. CAT/C/NPL/CO/2, 13 April 2007, para.29.

[171] This was an operation handled by the Violent Crime Crack Unit to clamp down on serious crimes.

[172] Information obtained by REDRESS in the course of interviews with torture survivors in Uganda in late 2006 and early 2007.

[173] REDRESS, *Torture in Uganda, A Baseline Study,* p.34.

Lawyers and NGOs should encourage authorities to open investigations into torture allegations promptly and to conduct investigations and prosecutions expeditiously. To this end, they may consider taking the following steps:

- Document thoroughly every step taken by the victim and his/her lawyer and the responses, or lack thereof, of the responsible authorities. Collate this information so as to identify causes and to be able to demonstrate a pattern of delays where applicable;
- Bring *habeas corpus* proceedings, where available, to lodge complaints of torture seeking prompt action by the responsible authorities, including the judiciary;
- Use existing rights of victims under the relevant national laws to seek information about investigatory measures, to compel the authorities to carry out specific measures within a certain timeframe and to appeal any decisions to suspend or to discontinue investigations;
- In case of a failure of the national authorities to investigate allegations of torture promptly or to conduct investigations expeditiously, where possible, lodge a complaint to a national human rights institution or oversight body with the power to review the conduct of investigations;
- Conduct alternative investigations in line with international standards and use findings to compel authorities to act or for litigation purposes;
- Bring private prosecutions promptly where possible;
- Make strategic interventions (particularly *amicus curiae* briefs and third party interventions where the rules of the court concerned permit) in pending cases, invoking international standards on effective and timely investigations;
- Advocate for legislative reforms that remove obstacles to prompt and expeditious investigations, such as immunity laws, and compel responsible bodies to take specific measures in torture cases within a specific timeline so as to ensure that investigations and prosecutions are effective;
- Advocate institutional reforms needed to make investigations and prosecutions more effective, including by engaging with the responsible bodies and by calling for greater powers and resources for the investigation of torture cases where appropriate;
- Upon exhaustion of domestic remedies or where investigations or prosecutions are unduly prolonged, bring cases before international human rights treaty bodies where possible with a view to obtaining effective remedies for the torture victim(s) in the case at hand and to setting precedents that may prompt national authorities to change their practice.

Lawyers and NGOs should seek to prevent undue delays in proceedings of torture cases. To this end, they may consider taking the following steps:

- ***Judicial proceedings, including enforcement of awards:***

- Handle the case file(s) in such a way that their own conduct does not contribute to delays which could have otherwise been avoided;
- Document delays in the course of proceedings and identify the sources of delays. Collate and analyse such information with a view to identifying key causes and patterns of delay;
- Identify the main obstacles to the speedy resolution of torture cases and pursue strategic litigation, invoking international standards where possible and appropriate, with a view to expediting the resolution of torture claims in national proceedings:

- Advocate for legislative reforms, in particular with a view to strengthening the rights of victims of torture to a timely resolution of their cases, for example by providing that the outcome of a civil reparation claim is independent from that of a related criminal case;
- Advocate for institutional reforms to strengthen the administration of justice, in particular by promoting access to justice and enhancing the capacity of the judiciary to dispose of cases in a timely manner;
- Upon exhaustion of domestic remedies or where proceedings are unduly prolonged, bring cases before international human rights treaty bodies where possible with a view to obtaining effective remedies for the torture victim(s) in the case at hand and to setting precedents that may prompt national authorities to change their practice.

- Non-judicial proceedings

- Seek to use courts or other competent bodies to prompt non-judicial bodies, such as national human rights institutions or truth and reconciliation commissions to consider claims expeditiously;
- Bring applications before courts or other competent bodies with a view to ensuring timely compliance and enforcement by the government or other responsible national bodies;
- Advocate for reforms seeking to introduce timelines, oversight mechanisms or even binding obligations to act on non-judicial decisions within a given timeframe so as to avoid unnecessary delays between the decision and its implementation.

Governments

The responsible government bodies should take the following steps in seeking to implement relevant international standards of opening investigations into torture allegations promptly and of conducting investigations and prosecutions expeditiously:

- ***Prompt and expeditious investigations and prosecutions:***

- Adopt an anti-torture policy, which includes a commitment to combating impunity by responding promptly to torture allegations and by seeking to investigate, prosecute and punish perpetrators of torture expeditiously;
- Analyse existing law and practice with a view to identifying legal obstacles to effective investigations, such as amnesty laws, and/or procedures to expedite investigations and prosecutions, in particular those that strengthen victims' rights in proceedings; following consultation with experts and civil society, introduce laws seeking to address the shortcomings identified;
- Identify the causes for delays in responding to torture allegations and in investigating and prosecuting torture cases, and implement changes to the institutional structure, the capacity of bodies and applicable procedures; set up an independent body either tasked with promptly investigating allegations of torture or with overseeing the conduct of investigating bodies, in particular their effectiveness in handling torture cases;
- Commit a sufficient amount of finances in the annual budgets set aside for the effective implementation of said measures.

- ***Judicial proceedings, including enforcement of awards:***

- As part of an anti-torture policy, make a commitment to providing victims of torture with effective access to justice and reparation, which includes timely adjudication of claims and timely enforcement of any awards made;
- Analyse existing law and practice with a view to identifying legal obstacles to the timely adjudication of claims, such as the link between the outcome of criminal cases and that in civil cases, and/or procedures to expedite the adjudication of claims in torture cases, such as fast-track procedures;
- Analyse existing law and practice with a view to identifying legal obstacles to the timely enforcement of awards;
- Identify the causes for delays in the adjudication of torture cases and their subsequent enforcement, and implement requisite changes, such as promotion of better case management, anti-corruption initiatives and clarification of responsibility for the implementation of awards;
- Commit a sufficient amount of finances in the annual budgets set aside for the effective implementation of said measures.

- Non-judicial proceedings

- As part of an anti-torture policy, make a commitment to comply speedily with recommendations or decisions by national human rights institutions and/or Truth and Reconciliation Commissions or similar bodies to award reparation to torture victims;
- Analyse existing law and practice with a view to identifying legal obstacles to the timely compliance with said recommendations or decisions and to devising procedures aimed at ensuring timely implementation; following consultation with experts and civil society, introduce laws seeking to address the shortcomings identified;
- Identify the causes for delays in complying with said recommendations or decisions, and implement requisite changes, such as clear internal guidelines on responsibility and means of compliance;
- Commit a sufficient amount of finances in the annual budgets set aside for the effective implementation of said measures.

Judiciary

Judges, either individually or collectively, should take the following steps in order to minimise unreasonable delays in relevant proceedings:

- ***Prompt and expeditious investigations and prosecutions:***

- In habeas corpus proceedings, promptly respond to any allegations or indications of torture by promptly initiating an investigation or ordering the responsible bodies to commence an investigation promptly as appropriate;
- In their capacity as visiting and monitoring bodies, promptly respond to any allegations or indications of torture by initiating an investigation or ordering the responsible bodies to commence an investigation promptly as appropriate;
- Where called upon, compel the investigating body promptly to commence an investigation and to take specific investigatory measures in a timely manner;
- Where judges play an active role in investigations, conduct the requisite investigative steps expeditiously;
- Conduct trials against accused perpetrators of torture expeditiously, by considering the rights of victims without compromising the right of the accused to a fair trial;

- Where in a position to do so, such as Constitutional Courts or Supreme Courts, where possible invalidate legislation that hinders or prevents effective investigations, order the relevant authorities to take specific reforms or call for such reforms in cases of systemic failings.

- ***Judicial proceedings, including enforcement of awards:***

- Conduct any proceedings expeditiously, in particular by countering delay tactics of defendants, such as the seeking of repeated adjournments, and by seeking to fast-track torture cases where possible;
- Introduce changes to case management so as to ease any existing backlog of cases;
- Take measures to counter corruption, including corruption aimed at delaying proceedings in torture cases;
- Where in a position to do so, such as Constitutional Courts or Supreme Courts, where possible invalidate legislation that hinders or prevents timely adjudication and enforcement of torture cases, order the relevant authorities to take specific action or call for such reforms in cases of systemic failings;
- Call for institutional reforms aimed at improving the judicial infrastructure and the capacity of courts to deliver justice in a timely manner.

Human rights commissions/TRC

National human rights institutions, Truth and Reconciliation Commissions and/or similar bodies should take the following steps with a view to ensuring that their own proceedings are conducted expeditiously and that their recommendations or decisions are complied with in a timely manner:

- Conduct investigations of torture allegations and/or the determination of torture claims expeditiously;
- Organise the handling of torture cases in such a way as to avoid unnecessary delays, including by introducing timelines for taking specific action; call for more resources where existing funds prove insufficient to guarantee effective responses in torture cases;
- In case of non-compliance by the government or responsible bodies, seek to use judicial challenges to compel government;
- In cases of systemic delays in government compliance, call for legislation that vests the body with enforcement powers.

International Human Rights Treaty Bodies

International human rights treaty bodies should consider the following issues in their jurisprudence as a means of clarifying existing standards, strengthening victims' rights and providing guidance to states parties.

- ***Prompt and expeditious investigations and prosecutions:***

- Clarify the specific obligations of states in investigating and prosecuting torture allegations, in particular with regard to the timely taking of specific measures, such as those described in the Istanbul Protocol;
- Strengthen victims' right to an effective remedy by recognising their right to active participation in proceedings and to obtain timely information about the status of proceedings:

- Where applicable, human rights bodies that are not already following such practice should in their awards:
- specify the type and amount of damages, taking into consideration the suffering caused by the delays;
- order the state concerned to conduct prompt and effective investigations, specifying the steps to be taken as appropriate;
- request the state concerned to take measures to ensure non-repetition, such as adopting legislative changes, instituting institutional reforms and providing training on relevant skills, procedures and standards.

- ***Judicial proceedings, including enforcement of awards:***

- Further elaborate on the criteria for determining whether proceedings have been conducted within a reasonable time and state's obligations in this regard, in particular where delays are the result of systemic shortcomings;
- Strengthen victims' rights to an effective remedy by recognising their right to active participation in proceedings, including through the use of remedies compelling the authorities and courts to expedite proceedings;
- Where applicable, human rights bodies that are not already following such practice should in their awards:
- Specify what steps the state concerned should take to expedite proceedings where cases are still pending;
- specify the type and amount of damages, taking into consideration the suffering caused by the delays;
- request the state concerned to take measures to ensure non-repetition, such as adopting legislative changes aimed at avoiding delay in the adjudication of claims and enforcement of awards in torture cases, instituting institutional reforms in the judicial system and providing judges and others with training on relevant procedures and standards.

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