

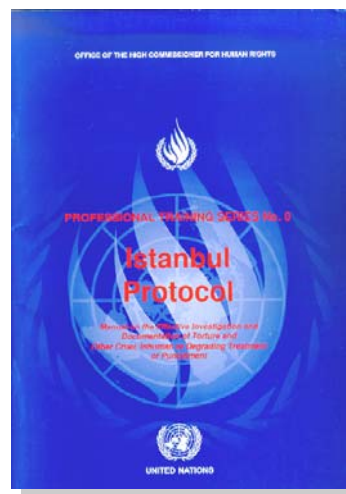
## Reference Materials

The Istanbul Protocol: International Guidelines for the Investigation and Documentation of Torture

# LEGAL INVESTIGATIONS OF TORTURE ALLEGATIONS

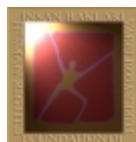
A Practical Guide to the Istanbul Protocol  
– for Lawyers

2004



This guide was written by the REDRESS TRUST as Part of the Istanbul Protocol Implementation Project, an initiative of Physicians for Human Rights USA (PHR USA), the Human Rights Foundation of Turkey (HRFT), the World Medical Association (WMA), and the International Rehabilitation Council for Torture Victims (IRCT)

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The Istanbul Protocol: International Guidelines for the  
Investigation and Documentation of Torture

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– for Lawyers

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## **ACTION AGAINST TORTURE: A PRACTICAL GUIDE TO THE ISTANBUL PROTOCOL FOR LAWYERS**

### **ACKNOWLEDGMENTS**

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We are grateful for the comments and assistance provided by Hulya Upcinar and Turkcan Baykal of the Human Rights Foundation of Turkey, Olga Shepeleva of the Nizhny Novgorod Committee against Torture and the “Demos” Research Centre for Civil Society in Russia, Lutz Oette and Kevin Laue of REDRESS.

## **REFERENCE MATERIALS REGARDING THE USE OF THE ISTANBUL PROTOCOL: INTERNATIONAL GUIDELINES FOR THE INVESTIGATION AND DOCUMENTATION OF TORTURE**

The Istanbul Protocol is the first set of international guidelines for the investigation and documentation of torture. The Protocol provides comprehensive, practical guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting the findings to the relevant authorities. Initiated and co-ordinated by Physicians for Human Rights USA (PHR USA), Action for Torture Survivors and the Human Rights Foundation of Turkey (HRFT), the Protocol was developed over three years with the involvement of more than 40 organisations, including the International Rehabilitation Council for Torture Victims (IRCT) and the World Medical Association (WMA).

With the generous support of the EU, the 'Istanbul Protocol Implementation Project' was carried out between March 2003 and March 2005 to increase awareness, national endorsement and tangible implementation of the Protocol in five target countries; Georgia, Mexico, Morocco, Sri Lanka and Uganda.

The resource materials presented here were developed as a source of practical reference for health and legal professionals during the trainings conducted as part of the project. The materials were widely disseminated to the 250 individual health professionals and 125 lawyers who participated in the trainings and were also distributed to relevant national institutions and government agencies in the five countries. It is hoped that these materials offer insights and create synergy between the two professions in the joint efforts to combat torture.

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# INTRODUCTION

Recognising the prevalence of torture in the world and the need to take active steps to combat it, medical, legal and human rights experts from a range of countries drafted the “**Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)**.” The Manual was finalised in August 1999 and has since been endorsed by the United Nations, regional organisations and other bodies.<sup>1</sup>

The Istanbul Protocol is intended to serve as a set of international guidelines for the assessment of torture or cruel, inhuman or degrading treatment or punishment, and for investigating such allegations, and reporting findings to the judiciary or other investigative bodies. The set of “**Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**” (**The Istanbul Principles**) annexed to the Istanbul Protocol was included in the Resolution on Torture unanimously adopted by the UN General Assembly in December 2000.<sup>2</sup> Subsequently, the United Nations Commission on Human Rights drew the attention of governments to these Principles and strongly encouraged them to reflect upon them as a useful tool in combating torture.<sup>3</sup>

Torture is defined in the Istanbul Protocol in the words of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

“Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>4</sup>

Accordingly, torture is the intentional infliction of severe pain or suffering, whether physical or mental, by or on behalf of a public official (such as the police or security forces) or with their consent. The calculated abuse of an individual’s physical and psychological integrity, in a way that is designed specifically to undermine their dignity, is horrible in any circumstance. But when this act is perpetrated by or on behalf of a public official (someone with the very responsibility to protect an individual’s rights) the crime becomes all the more reprehensible. Indeed torture is typically perpetrated/condoned by the State officials who are responsible for upholding and enforcing the law.

Torture may cause physical injury such as broken bones and wounds that heal slowly, or can leave no physical scars. Often torture will lead to psychological scars such as an inability to trust, and a difficulty to relax in case the torture happens again, even in a safe environment. Torture survivors may experience difficulty in getting to sleep or may wake early, sometimes shouting or with nightmares. They may have difficulties with memory and concentration, experience irritability, persistent feelings of fear and anxiety, depression,

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<sup>1</sup> Available at <http://www.unhchr.ch/pdf/8istprot.pdf>.

<sup>2</sup> UNGA Resolution 55/89 Annex, 4 December 2000.

<sup>3</sup> Commission on Human Rights Resolution 2003/33, 57th meeting, 23 April 2003 [E/CN.4/2003/L.11/Add.4].

<sup>4</sup> Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UNGA resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

and/or an inability to enjoy any aspect of life. Sometimes these symptoms meet the diagnostic criteria for post-traumatic stress disorder (PTSD) and/or major depression. Physical and psychological scars can last a lifetime. To someone who has no experience of torture, these symptoms might appear excessive or illogical, but they can be a normal response to trauma.

The word 'torture' will, to most people, invoke images of some of the most horrific forms of physical and psychological suffering - the pulling out of fingernails, electric shocks, mock executions, being forced to watch the torture of parents or children, rape. The variety and severity of the methods of torture and cruel, inhuman or degrading treatment or punishment may simply defy belief. But there is no exhaustive list of acts that constitute torture;<sup>5</sup> torturers continue to invent new ways to brutalise individuals. And there is no limit on who can be victimised – survivors of torture come from all walks of life, and from most countries around the world. Even children may be victims.<sup>6</sup> But most frequently, torture survivors are criminal suspects, or victims of discrimination on the grounds of race, ethnicity, religion, gender or sexual identity.<sup>7</sup>

As noted in the Istanbul Protocol, "torture is a profound concern for the world community. Its purpose is to deliberately destroy not only the physical and emotional well-being of individuals, but the dignity and will of entire communities. It concerns all members of the human family because it impugns the very meaning of our existence and our hopes for a brighter future."

In other words, torture is abhorrent not only for what it does to the tortured but for what it makes of the torturer and the system that condones it. The Istanbul Protocol explains: "Perpetrators often attempt to justify their acts of torture and ill-treatment by the need to gather information. Such conceptualizations obscure the purpose of torture and its intended consequences...By dehumanizing and breaking the will of their victims, torturers set horrific examples for those who later come in contact with the victim. In this way, torture can break or damage the will and coherence of entire communities...."

For this reason, torture is absolutely prohibited by every relevant human rights instrument since the Universal Declaration of Human Rights of 1948. The violation of this prohibition is considered so serious that no legal justification may ever be found, even in times of emergency or armed conflict.

Despite the absolute prohibition of torture under international law, a glance at any of the reports of the United Nations Special Rapporteur on Torture, or of recent reports of the International Committee of the Red Cross (ICRC), or indeed many newspapers, makes it quite clear that torture is still commonplace in many countries around the world. This imbalance between the absolute prohibition on the one hand and the frequent practice of torture underscores the need to improve domestic implementation of international standards against torture and to improve the effectiveness of domestic remedies for torture survivors.

The Istanbul Protocol is an important instrument in the fight against torture - the effective investigation and documentation of torture helps to expose the problem of torture and to bring those responsible to account. The Principles contained in the Protocol reflect important international standards on the rights of torture survivors and States obligations to refrain from and prevent torture.

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<sup>5</sup> In its General Comment on Article 7 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee considered that it is not desirable to draw up a list of prohibited acts or a precise distinction between them. Furthermore, Sir Nigel Rodley, former UN Special Rapporteur on Torture, considered that it is extremely difficult and indeed dangerous to establish a threshold to distinguish acts of torture from cruel, inhuman or degrading treatment.

<sup>6</sup> See *Hidden Scandal, Secret Shame* (AI Index ACT 40/38/00) for reports of torture perpetrated against children.

<sup>7</sup> See *Crimes of Hate, Conspiracy of Silence* (AI Index ACT 40/016/2001) for reports of torture perpetrated against sexual minorities; *Broken Bodies, Shattered Minds* (AI Index: ACT 40/001/2001) for reports of the torture of women; *Racism and the Administration of Justice* (AI Index: ACT 40/020/2001) for reports of torture and racial discrimination.



International law requires States to investigate allegations of torture and to punish those responsible. It also requires that victims of acts of torture obtain reparation and have an enforceable remedy to fair and adequate compensation, restitution of their rights and as full rehabilitation as possible. The Istanbul Protocol is a manual on **how** to make investigations and documentations of torture **effective** in order to punish those responsible, to afford adequate reparation to the victims and more generally, to prevent future acts of torture.

This Guide is aimed at lawyers working with torture survivors. It describes the various international standards contained in the Istanbul Protocol, details international jurisprudence supporting such standards and outlines practical ways for lawyers to seek to have these standards recognised and implemented at the national level. It provides information for lawyers on a) how to challenge governments when investigations of torture are ineffective, b) how to amass the necessary evidence to assist in investigations and/or when bringing allegations of torture to the attention of the competent officials and c) provides a general overview of the international legal standards relevant to combating and preventing torture and assisting victims to seek remedies and reparation.

Lawyers are key interlocutors for survivors of torture seeking justice and other forms of reparation. Equally, they may play a vital role in persuading governments to comply with their international obligations to refrain from acts of torture and to implement preventative measures. If lawyers are familiar with the applicable international standards, they may seek to interpret and apply domestic law in light of these standards, and may cite such standards in their legal argument, pleadings and complaints.

# **PART I: AN OVERVIEW OF THE ISTANBUL PROTOCOL**

## **A. The importance of medical professionals in the documentation of torture and the need for lawyers to understand the medical symptoms of torture**

The Istanbul Protocol highlights the important role of medical professionals in the documentation of torture and sets out detailed guidelines on methodology for obtaining medical evidence, including the recommended content of medical reports.

It is important for lawyers working with torture survivors to know how torture can be medically documented and what are the physical and psychological symptoms of torture. This will not only help them to better understand their clients and assist them but equally, such insight is extremely important when lawyers lodge complaints of torture or other forms of ill-treatment on the survivors' behalf. As recognised in the Istanbul Protocol lawyers and doctors need to work closely together to effectively investigate and document acts of torture. Medical evidence will help prove that torture has occurred. It will also assist lawyers to determine victims' claims for reparations (e.g., restitution, compensation and rehabilitation). Similarly, lawyers will need to assess whether the official investigation of the police or other competent body took into account proper medical evidence or whether they need to arrange for independent medical examinations to attest to the victim's version of the events.

Although the factors influencing the psychological responses to torture are not known exactly, several aspects can have an impact on the victim:

- ❑ **The perception, interpretation and meaning of torture by the victim:** Individuals react to extreme trauma like torture in accordance with what it means to them. The psychological reactions to trauma are closely linked with the psychological meaning of the trauma to the person, which is socially, culturally and politically framed.
- ❑ **The social context before, during and after torture:** such as community and peer resources and values and attitudes about traumatic experiences; political and cultural environment; traumatic conditions after torture; exposure to subsequent reactivating stressors---losses and changes in the individual's life during the post trauma period also have a great impact on the psychological response.
- ❑ **The severity and duration of the traumatic events, the circumstances and the nature of the torture:** It is difficult to make a hierarchical list of the severity of the atrocities on the individual and it is problematic to estimate objectively the degree of severity. Humiliation, threat to beloved ones or witnessing the torture of another person may have a more profound psychological effect on the victim than to suffer from electric shocks or falanga [beating the soles of the feet], though this may differ person to person.
- ❑ **The developmental phase and age of the victim:** although there is limited knowledge on factors that are related to torture symptoms, in a more general context of traumatic experiences, it has been determined that there is a relationship between the age of onset of the trauma, the nature of the traumatic experience, and the complexity of the clinical outcome.

In other words, personal variables such as cultural and political background, gender, age, losses during and after the torture, etc, are all factors that may influence the severity of the symptoms produced by torture. In addition coping capabilities, physical health and disabilities, pre-existing psychological disorders, pre-existing personality, genetic and biological vulnerabilities also affect the symptoms of torture.

Understanding the physical and psychological effects of torture is vital when lawyers interview victims with a view to submitting criminal or civil claims for torture. It is important for three main reasons:

- a) to make sure that the lawyers are asking the right questions and collecting necessary information/evidence to assist in building up their case;**
- b) to help lawyers understand the psychological consequences that torture victims may suffer (like PTSD) and avoid re-traumatising the victim during the interview; and**
- c) to prepare lawyers on the difficult subject of torture and to understand unexpected “reactions” or “answers” on the part of victims, as well as to recognise symptoms like paranoia or schizophrenia.**

For detailed guidelines for lawyers on documenting allegations of torture, see the Essex Torture Reporting Handbook, Part II - Documenting Allegations (<http://www.essex.ac.uk/torturehandbook/english.htm>) and also see Chapter V General, Interview Considerations, F) Taking the History of the Istanbul Protocol (<http://www.unhchr.ch/pdf/8istprot.pdf>)

Specifically on the role of lawyers, the Istanbul Protocol states that lawyers have a duty in carrying out their professional functions to promote and protect human rights standards and to act diligently in accordance with law and recognised standards and ethics of the legal profession. Other human rights instruments, such as the “*UN Basic Principles on the Role of Lawyers*”,<sup>8</sup> set out the duty of lawyers to assist clients “in every appropriate way” and to take legal action to protect their interests.

Similarly, under the “*UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*”<sup>9</sup> it is a “gross contravention of medical ethics” for doctors to engage in acts which constitute participation in, complicity in, incitement to, or attempts to commit torture. However, as recognised by international medical associations, such as the World Medical Association, there is no express obligation on doctors under professional codes of medical ethics to report suspected cases of torture about which they become aware. The World Medical Association recommends that, where possible, doctors report such cases with the victim's consent, however, where the victim is unable to express him or herself freely, without explicit consent.<sup>10</sup>

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<sup>8</sup> See *UN Basic Principles on the Role of Lawyers*, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990.

<sup>9</sup> The *UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* were adopted by the UN General Assembly on 18 December 1982.

<sup>10</sup> The *Resolution on the Responsibility of Physicians in the Denunciation of Acts of Torture or Cruel or Inhuman or Degrading Treatment* was adopted by the World Medical Association, 2003.

Both lawyers and doctors must carry out their work in good faith, placing their professional responsibilities over personal or institutional interests. Working together, lawyers and doctors can ensure that investigators conduct investigations into torture allegations fully, impartially and promptly.

If lawyers know or have information about another lawyer or a doctor that is not complying with these general duties, they should report them to their medical and legal organisations respectively. If the breach of duty is sufficient to amount to administrative or criminal responsibility they should be reported to the appropriate authorities described. See the section on “effective procedural remedies”, remedies at the national level, later in this Manual (e.g. human rights commissions, disciplinary procedures, police complaint mechanisms).

## **B. International Standards in the Istanbul Protocol**

The Istanbul Protocol outlines international legal standards on protection against torture and sets out specific guidelines on how effective investigations into allegations of torture should be conducted. These guidelines (the Istanbul Principles) have been recognised by human rights bodies as a point of reference for measuring the effectiveness of investigations. For example, the Inter-American Commission on Human Rights cited the Istanbul Principles as the minimum requirements for medical reports prepared by medical professionals when investigating cases of alleged torture.<sup>11</sup> Similarly, a resolution of the African Commission on Human and Peoples' Rights affirmed that investigations into allegations of torture should be conducted promptly, impartially and effectively, guided by the Istanbul Protocol.<sup>12</sup>

The Istanbul Protocol identifies the following obligations on governments to ensure protection against torture:

### **1) To take effective legislative, administrative, judicial or other measures to prevent acts of torture, for example, by:**

- Not expelling, returning or extraditing a person to a country when there are substantial grounds for believing that the person would be tortured (non-refoulement);
- Ensuring that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made;
- Ensuring that the prohibition of torture is included in training of law enforcement and medical personnel, public and other relevant officials;

### **2) To ensure that general safeguards against torture exist in places of detentions such as:**

- Granting detainees prompt and unrestricted access to a lawyer and a doctor of their choice;
- Informing family members or friends about the person's detention;
- Providing detainees access to family members and friends;
- Not holding persons in incommunicado detention;

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<sup>11</sup> *Ana, Beatriz and Celia Gonzalez Perez .v. Mexico* (Report No. 53/01), Inter-American Commission on Human Rights, 4 April 2001.

<sup>12</sup> See the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or degrading Treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session.

**3) To effectively investigate allegations of torture, by:**

- Ensuring that the relevant authorities undertake a prompt and impartial investigation whenever there are reasonable grounds to believe that torture has been committed;
- Guaranteeing that all allegations of torture are effectively investigated;

**4) To ensure that alleged perpetrators are subject to criminal proceedings by:**

- Criminalising acts of torture, including complicity or participation;
- Making torture an extraditable offence and providing assistance to other national governments seeking to investigate and/or prosecute persons accused of torture;
- Ensuring that the alleged perpetrators are subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed;

**5) To ensure that victims of torture have the right to an effective remedy and adequate reparation by:**

- Ensuring that victims of torture have effective procedural remedies to protect their right to be free from torture in law and practice;
- Guaranteeing that domestic law reflects the different forms of reparation recognised under international law and that the reparations afforded reflect the gravity of the violation(s).

## **PART II: INTERNATIONAL STANDARDS IN THE ISTANBUL PROTOCOL**

Part 2 of this Guide describes the general measures that States are obliged to take to forestall torture and other forms of ill treatment and explains how lawyers can advocate for the implementation of such measures through general advocacy work and also in the context of individual cases. This section will address the following international standards:

- A. General preventative measures;**
- B. Specific safeguards in places of detention;**
- C. Investigating allegations of torture effectively;**
- D. Prosecution of alleged perpetrator and punishment of those responsible; and**
- E. Guaranteeing effective remedies and adequate forms of reparation for the victims.**

### **A. General measures to prevent torture**

Taking measures to prevent torture is the first obligation to ensure protection from torture as outlined in the Istanbul Protocol. The positive obligation on governments to prevent torture is specifically enshrined in the United Nations Convention against Torture as well as the Inter-American Convention to Prevent and Punish Torture.<sup>13</sup>

Studies reveal that the inadequacy of national laws to prohibit torture, the discrepancy between laws and what happens in reality and the lack of legal safeguards in places of detention all contribute to the persistence and prevalence of torture.<sup>14</sup> If broad preventative measures are in place at the national level to address basic legislative, administrative and institutional deficiencies, lawyers will have more scope to address more specific weaknesses, such as procedural irregularities in the investigations process.

Lawyers working with professional associations such as national bar associations or law societies or when affiliated with civil society groups such as human rights organisations, may lobby their governments to adopt new legislation or amend existing laws that incorporate preventative aspects and/or to join parliamentary drafting committees to work towards implementation of international obligations in domestic law.

As part of their litigation strategy and case preparation, lawyers may make reference to the need of the judiciary to take cognisance of international legal standards necessary for the prevention of torture. If the legal tradition permits courts to invoke international law directly, without need for implementing legislation, lawyers' frequent reference to such standards will help to ensure that such principles eventually become part of the national legal culture.

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<sup>13</sup> See A.S. Treaty Series No. 67.

<sup>14</sup> For a summary of findings, see REDRESS, *Reparation For Torture: A Survey of Law and Practice in Thirty Selected Countries*, April 2003, at p. 41. [REDRESS' Audit]

Even where implementation legislation is required but does not yet exist, lawyers may still refer judges to treaties that their governments have ratified so that courts can in a more general way, interpret national laws consistently with such treaties. In particular, lawyers may take the following concrete steps as part of their litigation strategy:

- ✓ Use international human rights arguments in pleadings and case submissions; try to find parallels between national law safeguards and international law standards;
- ✓ If possible, refer to positive jurisprudence of neighbouring countries, or countries with a similar legal system, in order to encourage judges to accept new or novel arguments;
- ✓ Develop casework strategies that seek progressive changes in the approaches of judges to the question of torture. Always start with more straightforward constitutional arguments that are well entrenched in the national legal culture before moving to other concepts. If possible, select the most 'sympathetic' and clearest of cases, where for example most medical evidence is available to prove both physical and psychological injury to make sure both types of torture become part of national jurisprudence;
- ✓ Identify the local region or court that will be most sympathetic or most willing to entertain new legal argumentation and start to bring challenges in this jurisdiction before moving to areas where judges may be more reticent of change;
- ✓ Make sure that your domestic litigation strategy is consistent with the possibility to submit a petition to an international human rights body or court, e.g. if available remedies are not fully consistent with international standards, specify this in the pleadings and also try to exhaust all possible avenues at the national level (like civil litigation even if it is almost "impossible" to succeed without a criminal sentence).

Lawyers can also be involved in more general lobbying activities to promote the implementation of measures to prevent and punish torture. Specific **legislative** initiatives that lawyers may become involved with include:

- ✓ Campaigns to ratify the UN Convention against Torture and its Optional Protocol as well as regional human rights instruments prohibiting torture;
- ✓ Proposals for national legislation to implement the provisions of the UN Convention against Torture including: making torture a specific criminal offence in line with Article 1; ensuring that statements made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made; and guaranteeing effective remedies and adequate reparation specifically for torture victims;
- ✓ Specific provisions under national legislation to guarantee that the crime of torture is prosecuted *ex officio* (i.e. without a victim lodging a complaint);
- ✓ Proposals to legislate mandatory medical examinations for detainees upon entry into detention centres;
- ✓ Administrative legislation forcing authorities in detention centres to keep permanent records of persons detained and as well as medical records of all detainees (including medical diagnosis);
- ✓ Revoke legislation that contravenes any provision of the UN Convention against Torture or that generally facilitates torture and ill treatment in certain circumstances (such as "security legislation") as well as any legislation that exempts perpetrators from punishment (such as amnesties or immunities);
- ✓ Amendments to the Rules of Court, Procedural Codes and/or other relevant evidentiary principles to shift the burden of proof to the relevant custodial authority when it is reasonably alleged that torture took place during detention (i.e. the individual is sent to emergency hospitalisation during detention).



Lawyers may also become involved in **policy initiatives** or **advisory committees** that promote greater accessibility, transparency and accountability of public institutions, such as:

- ✓ Commenting on reforms to national legal aid structures in order to improve torture survivor's access to justice;
- ✓ Producing guidelines for distribution to detainees on their right to be free from torture, custodial safeguards and steps they may take when this right is violated; similar guidelines to custodial authorities emphasising their obligations and rights of detainees;
- ✓ Recommending measures to enhance the transparency of law enforcement bodies: for example, methodical documentation of reported cases of torture (allegations), analysis of the number of alleged cases against investigation and prosecution rates as well as awards of reparation; public dissemination of such statistics, imposition of time periods within which allegations of torture must be investigated and disciplinary sanctions for omissions or actions that render an investigation ineffective;
- ✓ Participating in training sessions for law enforcement and other security officials, including the military, on international standards in relation to the prohibition of torture;
- ✓ Promoting training sessions for judges on safeguards against torture, as well as on the specific role of the judiciary in preventing and punishing torture and generally on the countries' international legal obligations on the subject.

## **B. Specific safeguards in places of detention**

The Istanbul Protocol also reiterates the importance of periodic visits to places of detention as an effective tool to scrutinise national detention practices and as a means of preventing the systematic practice of torture. Significantly, the Istanbul Protocol states that independent commissions, set up at the national level and consisting of legal and medical experts should be given periodic access to places of detention. The Istanbul Protocol also cautions against the negative effect of well-intentioned non-specialists of official institutions and NGOs visiting places of detention and being counterproductive to ongoing investigations into allegations of torture.

### **1. "Preventative mechanisms" to visit places of detention**

"Preventative mechanism" is a term used in international human rights instruments to denote an independent body of experts, authorised to undertake regular visits to places where persons are deprived of their liberty, in order to prevent torture. The principle that places of detention should be visited by independent experts is set out in the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.<sup>15</sup> The former UN Special Rapporteur on torture also expressed the need for inspection of places of

<sup>15</sup> "In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment." *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 29.

detention: "Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture."<sup>16</sup>

The Istanbul Protocol provides that as a preventative measure, independent commissions should be set up at the national level, and given periodic access to places of detention. The recently adopted Optional Protocol to the United Nations Convention against Torture<sup>17</sup> establishes a double system of prevention: national and international. Upon entry into force, a Subcommittee of the United Nations Committee against Torture will be established to conduct visits to places of detention in the territory of States parties to the Protocol. At the same time, State Parties must also establish, designate or maintain independent "national preventative mechanisms" to conduct periodic visits to places of detention and formulate recommendations to national authorities.<sup>18</sup> According to the Optional Protocol, these "early warning systems" can alert national authorities to emerging patterns of impermissible conduct in places of detention and practices that may be conducive to torture being practised.

Some countries have established specific bodies that function as national preventative mechanisms, in others, national human rights commissions or similar bodies are authorised to undertake visits to places of detention as part of their mandate.

### **To be truly effective, "preventative mechanisms" must:**

- ✓ **Be independent and impartial;**
- ✓ **Be comprised of lawyers, doctors and others with expertise in the investigation and documentation of torture;**
- ✓ **Have unrestricted and unlimited access to all places of detention and to all detainees, with unhindered and confidential access for interviews (no third-persons);**
- ✓ **Have the option to publicise their reports and formulate recommendations to national authorities for improvement in protection afforded to detainees;**
- ✓ **Establish a follow-up mechanism for their recommendations**

In practice, the extent to which lawyers can become involved with national preventative mechanisms depends on the composition and mandate of the particular body. But as recommended by the UN Committee against Torture, both lawyers and doctors should form part of the independent body of experts visiting places of detention.<sup>19</sup> In some countries lawyers and representatives from NGOs can participate in visits by such bodies. In other countries, where lawyers learn about abuses occurring in a detention facility only through

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<sup>16</sup> Report of the Special Rapporteur on torture, N. Rodley E/CN.4/1995/34, 12 January 1995, paragraph 926 (c).

<sup>17</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Protocol is available for signature, ratification and accession as from 4 February 2003.

<sup>18</sup> State Parties are obliged to "maintain, designate or establish" under Art. 17 of the Optional Protocol to the CAT. For guidelines on establishing independent and effective national preventative mechanisms, see *Preventing Torture at Home: A Guide to the Establishment of National Preventative Mechanisms*, Amnesty International, IOR 51/004/2004, 1 May 2004.

<sup>19</sup> Report of CAT on systematic practice of torture in Turkey under Article 20 of the UN Convention against Torture, A/48/44/Add.1, 15 November 1993, para. 47.

communication with their client(s), this information can be submitted to the national preventative mechanism for their follow-up.

Where national authorities fail to effectively fulfil their positive obligations to take measures to prevent torture, these deficiencies can be brought to the attention of appropriate international mechanisms. Some examples of such “international preventative mechanisms” are listed below:

**a. International (universal) mechanisms:**

<b>United Nations Special Rapporteur on the Question of Torture</b>
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The Special Rapporteur's remit is to provide the United Nations Commission on Human Rights with information on governments' legislative and administrative actions in relation to torture and the extent to which State Parties are fulfilling their obligations under the United Nations Convention against Torture.

Individuals can send allegations of torture to the attention of the Special Rapporteur on Torture. Upon receiving these allegations, the Special Rapporteur's dialogue with a government can begin in one of two ways. If the Rapporteur believes that the allegations he has received are credible, he will either transmit an urgent appeal or raise the allegation in a standard communication.

The urgent appeal procedure is designed to respond urgently to information reporting that an individual may be at risk of torture and is used to *prevent* possible incidents of torture. It will therefore be used only where information is very recent. It is a non-accusatory procedure, which means that it merely asks the Government to take steps to make sure that the person is not tortured, without adopting any position on whether or not the fear of torture might be justified.

Standard communications are transmitted to governments on a periodic basis and contain both allegations concerning individual cases (individual allegations) and those concerning general trends, patterns and special factors contributing to the practice of torture in a country (general allegations).

These communications are transmitted to the government against which the allegations have been made, in order to give that government an opportunity to comment on them. Depending on the response received from the government, the Special Rapporteur may inquire further or make recommendations. All communications sent and received throughout the year are listed in an annual report, along with further recommendations and general comments as appropriate, including recommendations about measures which should be taken in order to eradicate torture.

The power of the Special Rapporteur lies with the Commission on Human Rights, and the public nature of the procedure. His conclusions are not legally binding and he has no powers of enforcement. Nonetheless, not many states are immune to public condemnation, and the publicity of his findings creates pressure for states to co-operate by introducing reforms or otherwise implementing his recommendations.

For more details on the information that should be included in a communication to the United Nations Special Rapporteur on Torture, see the model questions on the website of the Office of the High Commissioner for Human Rights,<sup>20</sup> or *The Torture Reporting Handbook* ([http://www.essex.ac.uk/torturehandbook/handbook\(english-complete\).doc](http://www.essex.ac.uk/torturehandbook/handbook(english-complete).doc)) at page 92.

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<sup>20</sup> <http://www.unhchr.ch/html/menu2/7/b/torture/torquest.htm> (last accessed July 2004).

## Subcommittee of the United Nations Committee against Torture

Once the Optional Protocol to the United Nations Convention against Torture<sup>21</sup> has entered into force, the Subcommittee of the United Nations Committee against Torture<sup>22</sup> will be established to conduct visits to places of detention in the territory of State Parties. States must also establish, designate or maintain independent "national preventative mechanisms" to conduct periodic visits to places of detention and formulate recommendations to national authorities for improvement in protection afforded to detainees. The Optional Protocol also stipulates specific criteria to ensure the effectiveness and functional independence of such national preventative mechanisms.

The Optional Protocol was adopted on 18 December 2002 and will enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession. To see the status of ratification go to: <http://www.unhchr.ch/html/menu2/6/cat/treaties/proratification.htm>

## International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is a neutral and independent organisation which acts primarily in the context of armed conflict, but also in situations of violence and political unrest. Its headquarters are based in Geneva, Switzerland, but it has field delegations in many countries where its activities are required, usually through an agreement with the governing authorities. One of its functions in these contexts is to act as a neutral intermediary between detainees and their detaining authorities. Its representatives carry out **visits to places of detention** where persons are held in connection with the conflict or unrest, and **examine the conditions of detention and treatment** and **interview detainees about their experiences in detention**. They require access to all places of detention where detainees falling within their field of activity are kept, as well as the opportunity to interview the detainees themselves in private. In return, they maintain absolute confidentiality about what they observe during such visits. Because of its special mandate and methods of work, the ICRC is often able to gain access to places of detention which others cannot visit.

The ICRC has its own network and personnel, and functions independently of other organisations. Nonetheless, it is willing to receive information about patterns of violations or enquiries about specific detainees or missing persons which it may be in a position to follow up. It prefers to receive such information directly from relatives, but will accept it from NGOs on the understanding that the confidentiality protecting its work means that the NGO should not expect to receive feedback on any action taken. In the case of missing or disappeared persons, it may send a response to the family. In general, it will seek to make direct contact with the family before it decides to take action. Its guiding principle is that any action it takes is on behalf and in the name of the detainees themselves, not of other organisations.

If information is passed on to the ICRC, it should be as detailed as possible about the arrest and detention. As a general rule, the ICRC will tend to act more readily in cases indicating a pattern than in individual cases.

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<sup>21</sup> See A/RES/57/199.

<sup>22</sup> Under Article 20 of the United Nations Convention against Torture there is also an inquiry procedure that allows the Committee against Torture to look into allegations of "systematic practice" of torture in a State Party to the Convention, with a possibility of visiting the country, unless that State Party has formally declared that it does not recognise the Committee's competence to do so. However this procedure is not preventative but "reactive", since the Committee can only visit the country after allegations of systematic torture have been made.

## **b. Regional mechanisms:**

### **Special Rapporteur on Prisons and Conditions of Detention in Africa**

The primary functions of the Special Rapporteur are monitoring and fact-finding but it can receive information from individuals and NGOs. Reports issued by the Special Rapporteur on visits to prisons include allegations of ill-treatment of prisoners and detainees in police stations plus recommendations on how the relevant national authorities should address identified concerns.<sup>23</sup> It was created by a 1996 resolution of the African Commission on Human and Peoples' Rights and it is comprised of one independent expert that examines situations of persons deprived of their liberty within the territories of States.

#### **Special Rapporteur on Prisons and Conditions of Detention in Africa**

Kairaba Avenue, P.O. Box 673

Banjul, Gambia

Telephone: +220 392 962; Fax: +220 390 764

Email: [achpr@achpr.gm](mailto:achpr@achpr.gm)

### **European Committee for the Prevention of Torture**

The European Committee for the Prevention of Torture (CPT) visits places of detention in State Members of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (in co-operation with national authorities) and examines the treatment of persons deprived of their liberty with a view to strengthening the protection of detainees against torture. Lawyers in countries that are Members to this Convention can submit information to the Committee on situations of concern.

#### **European Committee for the Prevention of Torture**

C/o Council of Europe

67075 Strasbourg Cedex, France

Telephone: +33 3 88 41 39 39, Fax: +33 3 88 41 27 72

Email: [cptdoc@coe.int](mailto:cptdoc@coe.int); web: [www.cpt.coe.int](http://www.cpt.coe.int)

*\*The Torture Reporting Handbook*<sup>24</sup>

([http://www.essex.ac.uk/torturehandbook/handbook\(english-complete\).doc](http://www.essex.ac.uk/torturehandbook/handbook(english-complete).doc)) contains detailed procedures on submitting information to the CPT at page 108.

## **2. Custodial safeguards**

A detainee's right to access a lawyer of his or her own choosing is firmly established under international law. This safeguard protects basic due process rights enshrined in international law and it is also an important protection against torture. As established in Principle 33 (1) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*: "A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel,

<sup>23</sup> For more information on the mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa and the Special Rapporteur on Extra-Judicial Executions in Africa, see Section 5.3 in *Reporting Killings as Human Rights Violations Handbook* by Kate Thompson and Camille Giffard, Human Rights Centre, Essex University, UK.

<sup>24</sup> *The Torture Reporting Handbook* by Camille Giffard, Human Rights Centre, Essex University, UK.

inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.”<sup>25</sup>

International human rights law has also established other safeguards to protect persons who are taken into custody with the objective of minimising the opportunities for the practice of torture. These measures are commonly referred to as “custodial safeguards” and include the right of access to lawyers, physicians and family members<sup>26</sup> and, in the case of foreign nationals, diplomatic and consular representatives.<sup>27</sup>

The Istanbul Protocol provides that governments are obliged to put in place custodial safeguards in places of detention to minimise the risk of torture. The European Committee for the Prevention of Torture has referred to what it terms a “trinity of fundamental rights” for detainees at the outset of their detention: the right of a detainee to have the fact of their detention notified to a third party of their choice, the right of access to a lawyer and the right of access to a doctor, including the right to be examined by a doctor of their choice (additional to medical examinations carried out by a doctor called by law enforcement officials).

#### **a. International standards on the right of detainees to access a lawyer**

International law stipulates that any person deprived of their liberty, with or without having been charged of a criminal offence, should have prompt and unrestricted access to a lawyer. A detainee's right to access a lawyer should be provided for in national law and any restrictions on this right should be exceptional and subject to judicial review.<sup>28</sup> However, in some countries, domestic law only accords detainees the right to access a lawyer after a specific time period and not from the outset of their detention.<sup>29</sup> The United Nations Special Rapporteur on Torture has stated that national legislation should provide that detainees are given access within 24 hours of detention.<sup>30</sup>

Detainees have a right to full and unrestricted access to a lawyer of their own choice. As recognised by the *UN Basic Principles on the Role of Lawyers (Basic Principles on Lawyers)*,<sup>31</sup> national authorities are obliged to ensure effective and equal access to lawyers for all persons within their territory. The *Basic Principles on Lawyers* also stipulate that governments should ensure that all persons are immediately informed of their right to a lawyer of their own choice upon detention and have prompt access to a lawyer. Furthermore, Principle 8 stipulates that governments should ensure that lawyers are able to perform their

<sup>25</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>26</sup> CPT, 12<sup>th</sup> General Report, *supra*, 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.

<sup>27</sup> 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)*, ICJ Reports 2001, para.77 and the *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, recognised that Article 36 (1) of the Vienna Convention on Consular Relations creates individual rights for the national concerned.

<sup>28</sup> As recognised by the UN Human Rights Committee, even when persons are under “administrative detention”, which is a detention without charge or trial, authorised by administrative order rather than by judicial decree (normally applied by States in emergencies) the legality of the detention should be subject to judicial review. [Communication No. 560/1993, CCPR/C/59/D/560/1993, *Hammel v Madagascar*, Communication No. 155/1983, CCPR/C/29/D/155/1983; at paras 18.2 and 20; see also *Torres v Finland*, Communication No. 291/1988, CCPR/C/38/D/291/1988; *Vuolanne v Finland*, Communication No. 265/1987, CCPR/C/35/D/265/1987, *Portorreal v Dominican Republic*, Communication No. 188/1984, CCPR/C/31/D/188/1984). See also *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, Inter-Am. Ct. H. R. (Ser. A) No. 8 (1987)].

<sup>29</sup> The CPT Standards: Substantive sections of the CPT's General Reports, CPT/Inf/E (2002) - Rev.2003.

<sup>30</sup> UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, paragraph 39.

<sup>31</sup> *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

professional functions without improper interference and can consult with their clients freely without delay, interception or censorship and in full confidentiality.

The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>32</sup> (*UN Body of Principles on Detention*) also stipulates the right to consult and communicate, without delay or censorship and in full confidentiality, with legal counsel (save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order). The UN Special Rapporteur of Torture, stresses that access to a lawyer should be prompt and that the lawyer should be independent from the State apparatus. Exceptionally, where it is contended by national authorities that prompt contact with a particular lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, the detainee should be permitted to meet with an independent lawyer, such as one recommended by a bar association.<sup>33</sup>

Importantly, the *Basic Principles on Lawyers* also specify that governments should guarantee that "persons who exercise the functions of a lawyer without having the formal status of lawyers" benefit from the same legal protections as lawyers. In this sense, members of human rights organisations that are representing the interests of a detainee should also have access, independent of their qualification as lawyers.

## **b. International standards on the right of detainees to access a doctor**

The UN Special Rapporteur on Torture considers that a prompt and independent medical examination upon a person's admission to a place of detention constitutes one of the basic safeguards against torture and other forms of ill-treatment.<sup>34</sup> In accordance with international human rights instruments, such as the *UN Code of Conduct for Law Enforcement Officials*<sup>35</sup>, the UN Special Rapporteur on Torture considers that the health of detainees should be ensured during the whole period of detention.

The *UN Standard Minimum Rules for the Treatment of Prisoners*<sup>36</sup> (*UN Rules for the Treatment of Prisoners*) and the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>37</sup> (*UN Body of Principles on Detention*) provide a set of medical safeguards for detainees, and stipulate that a medical examination shall be offered to a detainee promptly after their detention and that free medical care should be provided to detainees whenever necessary. All medical examinations of detainees should be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise, out of the sight of these officials. The *UN Body of Principles on Detention* stipulates that a detainee, or his lawyer, will have the right to petition a judicial or other competent national authority for a second medical examination or opinion.

*The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*,<sup>38</sup> oblige States to "Establish regulations for the treatment of all persons deprived of their liberty guided by

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<sup>32</sup> The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* was adopted by General Assembly Resolution 43/173 of 9 December 1988.

<sup>33</sup> Idem.

<sup>34</sup> See report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment to the UN Commission on Human Rights, E/CN.4/2004/56, 23 December 2003.

<sup>35</sup> *Code of Conduct for Law Enforcement Officials*, adopted by General Assembly resolution 34/169 of 17 December 1979.

<sup>36</sup> *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>37</sup> The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* was adopted by General Assembly Resolution 43/173 of 9 December 1988.

<sup>38</sup> Adopted by the African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October 2002.



the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.” Principle 25 of the *UN Body of Principles on Detention* provides that “A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.”

The UN Special Rapporteur on Torture, has specified that the forensic medical services should be under judicial or an independent authority and not under the same governmental authority as the police and prison system.<sup>39</sup> Similarly, the European Committee for the Prevention of Torture has stressed that detainees should have the right to access independent doctors, and should be medically examined by qualified doctors upon entering and leaving detention facilities as well as upon request without undue outside interference, such as presence of police officers.<sup>40</sup>

### **c. Action at the national level to gain access to places of detention when access is denied**

Practical approaches that can be taken where national authorities deny detainees access to a lawyer of their own choice include:

- ✓ Identifying the level of responsible authority where the denial of access originates;
- ✓ Reasoning access with officials at the place of detention and where that fails to request authorisation from the next level of responsibility, up to ministerial level;
- ✓ Make *written* interventions with those in charge at specific places of detention requesting to be informed of existing custodial safeguards, and if no response is obtained, make a written intervention with the next level of responsibility and seek judicial review where interventions are met with administrative silence;
- ✓ Ensure that authorisations of access are in *writing* and that officials at the place of detention are notified of the authorisation;
- ✓ Challenge any decision that denies access to the detainee based on the fact that access has been given to another lawyer (that is not the detainees choice);
- ✓ When direct interventions with the relevant authorities fail, contact the court or judge responsible and any other body that may be capable of influencing the situation and obtaining access, such as national human rights commissions, national visiting preventative mechanisms, parliamentarians, ombudspersons;
- ✓ Also inform international and regional mechanisms, giving as many details about the place of detention as known (see Section 1.a of Part 2 and Section E, Part 2);
- ✓ Seek provisional measures before courts or administrative bodies on appropriate procedural requirements that should be applied when someone is detained. It is also possible to seek interim measures from regional and international human rights bodies;
- ✓ Seek assistance from international campaigning organisations like Amnesty International or the World Organisation Against Torture.

<sup>39</sup> See page 12, Report of the UN Special Rapporteur of the Commission on Human Rights, A/56/156, 3 July 2001.

<sup>40</sup> CPT, 12<sup>th</sup> General Report, supra, para.42.



## C. International standards on effective investigation of torture allegations

The obligation on governments to carry out effective investigations is firmly established in international law. Whenever there are indications that torture might have been committed, governments are obliged to automatically undertake an effective investigation, even without a formal complaint triggering it.<sup>41</sup> Accordingly, the Istanbul Protocol provides that, "even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred".

The obligation on governments to conduct an effective investigation is a corollary to the right of victims to an effective remedy to complain of acts of torture. In principle, any allegation of torture triggers an obligation on the part of the State to investigate the substance of the complaint promptly and impartially. This standard has been affirmed by the UN Committee against Torture,<sup>42</sup> the Human Rights Committee,<sup>43</sup> the European Court of Human Rights<sup>44</sup> and the Inter-American Court of Human Rights.<sup>45</sup>

The obligation to investigate does not extend to clearly frivolous cases or those that are 'manifestly unfounded.' According to the Special Rapporteur on Torture, all torture allegations should be investigated and the alleged perpetrator(s) suspended from duty; however, the latter step should only be taken where the allegation is not manifestly ill-founded.<sup>46</sup> Rule 36 (4) of the *Standard Minimum Rules for the Treatment of Prisoners* obliges the authorities to deal with any complaint "(u)nless it is evidently frivolous or groundless," while the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* imposes no such restrictions, providing in Principle 33 (4) that "(e)very request or complaint shall be promptly dealt with and replied to without undue delay." However, it is difficult to draw this line. The Section on effective remedies, below, will give further guidance on international standards addressing the right of torture victims to have their allegations investigated.

For an investigation to be "effective" under international human rights law, it must be:

- Prompt
- Impartial
- Thorough

### 1. Obligation of the State to investigate allegations "promptly"

According to the Istanbul Protocol, "*States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated.*" Articles 12 and 13 of the Convention against Torture and Article 8 of the Inter-American Convention to Prevent and

<sup>41</sup> See for example Article 12 of the UN Convention against Torture stating that national authorities are obliged to proceed to an investigation *ex officio*, wherever there are reasonable grounds to believe that acts of torture have been committed and whatever the origin of the suspicion.

<sup>42</sup> See *Henri Parot v Spain*, CAT, Communication No. 6/1990, CAT/C/14/D/6/1990, para 10.4 and *Encarnacion Blanco Abad v Spain*, CAT, Communication 56/1996 at para 8.6. See also, Chris Ingelse, *The UN Committee against Torture: An Assessment*, The Hague/London/Boston: Kluwer Law International, 2001, at p. 355.

<sup>43</sup> *Eduardo Bleier v. Uruguay*, HRC Communication No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982).

<sup>44</sup> *Assenov & Others v Bulgaria*, (24760/94) [1998] ECHR 98 (28 October 1998) and *Veznedaroglu v Turkey*. 32357/96) [2000] ECHR 166 (11 April 2000).

<sup>45</sup> *Maritza Urrutia Case*, Judgment of 27 November 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003), para. 110; See, also, *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), para 176; Affirmed in *El Amparo Case*, Judgment of 14 September 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28 (1996), para. 61 of the judgment on reparations; *Suárez Rosero Case*, Judgment of 20 January 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44 (1999), para 79.

<sup>46</sup> General Recommendations of the Special Rapporteur, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (k).

Punish Torture both expressly require prompt or immediate investigations upon receipt of complaints of torture.<sup>47</sup> There are no hard and fast rules as to what constitutes “prompt” or “immediate.” The international jurisprudence indicates that it depends on the circumstances of the case but that the words would normally be given their literal meaning.

Promptness, according to the UN Committee against Torture, appears to relate not only to the time within which the investigation is commenced, but also the expediency with which it is conducted.<sup>48</sup> The Committee against Torture has also expressed concern about the lack of prompt investigations in its concluding observations.<sup>49</sup>

Despite the fact that neither the International Covenant on Civil and Political Rights nor the European Convention on Human Rights contain express provisions relating to investigations, both the Human Rights Committee and the European Court on Human Rights have concluded that investigations must be carried out promptly.<sup>50</sup> The Special Rapporteur on Torture<sup>51</sup> as well as instruments such as the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>52</sup> and the *Standard Minimum Rules for the Treatment of Prisoners*<sup>53</sup> have emphasised that complaints about torture should be investigated ‘promptly’.

The Human Rights Committee declared in its General Comment 20, “complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.” It has repeatedly emphasised that a “State party is under an obligation to investigate, as expeditiously and thoroughly as possible, incidents of alleged ill-treatment of inmates.”<sup>54</sup> In its consideration of State party reports, the Human Rights Committee has also repeatedly called upon States to “ensure that all instances of ill-treatment and of torture and other abuses committed by agents of the State are promptly considered and investigated by an independent body.”<sup>55</sup>

When examining whether an investigation is effective, the European Court of Human Right has applied the test of whether “the authorities reacted effectively to the complaints at the relevant time.”<sup>56</sup> The Court has in several cases based its finding of a failure by the authorities to investigate on the lack of prompt and timely investigations. Considerations are

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<sup>47</sup> The CAT uses the word “prompt” while the Inter-American Convention uses “immediate”.

<sup>48</sup> In *Halimi-Nedzibi v Austria*, Communication No. 8/1991, 18 November 1993 the complainant raised the issue of torture with an investigating judge on 5 December 1988. The investigation into the alleged torture was only commenced in March 1990. The Committee against Torture found that this was an unreasonable delay. In *Encarnacion Blanco Abad v Spain*, Communication 56/1996, February 1996, the complainant alleged during her first arraignment on terrorism-related charges that she had been tortured. It took another 15 days before the complaint was taken up by a judge and another four days before an inquiry was commenced. The investigation then took 10 months, with gaps of between one and three months between statements on forensic evidence reports. The Committee found this too to be an unacceptable delay. See also Amnesty International: *Combating Torture: A Manual for Action*, Amnesty International publication, AI Index: ACT 40/001/2003, June 2003, p. 175. (*Combating Torture*)

<sup>49</sup> Without, however, specifying what exactly constitutes “prompt.” See, for example, Concluding Observations : Egypt, UN Doc. CAT/C/XXIX/Misc.4, 20 November 2002, para. 5(b).

<sup>50</sup> See Human Rights Committee General Comment 20, Concerning Prohibition of Torture And Cruel Treatment or Punishment (Art. 7) 10/3/1992, para 14; *Aksoy v Turkey*, *Aksoy v. Turkey* (1997) 23 E.H.R.R. 553 ECHR.

<sup>51</sup> Report of the Special Rapporteur of 23 December 2003, E/supra, at para. 39; General Recommendations of the Special Rapporteur on Torture UN Doc. E/CN.4/2003/68 at para. 26(i).

<sup>52</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988. Principle 33 (1).

<sup>53</sup> Rule 36 (4).

<sup>54</sup> *Stephens v. Jamaica*, Communication No. 373/1989, UN Doc. CCPR/C/55/D/373/1989 (1995), para.9.2. See also *Irvine Reynolds v. Jamaica*, Communication No. 587/1994, UN Doc. CCPR/C/59/D/587/1994 (1997) and *Wayne Spence v. Jamaica*, Communication No. 599/1994, UN Doc. CCPR/C/57/D/599/1994 (1996).

<sup>55</sup> See e.g. Democratic People's Republic of Korea, UN Doc. CCPR/CO/72/PRK, 27 August 2001, para.15.

<sup>56</sup> *Labita v Italy*, Application no. 26772/95 (unreported judgment of 6 April 2000), para. 131.

given to the starting of investigations,<sup>57</sup> delays in taking statements,<sup>58</sup> and the length of time taken during the initial investigations.<sup>59</sup>

Equally, the Inter-American Court of Human Rights has not specified the meaning of “promptness.” However in *Cantoral Benavides v Peru*, when considering the failure of the State party to open a formal investigation following an allegation of torture, the Court referred to Article 8 of the Inter-American Convention against 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,” thus implying a literal meaning.<sup>60</sup>

## **2. Obligation of States to investigate the allegation “impartially” and the question of independence of investigating bodies**

The Istanbul Protocol provides that independent investigative mechanisms should be established. It gives examples of different grounds for requiring an independent investigative mechanism, such as insufficient expertise or lack of *impartiality* of investigators; the existence of a pattern of abuse (e.g. where the type of torture practised is attributable to public officials); the suspected involvement of public officials (e.g. where the national authorities have attempted to obstruct or delay the investigation of torture); or where the public interest would be served by creating an independent mechanism.

Impartiality has been described as a key, if not the most important, requirement of the investigation process.<sup>61</sup> The term ‘impartiality’ means free from undue bias. It is conceptually different from ‘independence’ which denotes that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators.<sup>62</sup> The two notions are, however, closely interlinked, as the lack of independence is commonly seen as an indicator of partiality.<sup>63</sup>

Articles 12 and 13 of the Convention against Torture and Article 8 of the Inter-American Convention to Prevent and Punish Torture expressly require investigations to be impartial. The Human Rights Committee has also found impartiality to be an implicit requirement for any investigation contemplated by Article 7 of the International Covenant on Civil and Political Rights<sup>64</sup> as has the European Court of Human Rights.<sup>65</sup>

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<sup>57</sup> *Çiçek v. Turkey* (2003) 37 E.H.R.R. 20 ECHR, para.149. *Timurtas v. Turkey* (2001) 33 E.H.R.R. 6 ECHR, para.89. See also *Tekin v. Turkey* (2001) 31 E.H.R.R. 4 ECHR, 67; and *Labita v. Italy*, supra, para. 133 *Tas v. Turkey* (2001) 33 E.H.R.R. 15 at paras. 70-72 where the public prosecutor did not commence an investigation until two years after the incident.

<sup>58</sup> *Assenov & Others v. Bulgaria*, supra.

<sup>59</sup> *Indelicato v. Italy* (2002) 35 E.H.R.R. 40 ECHR, para.37.

<sup>60</sup> *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, Inter-Am. Ct. H.R., (Ser. C) No.69 (2000).

<sup>61</sup> David Sloss *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties* in 24 International Yale Journal of International Law, 1999 129, at p. 143. See, also, Annex to A/54/426 (Report of Sir Nigel Rodley to the General Assembly, in accordance with General Assembly Resolution 53/139): “Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, UN Doc. E/CN.4/2001/66, 25 January 2001, para 1310; Principles 7 and 33 of the *Body of Principles*.

<sup>62</sup> See the final report of Mr. L.M. Singhvi, then Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6), para.79. See also Inglese, Torture, supra, p. 336 and J. Burgers and H. Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, 1988, p. 145.

<sup>63</sup> AI, *Combating torture*, supra, p. 175.

<sup>64</sup> See General Comment 20, supra, para 14.

<sup>65</sup> See *Assenov & Others v Bulgaria*, supra.

The treaty bodies have approached the issue of impartiality by considering both procedural and institutional aspects. Impartiality may relate to the proceedings or deliberations of the investigating body,<sup>66</sup> or in respect of any suspicion of, or apparent bias, that may arise from conflicts of interest.<sup>67</sup> In its consideration of State party reports, the Committee against Torture criticised the absence of independent bodies to investigate torture, particular in respect of torture by the police, the institution that ordinarily would be tasked with investigating torture.<sup>68</sup> Similarly, in a number of its concluding observations on State party reports, the Human Rights Committee expressed concern about the lack of impartial investigations of complaints about torture, including the absence of an independent oversight mechanism, and urged States parties to establish independent bodies competent to receive, investigate and adjudicate all complaints on torture and ill-treatment.<sup>69</sup>

The European Court of Human Rights, when assessing the effectiveness of investigations, has often held that investigations lacked independence, e.g. where members of the same division or detachment as those implicated in the allegations were undertaking the investigation.<sup>70</sup> Furthermore, the Court has noted that independence means not only a lack of hierarchical or institutional connection, but also practical independence.<sup>71</sup>

The Inter-American Commission on Human Rights has also observed that the lack of independence negatively impacts on impartiality, which is a minimum requirement for any investigation process,<sup>72</sup> and this approach has been confirmed in the jurisprudence of the Inter-American Court.<sup>73</sup>

The European Committee for the Prevention of Torture has repeatedly stressed the importance of impartial and independent investigations as one of the means of strengthening the protection of detainees from torture and inhuman treatment. As noted following its visit to Cyprus in 2000 "...it is axiomatic that the investigations conducted into such cases [torture] should not only be, but also be seen to be, totally independent and impartial."<sup>74</sup> It further observed, in relation to Spain "... that the investigation of complaints by the internal accountability mechanisms of the National Police and the Civil Guard cannot be said to be independent and impartial"<sup>75</sup> and emphasised "...that it is indispensable that the persons

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<sup>66</sup> It would appear that impartiality would follow standard principles of natural justice of *nemo iudex in sua causa* (no one may be a judge in his own cause).

<sup>67</sup> In the *Encarnacion* case, the Committee against Torture concluded that the particular investigation was partial because the court failed to take steps to identify the alleged perpetrators, and its refusal to allow the complainant to adduce further evidence to the forensic doctor's report. In *Khaled Ben M'Barek v Tunisia* the magistrate who led the inquiry was found to be partial because of his failure to give equal weight to evidence from both sides. *Khaled Ben M'Barek v Tunisia*, Communication 60/1996, UN Doc. CAT/C/23/D/60/1996.

<sup>68</sup> Concluding Observation of CAT, Latvia, UN Doc. CAT/C/CR/31/3, 5, February 2004, para. 6(b). Concluding Observation of CAT, Lithuania, UN Doc. CAT/C/CR/31/2, 5, February 2004, para. 5(a) and (a); Concluding Observation of CAT, Cambodia, UN Doc. CAT/C/CR/31/7, February 2004; Concluding Observation of CAT, Moldova, UN Doc. CAT/C/CR/30/7, May 2003, para. 6 (e); Concluding Observation of CAT, Cyprus, UN Doc. CAT/C/CR/29/1, December 2002, para 4 (1); Concluding Observation of CAT, The Netherlands and Antilles, UN Doc. A/55/44, paras. 181-188, May 2000, par.180 (f). See also, Ingelse, *Torture*, p. 398 and Burgers and Danelius, *Torture*, supra, pp. 144-45.

<sup>69</sup> See, for examples, Concluding Observations of HRC, Lithuania, UN. Doc. CCPR/CO/80/LTU, 15 April 2004; Concluding Observations of HRC, Latvia, UN. Doc. CCPR/CO/79/LVA, 6 November 2003; Concluding Observations of HRC, Viet Nam, UN. Doc. CCPR/CO/75/VNM, 26 July 2002; Concluding Observations of HRC, Yemen, UN. Doc. CCPR/CO/75/YEM, 26 July 2002; Concluding Observations of HRC, Azerbaijan, UN. Doc. CCPR/CO/73/AZE, 12 November 2001; Concluding Observations of HRC, Switzerland, UN. Doc. CCPR/CO/73/CH, 12 November 2001; Concluding Observations of HRC, Czech Republic, UN. Doc. CCPR/CO/72/CZE, 27 August 2001; Concluding Observations of HRC, Venezuela, UN. Doc. CCPR/CO/71/VEN, 26 April 2001.

<sup>70</sup> *Aktas v. Turkey*, supra, para. 301; *Ilhan v. Turkey*, supra, para. 101; *Güleç v. Turkey* (1999) 28 E.H.R.R. 121 ECHR, paras. 80-82; *Toteva v. Bulgaria*, supra.

<sup>71</sup> *Finucane v. United Kingdom* (2003) 22 E.H.R.R. 29 at para. 68. See also *Edwards v. United Kingdom*, supra, at para. 70.

<sup>72</sup> See "Report on the Situation of Human Rights in Mexico 1998", Inter-American Commission of Human Rights, September 24, 1998, OEA/Ser.L/V/II.100, para 323.

<sup>73</sup> *Marrizta Urrutia v. Guatemala*, supra, para. 119.

<sup>74</sup> *Report to the government of Cyprus on the visit to Cyprus carried out by the CPT Committee*, May 2000, supra, para. 13.

<sup>75</sup> *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, from 22-26 July 2001, CPT/Inf (2003) 22, para. 30.

responsible for carrying out investigations into complaints against the police should be truly independent from those implicated in the events.”<sup>76</sup>

### **3. Effective investigations should be conducted ‘thoroughly’: Substance of Investigations**

There is ample jurisprudence to indicate that investigations must be “thorough” and/or “effective”. Whereas the term “thorough” generally relates to the scope and nature of the steps taken in carrying out an investigation, “effective” relates to the quality of the investigation.

The Committee against Torture observed that investigations must be effective and thorough,<sup>77</sup> and that investigations must seek to ascertain the facts and establish the identity of any alleged perpetrators.<sup>78</sup> The Human Rights Committee has consistently held that States have a duty to investigate cases of torture and disappearances *thoroughly*.<sup>79</sup> In its concluding observations, the considers that for an investigation to be effective in practice and law, it should be capable of leading to the identification and punishment of those responsible and include effective access for the complainant and relatives to the investigative procedure.<sup>80</sup>

The European Court of Human Rights held that a thorough investigation should be capable of leading to the identification and punishment of those responsible for any ill treatment and that it “must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities”<sup>81</sup> Furthermore, authorities must always make a serious attempt to find out what happened<sup>82</sup> and “should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.”<sup>83</sup> Investigations should be of reasonable scope and duration in relation to the allegations.<sup>84</sup>

In *Blake*, the Inter-American Court of Human Rights also referred to the need for ‘effectiveness’<sup>85</sup> and specified the duty to adopt all the internal legal measures necessary to facilitate the identification and punishment of those responsible.<sup>86</sup> The Court specified that the State fails to comply with its duty to investigate effectively if “the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible”,<sup>87</sup> thereby stipulating an obligation of result in addition to

<sup>76</sup> Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Sweden, from 27 January to 5 February 2003, CPT/Inf (2003) 27, p.5.

<sup>77</sup> *Radivoje v Yugoslavia*, Communication 113/1998, para 9.6.

<sup>78</sup> *Encarnacion Blanco Abad v Spain*, supra, para 8.8. and *Hajrizi Dzemailj v Yugoslavia*, Communication 161/2000, para 9.4 :Criminal investigation must seek both to determine the nature and circumstances of the alleged act and to establish the identity of the persons involved.

<sup>79</sup> *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995 (14 June 1994), UN Doc. CCPR/C/60/D/612/1995; *Wayne Spence v. Jamaica*, Communication No. 599/1994, U.N. Doc. CCPR/C/57/D/599/1994 (1996); *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995); *Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993(1996).

<sup>80</sup> *Irfan Bilgin v. Turkey*, European Court of Human Rights.

<sup>81</sup> *Askoy v. Turkey*, supra, para. 95; *Aydin v. Turkey*, (supra, para. 103; and *Kaya v. Turkey*, supra, para. 89.

<sup>82</sup> *Timurtas v. Turkey*, supra, para.88.

<sup>83</sup> *Assenov & Others v. Bulgaria*, supra, para. 104.

<sup>84</sup> *Akkoç v. Turkey*, supra, para.99.

<sup>85</sup> *Bámaca Velásquez Case*, Judgment of February 22, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 91 (2002), (Merits, para.212 and Reparation, para.73).

<sup>86</sup> *Blake case*, Interpretation of the Judgment of Reparations (art. 67 American Convention on Human Rights), Judgment of October 1, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 57 (1999), Para.65. See also, *Paniagua Morales et al. Case*, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), para.91.

<sup>87</sup> *Velasquez Rodriguez*, supra, para. 176.

process. The Court has also specified that ‘effectiveness’ requires that victims have full access and capacity to act at all stages of the investigation.<sup>88</sup>

The European Court of Human Rights has analysed what steps authorities must take when gathering evidence, and has made reference in its jurisprudence to offers of assistance; objectivity; attitude of the authorities towards victims and alleged perpetrator(s); timely questioning of witnesses; seeking evidence at the scene, e.g. by searching detention areas, checking custody records, carrying out objective medical examinations by qualified doctors; use of medical reports, and, in death in custody cases, obtaining forensic evidence and carrying out an autopsy.<sup>89</sup>

#### **4. Key principles and procedures for an effective investigation**

Drawing from these standards the Istanbul Protocol provides detailed guidelines on the necessary elements to constitute an effective investigation. The Istanbul Protocol outlines the **key principles** of an effective investigation, including:

- ✓ **investigators must be competent, impartial and independent of suspects and the national authority for which the alleged perpetrators work;**
- ✓ **methods used to carry out investigations should meet the highest professional standards and findings shall be made *public*;**
- ✓ **investigators should have the authority and obligation to obtain all information necessary to the inquiry;**
- ✓ **necessary budgetary and technical resources shall be available to investigators;**
- ✓ **anyone implicated in alleged torture shall be removed from any position of control over alleged victims, witnesses and their families and investigators;**
- ✓ **the investigative mechanism should have access to independent legal advice to ensure that the investigation produces admissible evidence for criminal proceedings;**
- ✓ **the investigative mechanism should have the authority to seek assistance from international legal and medical expert;**
- ✓ **torture victims, their lawyer and other interested parties should have access to hearings and any information relevant to the investigation and must be entitled to present evidence;**
- ✓ **witnesses should be permitted to be represented by a lawyer if they are likely to be harmed by the inquiry (for example, if their testimony could entail criminal charges);**
- ✓ **the investigative mechanism should effectively question witnesses and parties to the proceedings should be allowed to submit written questions;**
- ✓ **detainees should have the right to obtain an alternate medical evaluation by a qualified health professional and this alternate evaluation should be accepted as admissible evidence by national courts.**

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<sup>88</sup> Ibid., para.117.

<sup>89</sup> See, for example, *Salman v. Turkey* supra, para. 106; *Tanrikulu v Turkey*, supra, para.109; *Gül v Turkey* (2002) 34 E.H.R.R. 28, para.89.

The Istanbul Protocol also outlines **minimum procedural standards** for investigations that take into account the rights of the victim, such as informing the victim of the nature of the investigation and how statements or evidence offered by the alleged victim may be used. It also sets out the type of evidence that investigators should try to obtain from the victim.

Where possible, interviewers should interview the alleged perpetrators and obtain medical evidence (physical and psychological), circumstantial evidence, and witness statements (ensuring safeguards and techniques for the safety of witnesses). Medical evidence is vital to torture investigations and will improve the likelihood of successful prosecutions. Some general guidance on obtaining evidence for torture cases is described in the next section and further information on collecting evidence is described in the *Essex Torture Reporting Handbook*<sup>90</sup> and detailed procedures, expanding on the Istanbul Protocol guidelines on obtaining physical evidence in Chapter V and psychological evidence in Chapter VI, are explained in the *Medical Physical Training Manual-Using the Istanbul Protocol for Medical Physical Examination*<sup>91</sup>. The most important issue concerning gathering of evidence is that it is of a sufficient quality to achieve the purposes of an investigation (including prosecution of alleged perpetrators and reparation for victims).

The Special Rapporteur on Torture has expressly endorsed the principles laid down in the Istanbul Protocol, specifying in relation to the question of medical evidence that “the forensic medical services should be under judicial or other independent authority, not under the same governmental authority as the police and the penitentiary system. Public forensic medical services should not have a monopoly of expert forensic evidence for judicial purposes.”<sup>92</sup> Similarly, the European Committee for the Prevention of Torture has stressed that detainees should have the right of access to independent doctors, and should be medically examined by qualified doctors upon entering and leaving detention facilities as well as upon request without undue outside interference, such as presence of police officers.<sup>93</sup>

## **5. Action at the national level to improve the effectiveness of investigations**

Different types of investigative mechanisms have been established in numerous countries.<sup>94</sup> However, the gap between the international standards on the obligation to investigate allegations of torture “effectively” and the reality in domestic law and practice is evident; and greater in some countries than others.<sup>95</sup>

To reduce this gap, lawyers should include international standards in both their advocacy efforts and their legal argumentation. It is important to find domestic legal provisions that reflect these international standards (if they exist) while always making reference to the State obligations under international law.

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<sup>90</sup> *The Torture Reporting Handbook* by Camille Giffard, Human Rights Centre, Essex University, UK., page 47.

<sup>91</sup> *Psychological Training Manual - Psychological Evidence of Torture* by Turkcan Baykal, Caroline Schlar and Emre Kapkin; Human Rights Foundation of Turkey (HRFT)

<sup>92</sup> Report of the Special Rapporteur, December 2002, *supra*, Annex 1], (j).

<sup>93</sup> CPT, 12<sup>th</sup> General Report, *supra*, para.42.

<sup>94</sup> For a list of the different types of bodies and mechanisms with authority to conduct investigations that exist in various countries, see *Combating Torture*, page 177.

<sup>95</sup> For more details on the findings from a review of law and practice on the right to reparation in different countries, see *Audit Project: A Survey of the Law and Practice of Reparation for Torture in 30 Countries Worldwide*, REDRESS, April 2003.

***What action can be taken to challenge the effectiveness of an investigation on the grounds that it has not been opened promptly?***

- Ensure that the complaint is filed in writing and date stamped;
- Write to the complaint body to request a formal reply to the allegation, and request to obtain a copy of their review procedures;
- Apply as soon as possible for judicial review on the effectiveness of the investigation (or take other step in accordance with review procedures) when an allegation of torture has been brought to the attention of the relevant national authority without an investigation being formally opened;
- Apply to the competent authority for an order to take the necessary steps to preserve the evidence.

***What action can be taken where an investigative body is negligent or does not follow procedural requirements?***

- Throughout the process challenge any decision of the investigative judge that does not comply with procedural requirements, or where there has been a failure to act, apply to the relevant court for a decision ordering the investigative judge to proceed with the inquiry;
- Determine whether it may be possible to transfer the matter to another investigative body;
- Advise the competent judicial supervisory body, such as the Judicial Council, of the matter and where appropriate, lodge a complaint.

***What action can be taken to challenge the decision of a national authority to close or suspend an investigation?***

- Request a copy of a written decision closing or suspending an investigation;
- Apply for judicial review to challenge the legality of the grounds on which the decision was taken;
- Seek to present 'new facts' or arguments that may justify the re-opening of the investigation.

The following are some **practical steps that may be taken by lawyers to enhance the effectiveness of investigations at the national level:**



- ✓ Having sought prior instruction from the client (to avoid putting him/her at any risk), alert investigators to any information pertinent to the investigation and where there might be a possibility of sources of evidence being overlooked, to ensure that the investigation produces evidence that is admissible in court;
- ✓ Assess the thoroughness of an investigation by checking if investigators have sought all relevant sources of evidence before injuries disappear or witnesses are no longer available, including medical evidence (of both physical and psychological damage);
- ✓ If possible, promptly submit any concerns with the thoroughness of the investigation, such as delays in conducting medical evaluations, in writing and request second medical evaluations if the competence or impartiality of the examining health professional is called into question;
- ✓ Challenge any report issued by the investigative mechanism that is not sufficiently comprehensive and reasoned, including information on why certain lines of enquiry were pursued and others not and highlighting any irregularities found in the course of the investigation; cite international and national guidelines/rules on collecting evidence and principles on investigations, including the Istanbul Protocol.
- ✓ Collect secondary documentation (such as reports of human rights organisations, research studies, press articles) to support a case that an existing investigation is ineffective or that the particular circumstances of the case (e.g. highly political) require an independent investigation or re-investigation of the allegations;
- ✓ Intervene with the relevant authorities where public officials (who may or may not have been charged with perpetrating torture but are implicated in the allegations) have not been suspended from their positions during the period of investigation;
- ✓ Seek safeguards for health professionals undertaking medical examinations to ensure they have sufficient time and privacy and to avoid any sanctions, in case their examinations confirm that torture was inflicted.

## **D. International standards on prosecution of alleged perpetrators of torture and punishment of those responsible**

International law clearly establishes the obligation on Governments to prosecute those accused of torture. This obligation exists regardless of where the crime was committed, the nationality of the victim or alleged perpetrator.<sup>96</sup> As established in the Istanbul Protocol, "States are required under international law to investigate reported incidents of torture promptly and impartially. Where evidence warrants it, a State in whose territory a person alleged to have committed or participated in torture is present, must either extradite the alleged perpetrator to another State that has competent jurisdiction or submit the case to its

<sup>96</sup> For more information, *Audit Report: A Survey of the Law and Practice of Reparation for Torture in 30 Countries Worldwide*, published by REDRESS, April 2003.

own competent authorities for the purpose of prosecution under national or local criminal laws.”<sup>97</sup>

## **1. General principles on the prosecution of alleged torturers**

International law provides few, if any exceptions to the obligation to investigate with a view to prosecuting alleged perpetrators of torture.<sup>98</sup> It is generally agreed that there should be no criminal immunity for persons accused of perpetrating torture,<sup>99</sup> and that amnesties cannot be accorded to perpetrators of torture or otherwise prevent victims from obtaining an effective remedy.<sup>100</sup> The Special Rapporteur on Torture has stated that ‘A person in respect of whom there is credible evidence of responsibility for torture or severe maltreatment should be tried and, if found guilty, punished. Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated.’<sup>101</sup> The United Nations Secretary General has also stressed the obligation to prosecute when violations of torture are concerned, as enshrined in the Vienna Declaration and Programme of Action.<sup>102</sup>

The Istanbul Protocol establishes that States are obliged to publish the results of investigations and are also obliged to ensure that the alleged offender or offenders are subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed. The *UN Declaration of Basic Principles for Victims of Crime and Abuse of Power*<sup>103</sup> calls for judicial and administrative processes to be responsive to the needs of victims - for example, by keeping them informed and allowing their views and concerns to be considered at appropriate stages of the proceedings. The European Court of Human Rights<sup>104</sup> and the Inter-American Court of Human Rights<sup>105</sup> have equally found a duty of States to inform the complainants about the outcome of investigations and, the Inter-American Court, to publish the results of an investigation. Both the Committee against Torture and the Human Rights Committee have called on State Parties to publish information relating to the number and nature of complaints, investigations undertaken, and steps taken following such investigations, including punishment of the perpetrators.<sup>106</sup> In its General Comment 20, the Human Rights Committee has moreover urged States to provide

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<sup>97</sup> The principle *aut dedere aut judicare* (the obligation to either extradite or prosecute) is principle is well established in international law. See REDRESS’ Amicus Brief on the Legality of Amnesties under International Law, <http://www.redress.org/casework/AmicusCuriaeBrief-SCSL1.pdf>.

<sup>98</sup> The former Special Rapporteur on Torture recommended to Chile that all allegations of Torture committed since 1973 (some covered by the Amnesty Law) should be subject of a thorough public inquiry and that “in cases where the evidence justifies it...those responsible should be brought to justice”, except where the proceedings are barred by a statute of limitations. (Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, para 76; Addendum, Visit by the Special Rapporteur to Chile, 1996.). However, it is generally accepted, that statutes of limitation only apply where effective remedies have been available (see for example Argentina Cases, Inter-Am. CHR 41, PP 10, 19 (1993)) and that statutes of limitation do not apply to serious violations of human rights and international humanitarian law that constitute crimes under international law (see Principle 6 of the UN Draft Basic Principles on the Right to a Remedy and Reparation for Gross Violations of Human Rights and Serious Violations of Humanitarian Law, Rev 05 August 2004)

<sup>99</sup> See, for example, Article 5 of the Convention against Torture; Article 4 of the Genocide Convention; Article 27 of the Rome Statute for an International Criminal Court; Robben Island guidelines, 16(b).

<sup>100</sup> Joinet, principle 32. See also, REDRESS’ Amicus Brief on the Legality of Amnesties under International Law, <http://www.redress.org/casework/AmicusCuriaeBrief-SCSL1.pdf>.

<sup>101</sup> *Report to the Commission on Human Rights (E/CN.4/2001/66, recommendation (j)).*

<sup>102</sup> World Conference on Human Rights – The Vienna Declaration and Programme of Action, June 1993, Section II, para 60.

<sup>103</sup> UN Declaration 40/34, adopted by the UN General Assembly on 29 November 1985.

<sup>104</sup> *Anguelova v Bulgaria*, supra, para.139.

<sup>105</sup> *Caracazo Case*, supra, para.181.

<sup>106</sup> Concluding observations of the Human Rights Committee on Germany’s State Party report, UN Doc. CCPR/CO/80/DEU, 15 April 2004, para.16 and by the Committee against Torture, UN Doc. CAT/C/CR/32/7, 18 May 2004, para.4 (c); Israel’s State Party report, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para.18, on Portugal’s State Party Report, UN Doc. CCPR/CO/78/PRT, 5 July 2003, para.8 (b), on Estonia’s State Party Report, UN Doc. CCPR/CO/77/EST, 15 April 2003, para.18 and on Togo’s State Party Report, UN Doc. CCPR/CO/76/TGO, 26 November 2002, para.12.

specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

## **2. Action at the national level to offset deficiencies in prosecutions**

Flaws in the investigative procedures may lead to deficiencies in the prosecution of alleged perpetrators. There are a range of reasons for low successful prosecution rates. These include ineffective investigations, and overly short deadlines for bringing criminal proceedings against alleged perpetrators. The above procedural flaws differ from barriers which impede prosecutions altogether, such as amnesty laws.<sup>107</sup>

Supporting evidence is vital to a successful prosecution, otherwise it is usually a case of one person's word against another. Medical evidence (both physical and psychological) is probably the most important type of evidence that can be obtained and will usually add strong support to witness testimony.

The Istanbul Protocol contains detailed guidelines on obtaining physical medical evidence in Chapter V and psychological medical evidence in Chapter VI. It outlines the type of evidence that investigators should try to obtain from different sources, including through interviews. Where possible, lawyers and doctors should interview the alleged victims and obtain medical evidence (physical and psychological), circumstantial evidence, and witness statements (ensuring safeguards and techniques for the safety of witnesses).<sup>108</sup>

It is rare, however, for medical evidence to be *conclusive* (proof with certainty that torture occurred), because:

- Many forms of torture leave very few traces, and even fewer leave long-term physical signs
- It is often difficult to prove beyond question that injuries or marks resulted from torture and not from other causes

What medical evidence can do is demonstrate that the recorded injuries or behavioural patterns are *consistent with* (could have been caused by) the torture described. Where there is a combination of physical and psychological evidence *consistent with* an allegation, this will strengthen the overall value of the allegation. Lawyers therefore, must recognise the importance of checking injuries sustained by detainees as well as signals of psychological abuse and that such indications must be examined by an independent, qualified doctor as quickly as possible (so that these injuries can be documented as evidence in the greatest possible detail).

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<sup>107</sup> For more information on legal sanctions, immunities and amnesties as exceptions to the prosecution of alleged perpetrators see, *Audit Project: A Survey of the Law and Practice of Reparation for Torture in 30 Countries Worldwide*, Redress, April 2003. Specifically on the legality of amnesties under international law, see REDRESS' Amicus Brief on the Legality of Amnesties under International Law, <http://www.redress.org/casework/AmicusCuriaeBrief-SCSL1.pdf>.

<sup>108</sup> For more information on these different types of evidence, see page 47, *The Torture Reporting Handbook* by Camille Giffard, Human Rights Centre, Essex University, UK.

## Practical Steps:

- ✓ If it is not possible to arrange an expert medical examination, lawyers should try to obtain any type of evidence of the injuries sustained, such as prison medical records, photos, testimonies, etc. Even if this evidence cannot prove that the person was tortured, it can prove that the person suffered physical or mental damage during detention, and thus the burden of proof should in some cases shift to the State apparatus. As the European Court of Human Rights ruled, where an individual is detained in good health but is injured at the time of release, it is incumbent on the national authorities to provide a plausible explanation as to the causing of the injury.<sup>109</sup> It is important therefore, to have medical records, testimonies, photos, etc from the detainees before being in custody proving that the person was in good health and then any evidence during his/her detention or after his/her release proving physical or mental injuries while in custody.
- ✓ Circumstantial evidence may also be helpful to the prosecution of a torture case. For example, evidence of similar fact, e.g., reputed studies of torture practices in the same or similar prison carried out in a similar way to what the victim alleges; human rights reports documenting consistent patterns of abuse. Also, lawyers should ensure that there is evidence to sustain all supporting facts: e.g., that the victim was in prison at the time that the torture is alleged to take place; that the alleged perpetrator was a public official and on duty at the time of the said event; that there was a specific purpose for causing the victim harm (e.g., to elicit information, to intimidate or threaten).

## **E. International standard on right to an effective remedy and adequate reparations for victims of torture and cruel, inhuman or degrading treatment or punishment**

The right to reparation for victims of torture and cruel, inhuman or degrading treatment and punishment is well-established: it is a fundamental principle of general international law that the breach of an international obligation entails the duty to afford reparation.<sup>110</sup> The prohibition to commit torture is an obligation of all States under general international law, and therefore, if breached, a new international duty to afford reparation arises independent of any treaty obligation.

Under international law: "*Reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*".<sup>111</sup> In other words, reparation for torture must be adequate/appropriate; that is proportional to the harm suffered and should as far as possible restore the life and dignity of the torture victim. For example, the Human Rights Committee established that although 'compensation' may differ from country to country, adequate compensation excludes purely "symbolic" amounts of compensation.<sup>112</sup>

<sup>109</sup> *Aksoy v. Turkey*, European Court of Human Rights, Judgement of 18 December 1996.

<sup>110</sup> See: Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 ("ILC draft Articles on State Responsibility")).

<sup>111</sup> Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17.

<sup>112</sup> *Albert Wilson v the Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003). The Human Rights Committee has referred in several decisions to the duty to afford "appropriate" compensation. See *Bozize v Central*

According to the UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Draft Basic Principles on Reparation), the forms that reparation may take include: *restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition*.<sup>113</sup>

## 1. Forms of reparation

**Restitution:** This form of reparation consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Although it is generally not possible to ‘undo’ the pain and suffering caused by human rights violations, certain aspects of restitution might be possible – such as restoring an individual’s liberty, legal rights, social status, family life and citizenship; return to one’s place of residence; restoration of employment and return of property.<sup>114</sup>

**Compensation:** The role of compensation is to fill in any gaps so as to ensure full reparation for the damage suffered (as long as the damage is financially assessable).<sup>115</sup> The Inter-American Court held, in the *Velásquez Rodríguez Case* that “it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.”<sup>116</sup> Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc) and non-material or moral damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment.

**Rehabilitation:** Rehabilitation is an important component of reparation and it is a right specifically recognised in international human rights instruments.<sup>117</sup> The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that: “victims should receive the necessary material, medical, psychological and social assistance and support.” The Special Rapporteur on the right to reparation has noted that reparation should include medical and psychological care and other services as well as legal and social services.<sup>118</sup> These services may be provided “in kind” or the costs may form part of a monetary award. It is important to distinguish between indemnity paid as way of compensation (for material and/or moral damage) and money provided for rehabilitation purposes.

**Satisfaction and Guarantees of Non-repetition:** Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of

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*African Republic* (No. 449/1990); *Mojica v. Dominican Republic* (No. 449/1991). In *Griffin v. Spain* (No. 493/1992) the Committee ordered “appropriate compensation for the period of his detention in the prison in Melilla”. See also Bossuyt, Marc J. “GUIDE TO THE ‘TRAVAUX PRÉPARATOIRES’ OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS” (2002 ed. Kluwer Academic Publishers).

<sup>113</sup> Annex, E/CN.4/2000/62. The revised version of 15 August 2003 can be found at <http://www.unhchr.ch/html/menu2/revisedrestitution.doc>.

<sup>114</sup> E/CN.4/2000/62, para 22. See also, Principles 8 - 10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

<sup>115</sup> Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts; Report of the International Law Commission on its Fifty-three Session, GA, Supplement No. 10 (A/56/10); cph. IV.E.”).

<sup>116</sup> *Velásquez Rodríguez Case*, Interpretation Of The Compensatory Damages Judgment, Judgment Of August 17, 1990, Para. 27.

<sup>117</sup> See for example the UN Convention on the Rights of the Child and its Optional Protocol; UN Convention against Torture; Declaration on Enforced Disappearances; Declaration on the Elimination of Violence against Women.

<sup>118</sup> Principle 24, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

the violation, the victims' right to know the truth and to hold the perpetrators accountable.<sup>119</sup> The Draft Basic Principles on Reparation list measures like: cessation of continuing violations; judicial sanctions against persons responsible for the violations; an apology, including public acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims and implementing preventative measures, such as ensuring effective civilian control of military and security forces, protecting human rights defenders and persons in the legal, media and other related professions.

## **2. Effective procedural remedies**

At the same time, international human rights law requires States to provide effective procedural remedies under domestic law to guarantee adequate reparations to victims of human rights violations. In other words, the right to reparation for torture and other human rights violations includes both, the right to substantive reparations/remedies (like compensation) and the right to effective procedural remedies to obtain them (i.e. access to civil, administrative and criminal avenues). This principle is incorporated in every international human rights instrument.<sup>120</sup>

In fact, the right to a remedy for a violation of a human right protected under any of the international instruments is itself a right expressly guaranteed by the same and, in case of fundamental human rights, it has been recognised as non-derogable.<sup>121</sup> For example, procedural safeguards against torture and other forms of ill-treatment, like the right of access to a lawyer while in detention, are not subject to limitations or derogation. Accordingly, there is an independent and continuing obligation to provide effective domestic remedies to protect human rights: during peace or war, and when declaring a state of emergency. Human rights instruments guarantee both, the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies)<sup>122</sup> and the substantive right to reparations (such as restitution, compensation and rehabilitation).<sup>123</sup>

**~A remedy must be effective in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by acts or omissions by national authorities.<sup>124</sup>**

The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in

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<sup>119</sup> Question of the impunity of perpetrators of human rights violations (civil and political); E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 17.

<sup>120</sup> For an overview of universal and national human rights instruments recognising the right to an effective remedy see REDRESS, Sourcebook on Reparation.

<sup>121</sup> See, for example, General Comment 29 on States of Emergency (Art. 4) if the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." The Committee considered further that "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees...The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights (...)." Similarly the Inter-American Court of Human Rights explained that the judicial remedies to protect non-derogable rights are themselves non-derogable. (Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9.)

<sup>122</sup> Some instruments explicitly call for the development of judicial remedies for the rights they guarantee; the African Charter of Human and Peoples' Rights for example, provides that all remedies should be judicial. See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

<sup>123</sup> See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

<sup>124</sup> See *Aksoy v. Turkey*, 18 December 1996, European Court of Human Rights.

granting appropriate relief for such violations.<sup>125</sup> In the case of serious human rights violations, like torture and other forms of ill-treatment, remedies need to be *judicial*.<sup>126</sup>

As explained by the UN Human Rights Committee, “administrative remedies cannot be deemed to constitute adequate and effective remedies [...], in the event of particular serious violations of human rights”.<sup>127</sup> Furthermore, the individual right of access to court for the determination of civil rights and obligations regarding serious human rights violations is a fundamental part of international human right law.<sup>128</sup>

By stating that remedies need to be judicial in nature, international jurisprudence refers to the type of remedy that States need to afford for victims of grave human rights violations. For example, in the case of torture, States need to afford:

- an effective remedy for victims to start a criminal investigation leading to the prosecution and punishment of the perpetrators by a *judicial* body and
- the right of victims to claim reparations before a *judicial* court.

In torture cases, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfil States’ obligations under international law. This means that even if a torture victim wishes to apply for compensation through an administrative procedure, he/she should have the right, in law and practice, to bring civil claim against the individual and State in a judicial court<sup>129</sup>

Similarly, remedies whereby detainees can challenge the legality of their detention, need to be *judicial*—in other words before a judicial authority (such as *habeas corpus* and *amparo*).<sup>130</sup> This type of remedy is also an important tool in combating torture because often the judge will be the first public official unrelated to the place of detention that a detainee comes into contact with. Consequently, it may be the first opportunity for a detainee to raise allegations of torture and for an investigation into these allegations to be initiated. Even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are grounds to believe that a person brought before him/her could have been subjected to torture.<sup>131</sup> In equal terms, provisional orders or injunctions are important safeguards against torture. Where a person is believed to be at risk during detention and/or interrogation, it is possible to apply to a court for an injunction against the public officials in question.

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<sup>125</sup> Article 13 requires “the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief” although State have some discretion as to how to comply (para 69) *D v. United Kingdom*<sup>125</sup> App. No. 30240/96 Judgment of 2 May 1997 (referring to *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Vilvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The HRC commented on Finland’s report (CCPR/C/95/Add.6) re the obligation under Art 2(b) of the ICCPR that “while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98).

<sup>126</sup> The nature (judicial, administrative or other) of the remedy should be in accordance with the nature of the right violated and the effectiveness of the remedy. In the case of grave human rights violations, which implicitly constitute a crime, like torture, there is unanimity in the jurisprudence of international human rights tribunals and bodies on the judicial nature of effective remedies. See REDRESS Sourcebook on the Right to Reparation, supra.

<sup>127</sup> *Nydia Bautista v Colombia* (No. 563/1993); *José Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia* (No. 612/1995).

<sup>128</sup> See e.g. Article 27.2 of the American Convention on Human Rights; Article 6 of the European Convention on Human Rights; Art 7 of the African Charter of the African Charter on Human Rights and People’s Rights, Article 13 of the Convention against Torture and other Cruel Inhuman or Degrading Treatment.

<sup>129</sup> See *Albert Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003).

<sup>130</sup> See above note 28 on judicial review of detention, including administrative detentions

<sup>131</sup> See The CPT Standards: Substantive sections of the CPT’s General Reports, CPT/Inf/E (2002) - Rev. 2003.

#### **d. Remedies at the national level include:**

**Criminal proceedings:** A person alleging that a public official has tortured him/her can generally seek to initiate criminal proceedings by making a complaint to the police, the local public prosecutor or a local court. In many domestic legal systems, a prosecution will only be opened if the public prosecutor decides that it is appropriate, and a victim cannot directly institute proceedings. Military personnel can generally be prosecuted in the same way as any other official, but may be subject only to internal military discipline, including the possibility of court-martial (trial before a military court applying military law).

**Civil proceedings:** Civil proceedings might be based on provisions in a national code of obligations, some form of legislation or on the common law. These provisions deal with many different issues, but they all involve a breach of some sort of general duty that everyone has, to exercise care in their relations with others. In general, civil proceedings are resorted to where an individual wishes to obtain compensation, usually financial, from the person responsible. The proceedings are judicial in nature and take place in the ordinary courts.

**Human/fundamental rights proceedings in national courts:** If the country has incorporated human rights principles into its national legislation, e.g. through a Constitution, a Bill of Rights or through legislation which allows international treaties to be enforced in domestic courts, then a case could be taken to the appropriate court for a declaration of a violation in a particular case or pattern of cases. It is also possible that a claim for compensation could be made on behalf of the victim(s). Such actions may have to be taken to a specific court, e.g. a constitutional court, and arguments based on human rights principles may support applications in other types of cases.

**National Human Rights Institutions/Commissions (NHRCs):** Most countries in Africa, the Middle East and other parts of Asia have preferred to establish national human rights institutions, instead of police complaints authorities. Such institutions have also been set up in a few countries in Latin America and Europe, as well as Canada. While the *Principles relating to the status of national institutions (Paris Principles)* serve as a point of reference for the establishment of NHRCs,<sup>132</sup> in practice NHRCs differ considerably in virtually all respects. In some cases, NHRCs may be able to investigate human rights violations on their own motion; in others they have only been vested with the mandate to carry out (initial) investigations into human rights violations that amount to criminal conduct. It is common for NHRCs to receive reports or complaints from individuals or groups concerning the incidence of grave violations of human rights, including torture, and conduct an inquiry. There is usually no time limit for bringing complaints and if the commissions consider there to be sufficient preliminary evidence, a summary of the findings or a recommendation will be submitted to the competent authorities.

**Ombudsman Institutions:** The institution of the Ombudsman was first established in Sweden as early as 1809 to ensure accountability of the public administration. There has since been a proliferation of Ombudsman institutions, referred to as the Public Defender (*Defensor del Pueblo*) in Spain and some countries in Latin America. The term Ombudsman has also been employed by bodies that are, by their nature, closer to human rights commissions or police complaints authorities. While some Ombudsman institutions have the power to receive and investigate complaints about police torture, the mandate of most is confined to dealing with complaints about public maladministration.<sup>133</sup> The only exception is

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<sup>132</sup> See Principles relating to the status of national institutions ("Paris Principles") UN Doc. E/CN.4/1992/43, 16 December 1991.

<sup>133</sup> See for an overview of Ombudsman institutions worldwide, [www.law.ualberta.ca/centres/loi/eng/worldwide.html](http://www.law.ualberta.ca/centres/loi/eng/worldwide.html). Compare the broad mandate of the Ombudsman in Australia (UN Doc. CAT/C/25/Add.11, 15 May 2000, paras. 96 et seq.) and Bolivia (UN Doc. CAT/C/52/Add.1, 21 September 2000, paras.71 et seq.) with the more traditional, narrow mandate of their counterparts in Fiji (UN Doc. HRI/CORE/1/Add.122, 25 November 2002, paras.186 et seq.) and the Philippines ([www.ombudsman.gov.ph](http://www.ombudsman.gov.ph)) as well as the specific mandates concerning criminal investigations and prison services of the



perhaps in Latin America where so-called Ombudsman offices have been set up to effectively fulfil the role of police oversight bodies.<sup>134</sup>

**Administrative proceedings:** Examples of administrative remedies, which might be relevant to a victim of torture, could include an application to a compensation commission set up to provide compensation to victims of violent crimes, or a submission to a police complaints authority. Administrative proceedings do not necessarily take place before a regular judge. Instead they will often involve decision-making by expert tribunals, or officials with special expertise or responsibility for a particular subject area.

**Disciplinary proceedings:** There are typically disciplinary proceedings for those internal to the police, the military, other branches of the security forces and the state administration. These are non-judicial proceedings in which a case is considered by a superior or superiors of the public official. A complaint can be lodged with a superior or with the appropriate oversight body, but the decision to initiate proceedings may only be taken internally. The types of sanctions which may be imposed in disciplinary proceedings are normally related to the job, and could include withholding pay, temporary suspension from work, reassignment to another post or even dismissal.

Although there can be several remedies available at the national level, to be **effective**, domestic remedies need to comply with international standards. In other words, torture victims should have access to effective complaint mechanisms; authorities are required to start a prompt and impartial criminal investigation, and where there is sufficient evidence, authorities are required to prosecute the alleged perpetrator and if found guilty, to punish him/her accordingly.

As well, to guarantee the efficiency of the process, there needs to be procedural opportunities to challenge the steps and decisions taken by authorities during criminal proceedings (e.g. when closing an investigation or when dropping prosecutions). For example, in countries with a common law system, it is sometimes possible to start a private prosecution when the police decides not to prosecute. Similarly, within the civil law tradition, where the investigative police is normally supervised by the judiciary, it is possible to challenge a decision to close an investigation or not start a prosecution, before an investigative judge.

In some countries, courts have the possibility to order compensation or other remedial measures against the convicted person in criminal trials. But this cannot substitute the right of torture victims to civil redress. Notwithstanding the legal systems, victims have a right under international law to bring a civil claim against the alleged perpetrators and/or the State, and this right is independent of any criminal prosecutions or their results.

Although there are different domestic legal systems, within its domestic procedures, States need to afford effective access to justice and adequate reparations for victims of torture proportional to the harm suffered (including rehabilitation and compensation). So for example, a national human rights commission may serve as a supervisory body to guarantee the impartiality of police investigations, but it cannot substitute criminal proceedings. The same applies to administrative boards, where even though victims of crimes can claim compensation, these boards cannot substitute the right to bring civil proceedings before a court.

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Ombudsman in Georgia (UN Doc. CAT/C/Add.1, 2 June 2000, para.107) and the Czech Republic (UN Doc. CAT/C/60/Add.1, 4 October 2002, paras.87 et seq.).

<sup>134</sup> See Gonzalo Elizondo and Irene Aguilar, *Ombudsman Institution in Latin America: Minimum Standards for its existence*, in Lindsnaes, Lindholt and Yigen, *National Human Rights Institutions*, supra, pp.209-220, noting on p.209 that "The institution of the ombudsman in Latin America has been given diverse technical names, such as *Defensor del Pueblo* in Ecuador, Bolivia, Peru, and Colombia, among others; *Defensor de los Habitantes* in Costa Rica; *Comisionado Nacional de Derechos Humanos* in Honduras and Mexico; or *Sindic de Greuges* in some localities in Spain" and Rachel Neild, *Confronting a Culture of Impunity*, supra, p.223.

### **3. International remedial avenues**

When domestic remedies fail to provide prompt and adequate redress to torture victims, States commit a new violation under international law independent of the substantive (torture) infringement, namely, a breach to the international duty to afford reparation. It is at this moment that States become liable under international law and victims may seek reparation at an international forum.

There is currently no general international human rights court where individuals can bring claims against States, so the forum varies depending on the international remedies available in each country. States have to agree to the jurisdiction of an international court or body specifically allowing individuals injured under their jurisdiction to bring challenges against them. There are regional human rights mechanisms like the European, Inter-American and African systems and universal (UN) human rights bodies, like the Human Rights Committee or the Committee Against Torture.

Human rights systems are mechanisms that monitor States' compliance with specific human rights conventions: for example the European Court of Human Rights monitors compliance of state parties to the European Convention on Human Rights or the UN Human Rights Committee monitors state compliance the International Covenant on Civil and Political Rights (ICCPR). The way they monitor state compliance with their conventional obligations is through individual complaints; that is why they are commonly referred to as "complaints procedures".

Some of these complaints procedures do offer a remedy for victims of torture, for example the European and Inter-American Courts of Human Rights have the power to order the State to afford reparation directly to the victims, however the African Commission on Human and Peoples Rights, or the UN Human Rights Committee and Committee Against Torture can only recommend to the State to provide reparation to the victims. But even if States do not comply with these recommendations, victims may still find that a decision recognising their suffering and the wrong done to them is a form of satisfaction.

#### **e. Access to international complaint mechanisms: exhaustion of local remedies**

For the reasons described above, it is considered under international law that States should have an opportunity to repair any human rights violation for which they are responsible before the international bodies intervene<sup>135</sup> - consequently, international procedures for individual complaints generally require domestic remedies to have been "exhausted" before accepting to examine the complaint. However, there is no need to exhaust domestic remedies when they are ineffective or cannot provide fair and adequate reparation. In such cases victims or their lawyers can seek recourse through the most appropriate individual complaints procedure at the regional or international (universal) level.<sup>136</sup>

For example, in a case before the European Court of Human Rights, a torture victim contended that the failure of a public prosecutor to open criminal investigations hindered their ability to invoke available domestic remedies. It was stated that the victim was unable to ensure a criminal prosecution of perpetrators (for example by challenging the decision not to prosecute in administrative courts) because the lack of an investigation meant there had

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<sup>135</sup> This principle does not apply for systematic or gross violations of human rights. For more information see *Reparation - A Sourcebook For Victims Of Torture And Other Violations Of Human Rights And International Humanitarian Law*, REDRESS, March 2003, available at <http://www.redress.org/publications/SourceBook.pdf> (REDRESS' Sourcebook on Reparation).

<sup>136</sup> Idem.

never been a formal decision not to prosecute. The Court held that the failure of the public prosecutor to open an investigation was tantamount to undermining the effectiveness of any other domestic remedies that may have been available.<sup>137</sup>

When assessing domestic remedies, the threshold applied by international human rights mechanisms to investigating allegations of torture effectively is very high. As established in section C, Part 2, States have an obligation under international law to investigate allegations of torture. Although it is normally recognised that this obligation is not applicable to non-well-founded allegations, in respect of the impact of the failure to investigate allegations on victims' access to a remedy and reparations, the European jurisprudence suggests that States will have violated victims' rights when they have failed to investigate despite the existence of an "arguable claim". In *Veznedaroglu v. Turkey*, the European Court of Human Rights implied that a complaint needs to be "arguable" in order to trigger the State's obligation to carry out an effective investigation.<sup>138</sup> What constitutes an "arguable claim" is determined on a case-by-case basis.<sup>139</sup> While the specific contents of this threshold have not been made clear, some European cases refer to a 'reasonable suspicion.'<sup>140</sup> According to the case law, allegations have been classified as arguable when backed up by at least some other evidence, be this witness testimonies or medical evidence or through the demonstrated persistence of the complainant.<sup>141</sup>

Through regional or international supervisory bodies, it is possible to invoke a national government's obligations under international law to obtain a formal or informal response to allegations of torture and obtain a remedy for the victim of torture.<sup>142</sup> For example, the Inter-American Court of Human Rights has ordered governments to investigate violations and sanction perpetrators, as well as award compensation and rehabilitation (medical treatment for victims and their relatives).<sup>143</sup>

Improving the general level of public awareness about the nature and scope of decisions made by international human rights bodies can only assist lawyers in their efforts to improve domestic implementation of international standards prohibiting torture. However, it is extremely important that lawyers seek not only reparations for the torture (or other violations) suffered by their clients, but that they also argue before international complaints mechanisms the failure of the domestic system to provide effective procedural remedies and substantive remedies/reparations.

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<sup>137</sup> *Assenov*, supra note 44

<sup>138</sup> *Veznedaroglu v Turkey* (2001) 33 E.H.R.R. 59 ECHR, paras. 32 et seq.

<sup>139</sup> See *Boyle and Rice v. United Kingdom* (1988) 10 E.H.R.R. 425 ECHR: "The Court does not think that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised..." See also, *McCallum v United Kingdom* (1991) 13 E.H.R.R. 597.

<sup>140</sup> *Veznedaroglu v Turkey*, supra, paras.34 et seq. *Assenov*, supra note 44, para 101. See also *Toteva v. Bulgaria*, Application no. 42027/98, Judgment of 19 May 2004, para.61.

<sup>141</sup> *Toteva v. Bulgaria*, supra, para. 62; *Tanrikulu v. Turkey* (2000) 30 E.H.R.R. 950 ECHR. See also the negative conclusion as to arguability in *Kurt v. Turkey* (1999) 27 E.H.R.R. 373 ECHR: "It is to be observed in this regard that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody." (para 108) (the Court found violations of Article 13 and Article 3 as regards the complainant's suffering for lack of information as to her son's whereabouts and the state's disregard of her complaint but held there was insufficient information to conclude that a violation of Article 3 had occurred as regards her son).

<sup>142</sup> For an overview of the different individual complaints procedures at the international level, see pages 28 - 39, *Reparations: A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, REDRESS, March 2003.

<sup>143</sup> See, for example, *Cantoral Benavides case v. Peru*, Series C No 88, 3 December 2001.

## **f. International Complaints Procedures**

Depending on the whether a country has specifically agreed to their jurisdiction, torture victims may file a complaint before the following international (universal) human rights mechanisms:

### **The United Nations Treaty Bodies:**

- **Committee Against Torture (CAT):** *supervises the UN Convention Against Torture*
- **Human Rights Committee (HRC):** *supervises the International Covenant on Civil and Political Rights*
- **Committee on the Elimination of Discrimination Against Women (CEDAW):** *supervises the UN Convention on the Elimination of Discrimination Against Women*
- **Committee on the Elimination of Racial Discrimination (CERD):** *supervises the UN Convention on the Elimination of Racial Discrimination*

The **Committee on the Rights of the Child (CRC)** supervises the UN Convention on the Rights of the Child. It can review State reports and discussions are currently ongoing regarding the possibility of adopting a protocol to the CRC which would allow individual complaints.

The most relevant for the purpose of torture-related material are the CAT, which focuses solely on the subject of torture, and the HRC, which is a well-established body dealing with a range of human rights including torture. However, the other committees are very important where torture allegations concern certain identifiable categories of persons, namely children, women and racial groups.

The working methods of each of these bodies are very similar. All have the power to examine and comment on state reports, and most are also able to receive individual complaints, or else are in the process of developing such a procedure.

Similarly, depending on the whether a country has specifically agreed to their jurisdiction, torture victims may file a complaint before the following international (regional) human rights mechanisms:

### **The Regional Human Rights Mechanisms:**

- **African Commission and Court on Human and Peoples' Rights**
- **European Court of Human Rights**
- **Inter-American Commission and Court of Human Rights**

\* For further detail on how the UN HRC and CAT as well as the three regional mechanisms work see Annex I

## **4. Action at the national level to improve implementation of the right to an effective remedy and reparation**

National legislation in most countries does not explicitly provide for any form of reparation for serious human rights violations, including torture. Several countries have adopted laws that allow survivors of torture to claim *compensation* against the State for wrongful conduct of their officials, normally as a matter of public law, but others only allow suits against individuals through normal civil procedures. However, the procedures for claiming

compensation are often cumbersome and reparation is confined to specific types of violations (like personal injury). Compensation awards that have been made often do not reflect the gravity of torture as a human rights violation, and courts seem reluctant to afford additional forms of reparation, such as rehabilitation.

In both civil and common law countries, most legal systems provide in their tort law that the wrongful infliction of personal injury carries a liability for reparation, particularly by paying compensation. In the majority of countries both the individual public official and the State are jointly liable. Generally, the effectiveness of civil law remedies is hampered by different factors including the lack of access to courts, short time limits to initiate proceedings, high legal costs and the difficulty of proving the claim in the absence of sufficient evidence.<sup>144</sup> In some countries a civil court can order the relevant national authority to take disciplinary sanctions against the public official who perpetrated torture, however the effectiveness of this avenue of recourse is limited as such court orders often remain non-enforced.

In several countries the outcome of civil proceedings is linked to the verdict in a criminal case. In countries where torture is institutionalised, the desirability for survivors of torture to bring a lawsuit against a public official or the State is extremely low. Additionally, the costs for bringing civil claims are normally very high and there is legal aid is usually not available. The option of filing a supplementary lawsuit as part of criminal proceedings is therefore an affordable and accessible option. However, the effectiveness of this remedy is limited for several reasons such as its dependency on effective investigations and prosecutions (these prerequisites are usually absent) and the fact that the reparation is often confined to compensation awarded against individual perpetrators. In some countries, compensation can be awarded as part of the punishment in criminal cases yet the torture victim cannot demand such compensation as a right because it is at the discretion of the court to impose punishment.

Several countries provide for constitutional remedies by way of application to the highest courts and such applications have proved effective in a few countries, however, time restrictions on applications and the lack of *locus standi* for relatives of torture victims decreases the effectiveness of this remedy. Most national human rights commissions have the authority to recommend reparation for human rights violations. Although, in some countries, these commissions rarely recommend reparation and the amount of compensation recommended, if any, tends to be low.

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<sup>144</sup> In practice, to successfully pursue civil or administrative proceedings, torture victims require a ruling by a judge in criminal proceedings as evidence that they have suffered torture.

**Practical steps to improve implementation of the right to an effective remedy and reparation:**

- ✓ lobby for national legislation to ensure that torture victims have an effective and enforceable right to prompt and adequate reparation;
- ✓ lobby for national legislation to protect torture victims, their lawyers and witnesses from intimidation and to ensure that allegations of intimidation are effectively investigated;
- ✓ improve access to domestic remedies for torture victims by improving legal aid and assistance services offered by lawyers;
- ✓ through appropriate channels, such as lawyers groups and bar associations, urge the judiciary to take into account the seriousness of torture as a human rights violation;
- ✓ take steps to encourage the award of rehabilitation as a form of reparation, in addition to fair and adequate monetary compensation;
- ✓ highlight bureaucratic procedures and other obstacles for torture victims and survivors to exercise their right to an effective remedy and adequate reparation through the media and other channels;
- ✓ lobby for adequate funding for institutions that offer rehabilitative care for torture victims and affordable access to medical services;
- ✓ support efforts by national human rights commissions, NGOs or other bodies to monitor the effectiveness of domestic remedies and forms of reparations awarded to torture victims through systematic data collation and recording;
- ✓ initiate private prosecutions on behalf of torture victims and seek to increase victims' empowerment through allowing victims to play a central role in proceedings.

# ANNEX I

## The African System for Protection of Human Rights

### African Commission on Human and Peoples' Rights

Established by the African Charter on Human and Peoples' Rights, which came into force on 21 October 1986 after its adoption by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU), the African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African continent.

The procedure followed by the Commission in considering complaints is of a highly confidential nature. Complaints can be made by States (against other States Parties) or by others (physical or moral person, private or public, African or international persons). In the latter case, the Commission considers complaints at the request of the majority of its members.

**Provisional Measures:** If the victim's life, personal integrity or health is in imminent danger, the Commission has the power under Rule 111 of its Rules of Procedure to adopt provisional measures, thereby urging the State concerned not to take any action that will cause irreparable damage to the victim until the case has been heard by the Commission. The Commission can also adopt other urgent measures as it sees fit.

**Admissibility of Complaints:** Individuals and organisations may lodge a complaint with the African Commission alleging that a State Party to the African Charter on Human and Peoples' Rights has violated one or more of the rights guaranteed. For a complaint to be admissible:

- The communication must include the author's name even if the author wants to remain anonymous;
- The communication must be compatible with the Charter of the OAU and with the African Charter on Human and Peoples' Rights Charter;
- The communication must not be written in insulting language directed against the State or the OAU;
- The communication must not be based exclusively on news from the media;
- The complainant must have exhausted all available domestic legal remedies;
- The communication must be submitted within a reasonable time from the date of exhaustion of domestic remedies;
- The communication must not deal with a matter, which has already been settled by some other international human rights body.

**The Merits:** In accordance with Rule 119, if the Commission decides that a complaint is admissible, it will inform the State concerned and the complainant. The State is then given 3 months to reply to the Commission providing explanations on the complaint and suggesting a way in which to remedy the situation. These will be forwarded to the complainant who will be given an opportunity to reply.

**Friendly Settlement:** Once a communication is declared admissible, the Commission may offer its good offices to facilitate a settlement of the dispute. If a friendly settlement is reached, a report containing the terms of the settlement is presented to the Commission at its session. This will automatically bring consideration of the case to an end. If no agreement is reached, a report is submitted to the Commission and the Commission will take a decision on the merits of the case.

**Deliberations:** During the session in which the Commission is hearing the substance of the complaint, the Parties can make written or oral presentations to the Commission. Where the Commission does not have sufficient information from the Parties, it may undertake an ex officio investigation, obtaining information from any other source.

**The Decision/Remedy:** On the basis of all of the information received, the Commission will make its 'observations' known to the parties. If a violation is found, it will make recommendations to the State Party concerned. However, the Commission does not have much power to secure compliance with its recommendations.

### **The African Court on Human and Peoples' Rights**

An African Court on Human and Peoples' Rights was established on 25 January 2004. Under Article 5 of the Protocol on the Establishment of an African Court on Human and Peoples' Rights, those who are entitled to submit cases to the Court include: the Commission, the State Party which has lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of the human rights violation and African Intergovernmental Organisations. In addition, Article 5(3) specifies that "The Court may entitle relevant Non Governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol." Article 27 of the Protocol specifies that: "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

### **The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)**

The 'Robben Island Guidelines' were adopted at the 32nd session of the African Commission in October 2002. The Guidelines encourage ratification of regional and international instruments prohibiting torture, and urge States to cooperate with the African Commission on Human and Peoples' Rights and its Special Rapporteurs as well as the United Nations Human Rights treaty bodies and thematic and country-specific special procedures. Significantly, the Guidelines set out a range of practical measures for States to undertake that are aimed at eradicating torture, such as: putting in place safeguards to prevent torture; ending impunity for alleged perpetrators; and assisting survivors.

<b>The European System For Protection Of Human Rights</b>
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### **THE EUROPEAN COURT OF HUMAN RIGHTS**

The European Court of Human Rights was established pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in September 1953, as amended by Protocol No. 11.

Any Contracting State or individual claiming to be a victim of a violation of the Convention may lodge a claim alleging a breach of any of the Convention rights. Individual applicants



may submit applications themselves, but legal representation is recommended, and even required for hearings or once an application has been declared admissible. The Council of Europe has set up a legal aid scheme for applicants who do not have sufficient means.

**Admissibility:** In order for a claim to be admissible before the Court, the following conditions must be satisfied:

- The complaint cannot be anonymous;
- The complaint must relate to the conduct of a State that has ratified the European Convention, and the conduct in question must have occurred after the ratification;
- All domestic remedies must have been exhausted, or it must be demonstrated that such remedies would have been ineffective;
- The complaint must be filed within six months from the date on which domestic remedies were finally exhausted;
- The complaint cannot be incompatible with the provisions of the Convention or manifestly ill-founded or an abuse of the right of application;
- Furthermore, Article 35 (2) (b) of the Convention specifies that the Court cannot deal with an application that is "substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

The Court has detailed forms and explanatory materials that explain what information must be supplied when filing a complaint.

**Examination on the Merits:** Once a case is determined to be admissible, the Court will put itself at the disposal of the parties to pursue a friendly settlement and/or proceed to a determination of the merits of the complaint. The Court will, on the basis of the evidence provided and through public hearings, make a finding as to the merits of the complaint and a judgment will be issued.

The Court has already determined that complainants whose rights have been violated are entitled to just satisfaction. In some instances, it has found that a finding of a violation in itself constituted 'just satisfaction', in other cases it has awarded both pecuniary and non-pecuniary damages. In respect of claims for the restoration of rights, the Court has ruled that a breach imposes on the State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. However, in the last decade, the Court has become more and more *specific* with the means that it considers adequate or appropriate to comply with its judgments.

**Provisional/Interim Measures:** Rule 39 of the Rules of Court allows the Court, at the request of a party or any other person concerned, or on its own motion, to adopt interim measures.

## **The Inter-American System for Protection of Human Rights**

### **The Inter-American Commission on Human Rights:**

The Inter-American Commission on Human Rights is an organ of the Organisation of American States (OAS), created to promote the observance and defence of human rights and to serve as consultative organ of the Organisation. It examines allegations of violations of the Charter of the OAS and violations of the American Convention on Human Rights.

Individuals and organisations may petition the Commission to examine complaints regarding the violation of rights under the Charter and American Convention on Human Rights. A form for petitioning the Commission is available on the Commission's website.

**Admissibility:** Article 44 of the Convention allows the Commission to receive petitions on behalf of individuals, charging a State for violating any of the rights enumerated in the Convention. The petitions may be filed by the victim himself or by a non-governmental organisation or another body on their behalf. Thus not only victims of a violation have the right to file private petitions. The prerequisites for admissibility are similar to those of other international organs dealing with human right violations:

The petitioner must have exhausted domestic remedies in accordance with general principles of international law.

The petition should be submitted within a period of 6 months from the date of which the victim of the alleged violation was notified of the final domestic judgment in his case.

The latter requirement, however, does not prevent the admissibility of a petition if it can be shown that domestic remedies do not provide for adequate due process, effective access to those remedies was denied, or there has been undue delay in the decision on those remedies. The Commission rules of procedure provide that, the respondent government has the burden of demonstrating the non-exhaustion of domestic remedies by the victim.

**Precautionary/Provisional Measures:** The Commission may request that a state take "precautionary measures" to avoid serious and irreparable harm if it receives a complaint that a serious violation of human rights is about to take place. The Commission may also request that the Court order "provisional measures" in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court.

**Examination of the Merits:** The information about the petition is sent to the State concerned and the State is requested to send its comments on the petition. If a response is received from the State, the author of the petition is asked to comment on the State's response. The Commission may carry out its own investigations, conduct on-site visits or hold a hearing on the case in which both parties, the author of the petition and the State concerned, would be asked to present their arguments. The Commission may also offer to assist the parties in negotiating a friendly settlement.

**Types of Decision:** The Commission will prepare a report on the case, which may include recommendations to the State concerned. The Commission may also present the case to the Inter-American Court of Human Rights.

## **The Inter-American Court of Human Rights**

The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.

The Court has adjudicatory and advisory jurisdiction. As regards its adjudicatory jurisdiction, only the Commission and the States Parties to the Convention are empowered to submit cases concerning the interpretation and application of the Convention. However, the procedures before the Commission called for under Articles 48-50 of the Convention must have been previously exhausted.

In addition, in order that a case against a State Party to be brought before the Court, the State Party must recognise the jurisdiction of the Court. This may be done by a declaration accepting the Court's jurisdiction in all cases or on the basis of reciprocity for a limited time or for a particular case.

As regards the advisory function of the Court, Article 64 of the Convention provides that any member state of the Organisation may consult the Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American states. This right of consultation also extends to the organs listed in Chapter X of the OAS Charter, within their sphere of action. The Court may also, at the request of any member state of the Organisation, issue an opinion on the compatibility of any of its domestic laws with the aforementioned international instruments.

The States Parties to the Convention elected the first seven judges of the Court at its seventh special session of the OAS General Assembly (May 1979). The Court was officially installed in San José, Costa Rica, where it has its seat, on 3 September 1979.

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