

## **Submission to the UN Special Rapporteur on Torture**

### **Questionnaire on the Extra-Custodial Use of Force and the Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

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#### **Introduction**

We are delighted to respond to the Special Rapporteur on Torture's questionnaire on the use of Extra-Custodial Force. We have mainly focused our responses on the first question in the questionnaire: *In what circumstances, if any, does the extra-custodial use of force by State agents amount to torture or CIDTP?* In addition, we briefly address selected aspects of questions 5 (intention) and 7 (good practices).

Our experience and that of our partners in the Global South, as well as a wide range of research, shows that the use of extra-custodial force is a widespread phenomenon across a range of contexts, including extra-judicial punishment, intimidation, corruption and crowd control. In many circumstances being taken into custody is a relative privilege.

Extra-custodial force has to be understood in the context of at least four related processes. First, the monitoring of detention facilities has pushed abuse into extra-custodial situations.<sup>1</sup> Second, in many Low-Income Countries, detention facilities are severely limited and under resourced, meaning that much policing takes place elsewhere.<sup>2</sup> Third, for reasons often linked to inefficient and unresponsive criminal justice systems, the police routinely resort to extra-judicial forms of punishment that are as likely to take place in people's homes or the street, as in a place of detention. Fourth, corrupt state officials can use intimidation and force in order to extort bribes. These are phenomena that can be found in most countries around the world. The illustrations of extra-custodial use of force described below can be considered to amount to torture when the severity threshold is met, and when they are carried out

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<sup>1</sup> Rejali, Darius. *Torture and Democracy*. Princeton University Press. 2000.

<sup>2</sup> Jensen, Steffen and Andrew Jefferson, *Human Rights and State Violence: State officials in the South*, 2009. Routledge.

for reasons of punishment or discrimination, as is often the case. Where the severity threshold for torture is not met, such acts usually amount to CIDTP.

### **Question 1 - Extent of Extra-Custodial Force**

Widespread evidence suggests that the use of extra-custodial force is a significant issue in many countries around the world. In 2016, DIGNITY and the University of Edinburgh carried out surveys amongst the residents of informal settlements in Kenya, Nepal, and Bangladesh. The surveys showed that violence, or the threat of violence was the dominant experience of many poor citizens in their interactions with the police and security forces.<sup>3</sup>

Our survey in Nairobi showed police were responsible for 26 percent of incidents of violence experienced by the respondents.<sup>4</sup> The survey also showed 18 percent of respondents felt that the police were the main perpetrators of violence in their area. A further survey carried out by the Independent Medical Legal Unit amongst informal traders in Nairobi revealed that 9 percent claimed to have been beaten in the previous year by public officials, and over 50 percent knew of another trader who had been beaten in the same period.<sup>5</sup> In Bangladesh, police harassment and extortion is an everyday fact of life for many, and the police are viewed by much of the population as “predators rather than protectors.” In Nepal, acts of torture and ill-treatment also often appear to be associated with relatively mundane accusations of criminal activities, and the police are perceived as the main source of violence. In our survey, the police were involved as perpetrators in nearly 55 percent of all reported violent incidents.<sup>6</sup>

Police brutality often takes place outside of places of detention. According to the surveys that we carried out in Dhaka, Kathmandu, and Nairobi, the residents of

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<sup>3</sup> Jeevan R. Sharma, Bandita Sijapati, Jeevan Baniya, Anish Bhandari, Dinesh Pathak, Ashin Bhattarai, Tobias Kelly & Steffen Jensen, *Torture and Ill-Treatment: Perceptions, Experiences and Justice-Seeking in Kathmandu's Squatter Communities* (2016), available at <http://soscbaha.org/book/fbook/extract/101>; Zahid ul Arefin Choudhoury, Fahima Durrat, Maria Hussain, Mohammad Shaheenur Alam, Morten Koch Andersen, *Slum, Poverty and Violent Conflict in Korail Bosti, Dhaka* (2016), available at <https://torturedocumentationproject.wordpress.com/publications/>; Peter Kiama, Catrine Christiansen, Steffen Jensen, Tobias Kelly, *Violence Amongst the Urban Poor in Nairobi* (2016), available at <https://torturedocumentation-project.wordpress.com/publications/>.

<sup>4</sup> Kiama et al., *supra* note 1.

<sup>5</sup> Independent Medico-Legal Unit (IMLU), *A Cry for Justice: Torture and Ill-Treatment of Hawkers and Small Scale Traders in Nairobi City County* (2014), available at <http://www.imlu.org/2011-06-30-23-44-4/2015-08-28-09-08-23/reports/finish/2-reports/279-torture-andill-treatment-of-hawkers-and-small-scale-traders-in-nairobi-city-county/0.html>.

<sup>6</sup> Sharma et al., *supra* note 1.

informal settlements, in particular, commonly experience violations at the hand of state officials in their neighbourhoods and homes. In Kenya, people were often not formally detained, but beaten and extorted “off the book.” Similarly, in our Nepal survey, respondents reported that less than 5 percent of the identified acts of torture and ill-treatment had taken place in a place of detention.<sup>7</sup> Our Dhaka survey showed that victims are often not detained, but beaten up in public or in their homes.<sup>8</sup> Another survey, carried out by the human rights organization DIGNITY in Bangladesh, showed that 46 percent of incidents of torture and ill-treatment took place in the victim’s home.<sup>9</sup>

### Extra-Judicial Forms of Punishment

In contexts where legal systems are inefficient, unresponsive or unable to bring alleged perpetrators of crime to account, the police can try to short-circuit the criminal justice system through the use of extra-judicial punishment. Instead of detaining people, the police resort to summary forms of justice, often in an open and public manner.<sup>10</sup> This is a form of violence that has links to extra-judicial killings and disappearance, except that it is often deliberately carried out in public in order to intimate wider populations. Often, this violence can also have the support of parts of the wider population, who do not trust the wider criminal justice system.<sup>11</sup> Minorities and marginal groups are often the particular victims of such violence, which is used to in a discriminatory manner to further enforce their marginalization.

Evidence from South Africa, for example, suggests that police violence is often an attempt at immediate, tangible and visible forms of punishment, which might be supported by sections of the public.<sup>12</sup> Alleged criminals are often never charged or taken to police stations, but kept in the back of police vans or beaten in public. Similarly, evidence from Brazil suggests that police violence in the favelas can often

<sup>7</sup> Sharma et al., *supra* note 1.

<sup>8</sup> Choudhury et al., *supra* note 1.

<sup>9</sup> Shr-Jie Wang, Jens Modvig & Edith Montgomery, *Household Exposure to Violence and Human Rights Violations in Western Bangladesh (I): Prevalence, Risk Factors and Consequences*, 9 BMC INT'L HEALTH HUM RTS. 29 (2009).

<sup>10</sup> See for example: “Police beat up Alleged Mobile Phone Thief in Public in Bangalore”, *India Today*, November 15 2011, <http://indiatoday.intoday.in/video/police-beat-up-man-public-beating-of-thief-mobile-phones/1/399082.html>; “Israeli Police Documented Savagely Beating Arab in Central Tel Aviv”, *Haaretz*, May 22 2016, <http://www.haaretz.com/israel-news/1.720952>.

<sup>11</sup> Wacquant, Loïc, “Toward a Dictatorship Over the Poor?” *Punishment & Society*, 2003, 5(2):197-205.

<sup>12</sup> Hornberger, Julia. “From General to Commissioner to General—On the Popular State of Policing in South Africa”, *Law & Social Inquiry* 2013, 38(3): 547–772

be a deliberately public show of force.<sup>13</sup> Evidence from both South Africa and the Philippines, as well as in many other countries around the world, furthermore suggests that the support by sections of the community is often exploited, as police consent to and even promote non-state forms of policing that is inherently brutal, intentional and purposeful. The extent of police collusion goes from being present at violent events or handing over suspects to vigilante groups in ways that are clearly covered by the Convention Against Torture.<sup>14</sup>

### Processes of Arrest

Persons being arrested or apprehended would often be considered to be under police 'custody' rather than merely being under police 'control'.<sup>15</sup> However, as there is a thin – and often blurred - line between the preceding steps and the actual arrest, this submission will address the process of arrest.

Police officers often resort to the excessive use of force at the initial stage of contact when stopping or detaining people. As with the use of public punishments, this is a form of violence that is clearly linked to extra-judicial killing and disappearances.<sup>16</sup> The use of excessive force in the process of arrest has become a source of particular concern in the United States in recent years, but can be found across the globe. Police officers all too often employ violence before attempting to use non-violent methods of restraint.<sup>17</sup> Again, members of minorities and other marginalised groups are often subjected to such forms of police brutality in a discriminatory manner.

<sup>13</sup> Larkins, Erika Robb, "Performances of Police Legitimacy in Rio's Hyper Favela", *Law and Social Inquiry* 2013, 38(3): 553-575.

<sup>14</sup> See Buur, Lars (2005) 'The sovereign outsourced': justice and violence in Port Elizabeth', in Thomas Blom Hansen and Finn Stepputat (eds) *Sovereign Bodies: Citizens, migrants) and States in the Postcolonial World*, Princeton: Princeton University Press:190-201; Jensen, Steffen (2009) 'The Vision of the State: Audiences, Enchantments and Policing in South Africa', in Jensen and Jefferson (eds) *State Violence and Human Rights: State officials in the Global South*, London: Routledge; Jensen, Steffen and Karl Hupal (2014) 'Policing Bagong Silang: Intimacy and politics in the Philippines', in Kyed and Albrechtsen (eds) *Policing and the Politics of Order Making*, London: Routledge.

<sup>15</sup> International human rights bodies mandated to prevent torture, such as the UN Subcommittee on Prevention of Torture (SPT) and the European Committee for the Prevention of Torture (CPT) would categorise arrest/apprehension as falling within their mandate, i.e. prevention of torture and ill-treatment in the context of police custody and other forms of deprivation of liberty.

<sup>16</sup> See for example: Amnesty International. *Excessive Force: Impunity for Police Violence in Indonesia* (2012).

<sup>17</sup> See ACLU, "Police Excessive Force", <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/police-excessive-force>; Alpert, Geoffrey and Roger Dunham. *Understanding Police Use of Force*. 2009. Cambridge University Press.

## Corruption and Intimidation

The use of violence is a common occurrence in the context of corruption. In countries where corruption and extortion are widespread, public officials can often use violence to force people to pay bribes.<sup>18</sup>

DIGNITY's own research in Manila, Johannesburg, Dhaka, Nairobi suggests that for many citizens, especially amongst the poor and marginal, contact with law enforcement officials is constantly marked by threats of violence and bodily harm, which are used to extort money from people and their families, with more or less formalised state sanctioned impunity. In the Philippines there are even local expressions that capture this: *hulid-up* (literally hold-up through arrest).<sup>19</sup> In one report from South Africa, evidence suggests that traffic police use the threat of violence to extort large amounts of money from motorists.<sup>20</sup> Other evidence from India suggests that police routinely harass citizens for bribes, with the threat of violence an ever present possibility.<sup>21</sup> In South Africa, in particular, groups such as migrants, township youth and sex workers are particularly vulnerable. The research of Dignity and its partners shows that the failure to pay bribes increases their risk of being victims of torture and ill-treatment.<sup>22</sup>

It is important to note that the threat of violence can be just as significant as its physical infliction. The threat of violence can be use to intimidate and can have significant psychological implications for the victims.

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<sup>18</sup> Gerber, Theodore ; Mendelson, Sarah, "Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?", *Law & Society Review*, Mar 2008, 42(1): 1-43.

<sup>19</sup> Jensen, Steffen, and Morten Koch Anderson, forthcoming. *Corruption and Torture: Violent Exchanges and Everyday Life for the Urban Poor*, Dignity; "Violent Exchange and the Production of Urban Citizenship", <https://dignityinstitute.org/what-we-do/urban-violence/projects/torture-and-corruption-violent-exchange-and-urban-citizenship/>

<sup>20</sup> Bruce, D. (2012). The law for sale: The endemic corruption in the Johannesburg Metropolitan Police Department. Johannesburg: Corruption Watch.

<sup>21</sup> Jauregai. Beatrice, "Beatings, Beacons, and Big Men: Police Disempowerment and Delegitimation in India", *Law and Social Inquiry* 2013, 38(3): 643-669.

<sup>22</sup> Langa, M., and Merafe, M. (2011). Profiling Torture and CIDT in the Hands of the Police: A Case Study of Kagiso Township, Gauteng. Johannesburg: Centre for the Study of Violence and Reconciliation; Thomas, K., and Langa, M. Forthcoming. Connection between Corruption and Torture of Foreign Nationals and Sex Workers by Members of the South African Police Service. Johannesburg: Centre for the Study of Violence and Reconciliation.

## **Crowd Control Measures**

The role of police in crowd-control efforts, if not strictly regulated and governed, may result in excessive use of force which in some instances may amount to CIDTP. Even in settings where strong regulations are in place, these may be ignored resulting in unjustified and excessive use of force for the purposes of crowd control, which may amount to CIDTP. Where such excessive use of force is carried out for the purposes of punishment and/or discrimination, for example against political opposition groups, and if the severity threshold is met, this may amount to torture.

## **Question 5 – Intentionality**

Question 5 of the questionnaire raises the important question of the intentionality of extra-custodial use of force: *In terms of intention, in order to amount to torture or CIDTP, does failure to comply with the relevant requirements governing extra-custodial use of force have to be deliberate, reckless or merely negligent? Or is intent irrelevant?*

It should be noted first that each specific incident would need to be examined on its facts to determine whether it amounts to torture or CIDTP, however there are some generalisations which ought to be mentioned. According to the definition of torture, there is an intentionality requirement in order to determine that a specific act constitutes the crime of torture. This is not so for CIDTP. With that being said, the use of excessive extra-custodial use of force may be considered to be torture or CIDTP even if it were reckless or merely negligent, where the State should have known that such use of force would result in violence reaching the severity threshold for CIDTP or torture, if the requisite definitional needs are met.

## **Question 7 – Good Practices**

### **Legal frameworks for policing**

In response to questions 7(a) and 7(b) of the questionnaire, DIGNITY has identified some good practices with regard to the legal frameworks for policing which could serve to limit incidents of excessive and unjustified extra-custodial use of force which may amount to torture or CIDTP. This is detailed in the enclosed paper entitled *Legal Study on Policing and Human Rights Standards* which examines the domestic legal frameworks in the Philippines, Liberia and South Africa to determine their compliance with international human rights standards and their application in practice. What is

clear from this study is that while a strong domestic legal and policy framework for human rights-based policing which aims to prevent excessive use of force is desirable, this is only effective if it is applied in practice. The Philippines, for example, has an extremely comprehensive policy and legal framework regulating police actions, which includes the complete domestication of the UN Code of Conduct for Law Enforcement Officials. However, the lack of enforcement of this robust framework has resulted in a police force that uses excessive force in extra-custodial settings with complete impunity. It is therefore clear that a strong legal framework is insufficient on its own, and must be coupled with a political willingness for effective implementation.

### **Prevention of extra-custodial torture and violence**

In the area of prevention of extra-custodial torture and violence, DIGNITY undertakes interventions with partners in Central America and East Africa towards Sustainable Development Goal (SDG) 11: Inclusive, Safe and Resilient Cities.

Interventions under DIGNITY's Intersectoral Urban Violence Prevention programme applies a set of general crosscutting entries, capacity development, advocacy work, alliance and network building and North-South partnership development. The intersectoral, public health<sup>23</sup> and territorial-based approaches to violence prevention in urban areas used by DIGNITY are, by their very nature, focused on place and coalition building.<sup>24</sup> Since 2016, DIGNITY is also applying a Place-based Leadership Development to the interventions in Kenya, with embedded implementation research in cooperation with UK based Sunderland University. Given that place-based leadership development recognizes and explicitly works with the tensions across sectoral boundaries (professional, psychological, political, social and economic), this makes the two approaches mutually reinforcing and more likely to create sustained reductions in urban violence.

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<sup>23</sup> For reference to the DIGNITY public health approach to violence prevention see the baseline study (Hansen-Nord, et al., *Social Capital and Violence in Poor Urban Areas of Honduras. Aggression and Violent Behaviour*, 2014) and the follow up impact study (Hansen-Nord, et al., *Reducing violence in poor urban areas of Honduras by building community resilience through community-based interventions, International Journal of Public Health* 2016).

<sup>24</sup> For an introduction to DIGNITY's intersectoral violence prevention approaches, which is informed by the public health approach to violence prevention, the human right-based approach to development and the human security approach and to their potential to reduce violence please refer to Kjaerulf, F & Barahona, R. (2010). Preventing violence and reinforcing human security: a rights-based framework for top-down and bottom up action. *Rev Panam Salud Publica*, 27 (5): 382-95

The interventions, which take place in urban municipalities, work with evidence based violence prevention from the various participating sectors' different mandates and prioritize creating and strengthening alliances, networking and establishing direct communications lines and personal collaborative relations *between local police, local authorities, private sector and local CSOs*. Related to Human Rights Based Approaches, the approach of facilitating meetings between rights holders and duty bearers 'at the middle ground' is used as a basic principle for all development workshops and meetings. In addition, the DIGNITY works with the Human Security Approach with both duty bearers and right holders' representatives. The human security approach works to develop intervention strategies that 1) becomes *participation driven* – by strategic strengthening of “bottom-up empowerment” and participation in local governance (which can ensure that local government mechanisms to a higher degree corresponds to local needs, in the urban territories where DIGNITY operates) and 2) becomes *protection driven* – by strategic “top-down” development of the state's protection infrastructure, in terms of development or strengthening of the norms, processes and institutions of the state institutions (especially police and local government), which to an increasing degree should protect its citizens against dangers and insecurities, and continuously work to close the gap between partial dysfunctional state institutions and international human rights standards.

### Further Information

We have attached some of the underlying research as an appendix. These are:

- Torture and Ill-Treatment Under Perceived: Human Rights Documentation and the Poor;
- Torture in South Africa: Exploring Torture and Cruel, Inhuman and Degrading Treatment and Punishment Through the Media;
- Conflicting Logics of Exceptionality: New Beginnings and the Problem of Police Violence in Post-Apartheid South Africa;
- Legal study on policing and human rights standards; internationally and in three countries of the global south (South Africa, Philippines and Liberia)

Should you require any further information please do not hesitate to contact us at:

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