

DIGNITY - Danish Institute Against Torture

LEGAL FACT SHEETS

ON DEFINITIONAL, NORMATIVE AND THEMATIC
ASPECTS OF TORTURE



Preface

This legal fact sheet collection consists of one-page overviews of definitional, normative and thematic aspects of the anti-torture framework. They aim to provide a broad introduction on a wide range of matters to a wide range of audiences, especially those starting to engage with this field. We use the UN Convention against Torture framework but also refer to regional and national frameworks where compatible and relevant. The reference pages aim to provide a full list of reading and resources for further, more specific research.

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Contents

Definitional & Normative

- Fact sheet N° 1. Defining Torture
- Fact sheet N° 2. Redressing Torture
- Fact sheet N° 3. Preventing Torture
- Fact sheet N° 4. Investigating Torture
- Fact sheet N° 5. Criminalising Torture
- Fact sheet N° 6. Prosecuting Torture

Thematic

- Fact sheet N° 7. Safeguards in Police Custody
- Fact sheet N° 8. Torture & Migration
- Fact sheet N° 9. Pre-Trial Detention
- Fact sheet N° 10. Prisoner Contact Rights
- Fact sheet on Corruption & Torture

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Legal N° 1 – Defining Torture



DEFINITION(S) OF TORTURE

Torture is universally and absolutely prohibited by international treaty and customary law.¹ The internationally recognised definition² of torture is found in the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT).³ This has been adopted by regional and domestic legal frameworks.

ARTICLE 1 (1) OF THE UNCAT

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

ELEMENTS OF TORTURE

All four elements of (1) severe pain or suffering, (2) intentionality, (3) specific purpose, and (4) official capacity are considered and required by a court to rule whether alleged ill-treatment amounts to torture.

Severe pain or suffering, whether physical or mental: could be an individual method or a combination of methods, occurring on one occasion or over time.⁴ Pain need not be prolonged;⁵ it can be short-lived.⁶ Mental pain can constitute torture on its own, and need not be coupled with physical pain. Interpreting 'severe' has proven difficult,⁷ as it involves the intensity of pain based on a multitude of factors, objective and subjective, including duration, a victim's health, age, and sex.⁸

Intentionality: refers to the perpetrator's motive to deliberately inflict severe pain. This is to be determined not subjectively but objectively.⁹ Recklessness, but not negligence, might also satisfy this element.¹⁰

Purpose: includes obtaining information or confession, intimidation, punishment, or discrimination of any kind, towards a victim or a third person.¹¹

Official capacity: has been interpreted to include persons with any officially recognized role, whether formally or informally. '**Acquiescence** of a public official' has also garnered attention recently with states increasingly using private contractors.¹² State inaction on issues of gender-specific violence are discussed under this element.

CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CIDTP)

Whilst also prohibited, CIDTP is not defined in international law. The line between torture and CIDTP is clear in a number of cases, where the given ill-treatment does not amount to torture because one or more of the four elements is missing. However, due to the complexity of the severity assessment this line may be unclear in other cases¹³ Wherever the line is drawn, CIDTP can never be clearly delinked from torture, as CIDTP embodies acts which are considered to 'fall short' of torture. It is, therefore, relatively defined.¹⁴

It is also important to note that there is also a 'minimum level of severity' that needs to be fulfilled before any treatment could be said to amount to any form of ill-treatment, whether torture, inhuman or degrading treatment or punishment. There is also no clear distinction between what amounts to cruel and inhuman and what amounts to degrading.¹⁵ CIDTP is to be interpreted as expansively as possible to offer the broadest protection¹⁶

TORTURE METHODS

There is no exhaustive list of methods inherently constituting torture. The following, however, are recognized by the literature, legal and medical, as being methods which, given a particular set of circumstances (duration, purpose, degree, severity, cumulation, other environmental factors etc.), constitute torture: beatings, falanga, denial of basic human need (water, food, sleep, etc.), sexual humiliation, threats, stress positions. See accompanying fact-sheets for more information.

MOREOVER

- Torture and CIDTP are both absolutely and universally prohibited, with no exceptions or justifications. All states, whether or not they are parties to the UNCAT, are therefore prohibited from resorting to torture. Individuals are also able to sue governments for violating this obligation.
- The 'lawful sanctions' clause remains contested. By one prominent authority, it effectively lacks any meaning or force.¹⁹ By others, these are to be defined as sanctions in line with international standards such as imprisonment.²⁰
- The understanding of torture is evolving and, therefore, unfixable, as it is informed by developments in the uses of state power (for example in terms of policing and punishment) and the societal expectations around its legitimate boundaries.
- Regional bodies and states are free to adopt broader, but not narrower, definitions of torture.²¹

REFERENCES

- ¹ Universal Declaration of Human Rights, 10 December 1948, Article 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); United Nations International Covenant on Civil and Political Rights, Article 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."); European Convention on Human Rights, Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); American Convention on Human Rights, Article 5 ("(1) Every person has the right to have his physical, mental, and moral integrity respected. (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."); African Charter on Human and Peoples' Rights, Article 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."); Arab Charter on Human Rights, Article 8 ("1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment."); United Nations Convention on the Rights of the Child, Article 37 ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."); United Nations Convention on Persons with Disabilities, Article 15 ("1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation"); Geneva Conventions (GC), Common Article 3 ("(1)(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...] (c) outrages upon personal dignity, in particular humiliating and degrading treatment); GCI, Article 12, GCII, Article 12, GCIII, Articles 17 and 87, GCIV, Article 32 (prohibition of biological experiments); GCI, Article 50, GCII, Article 51, GCIII, Article 130, GCIV, Article 147 (prohibition of "wilfully causing great suffering or serious injury to body or health"); Rome Statute for the International Criminal Court, Article 8 (2) (a) "(ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health").
- ² Inter-American Convention to Prevention and Punish Torture, Article 2 (For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.); Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 2008, Article 4 (adopting UNCAT definition under Article 1); United Nations, Human Rights Committee, *Giri v Nepal*, HRC, UN Doc. CCPR/C/101/D/1761/2008 (2011) para. 7.5, guided by UNCAT, Article 1.
- ³ A/RES/39/46, 10 December 1984, found here: www.un.org/documents/ga/res/39/a39r046.htm
- ⁴ ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber) 15 March 2002, para 182: torture "may be committed in one single act or can result from a combination or accumulation of several acts, which, taken individually and out of context, may seem harmless ... The period of time, the repetition and various forms of mistreatment and severity should be assessed as a whole".
- ⁵ Concluding Observations of CAT: USA, UN Doc. CAT/C/USA/CO/2 (2006), para. 13.
- ⁶ ICTY, *Naletilic and Matinovic*, Appeal Judgement, 3 May 2006, para. 300: ("no rigid durational requirement is built into the defi-
- nition".)
- ⁷ The concept of severity has been critiqued by prominent commentators as being 'vague and open to interpretation', 'not susceptible to precise gradation' and 'virtually impossible'.
- ⁸ *Selmouni v. France*, 25803/94, 29 July 1999, ECtHR, para. 100: ", it remains to establish in the instant case whether the "pain or suffering" inflicted on Mr Selmouni can be defined as "severe" within the meaning of Article 1 of the United Nations Convention. The Court considers that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."
- ⁹ CAT, General Comment 2, para. 9 ("The elements of intent and purpose in Article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.")
- ¹⁰ J. Mendez and A. Nicolescu, 'Evolving Standards for Torture in International Law' in M. Basoglu, *Torture and Its Definition in International Law* (2017), p. 244. For the point on negligence, see see J. H. 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* (1988), p.118.
- ¹¹ The United Nations Committee against Torture (CAT), the supervisory body of the UNCAT, has explained that "discrimination of any kind can create a climate in which torture and ill-treatment of the 'other' group subjected to intolerance and discriminatory treatment can more easily be accepted" (Contribution of the Committee against Torture to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, UN Doc. A/CONF.189/PC.2/17, 26 February 2001, p. 2.)
- ¹² CAT, General Comment 2, para. 15.
- ¹³ CAT, General Comment 2, para 3.
- ¹⁴ UNCAT, Article 16 (1) refers to CIDTP as acts 'which do not amount to torture'.
- ¹⁵ *Ireland v. U.K.*, 5310/71, 18 January 1978, ECtHR, para. 167.
- ¹⁶ M. Nowak, 'What Constitutes Torture? US and UN Standards' (2006) *Human Rights Quarterly* 28 (4), p. 830; N. Rodley, 'The Definition(s) of Torture in International Law', 55 *Current Legal Problems*, 467 (2002), p. 489.
- ¹⁷ *Ireland v. U.K.*, 5310/71, 18 January 1978, ECtHR, para. 167 ("The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.").
- ¹⁸ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, Principle 6 ('The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.')
- ¹⁹ M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), p. 84.
- ²⁰ *Ibid*, pp. 79-80.
- ²¹ See UNCAT Article 1 (2); embodying a broader definition, the Inter-American Convention Against Torture only requires that severe pain be intended and not necessarily inflicted, and has a more inclusive purposive element.

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Legal N° 2 – Redressing Torture



THE SCOPE OF REDRESS

Under Article 14 of the UNCAT, victims¹ of torture and other cruel, inhuman or degrading treatment or punishment have a right to obtain redress, procedurally and substantively, in the forms of fair and adequate **compensation** and full **rehabilitation** (and so are their dependents in the case of their death).²

States need to provide every victim with redress whether or not the ill-treatment was perpetrated by the state, on its jurisdiction or by its national.³ The breadth of this right has been interpreted by the Committee against Torture (CAT) to also include **restitution**, **satisfaction** and **guarantees of non-repetition**.⁴ Naturally, given that the restoration of the dignity of the victim is the ultimate objective, victim participation is of paramount importance.⁵

SUBSTANTIVELY SPEAKING

Reparation, namely the ‘process and result of remedying the damage or harm caused by an unlawful act’,⁶ needs to be **accessible**, **adequate**, **effective** and **comprehensive**, tailored and proportionate towards circumstances of the case. The forms of reparation are defined as follows:

Restitution: means to re-establish victim to the fullest extent possible back in position enjoyed before violation. Structural efforts are also envisaged.⁷

Compensation: includes economic compensation (medical expenses, loss of earnings), costs of bringing a claim for compensation (legal and special assistance) and damages for harm suffered.⁸

Satisfaction and Right to Truth: include investigation and criminal prosecution, or public acceptance, disclosure, and apology. A failure to investigate may constitute *de jure* or *de facto* violation of the UNCAT.

Guarantees of non-repetition: include combatting impunity for violations of the UNCAT. Prevention is also included here-in: oversight and training of security forces and law enforcement officials, adherence to international due process standards, protection of human rights defenders, independent monitoring of places of detention, training of health professionals.

PROCEDURALLY SPEAKING

To realise the substantive rights noted above, States are obliged to enact legislation, and establish effective complaint and investigation mechanisms. These can be explained as follows:

Legislation needs to provide effective remedy and right to obtain adequate and appropriate redress (including access to judicial remedy),⁹ and ensure adequate care and protection throughout process to avoid re-traumatisation, intimidation or retaliation.¹⁰ Failure to criminalise, investigate or complain against torture obstructs the victim’s capacity to access and enjoy their rights.¹¹ Decisions on redress need also be enforced.¹²

Investigative and Complaint Mechanisms: to be communicated and made accessible to public and individuals in detention.¹³ In the absence of a complaint, States need to take the initiative to provide redress.¹⁴

REHABILITATION SPECIFICALLY

Rehabilitation: is defined as the restoration of function or the acquisition of new skills required, enabling the maximum possible self-sufficiency and function (socially and vocationally). It is to be as full as possible (not referring to State resources but to victim recovery),¹⁵ holistic (medical, psychological care, legal and social services). Long-term and integrated and specialized services that are **available**, **appropriate** and **promptly accessible**.¹⁶

Needs are to be assessed on, *inter alia*, the Istanbul Protocol, consider victim’s strength and resilience (to avoid re-traumatisation etc.) and victim’s culture, personality, history and background, and provided promptly and without discrimination.¹⁷

MOREOVER

- Article 12 of the *International Covenant on Economic, Social and Cultural Rights* recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health. This is not to be understood as a right to be healthy.¹⁸ The obligation correlates with availability of state resources.¹⁹
- States are prohibited from deporting individuals in need of rehabilitation services to where such services are not available or guaranteed.²⁰
- A broader right to access rehabilitation is provided under the United Nations *Convention for the Rights of Persons with Disabilities*.²¹ The Convention also contains a broad description of disability which covers physical, sensory, intellectual, psychiatric and multiple disabilities that can be permanent, temporary, episodic or perceived.²²

REFERENCES

¹ It is important to note that the term “survivor” may be preferred by victims of torture. Whilst appreciating this, as this document is legally-oriented, it will refer to the relevant individuals as “victims”.

² CAT, General Comment No. 3, para. 3: ‘The term “victim” also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.’ See also M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), pp. 452-502.

³ CAT, General Comment No. 3, para. 22.

⁴ See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law New York, 16 December 2005 (‘Van Boven Principles’).

⁵ CAT, General Comment No. 3, para. 4.

⁶ Carla Ferstman, Reparations, Oxford Bibliographies, 13 June 2017

⁷ CAT, General Comment No. 3, para. 8.

⁸ CAT, General Comment No. 3, paras. 9-10.

⁹ CAT, General Comment No. 3, para. 20.

¹⁰ CAT, General Comment No. 3, paras. 21 and 31.

¹¹ CAT, General Comment No. 3, para. 19.

¹² CAT, General Comment No. 3, para. 24.

¹³ CAT, General Comment No. 3, para. 23.

¹⁴ CAT, General Comment No. 3, para. 27.

¹⁵ CAT, General Comment No. 3, para. 12.

¹⁶ CAT, General Comment No. 3, para. 13.

¹⁷ CAT, General Comment No. 3, para. 13.

¹⁸ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, E/C.12/2000/4, para. 30.

¹⁹ CESCR General Comment No. 14, para. 8.

²⁰ CAT, General Comment No. 4, para. 22.

²¹ *Convention for the Rights of Persons with Disabilities* (UNCRPD), article 26.

²² UNCRPD, article 2.

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Legal N° 3 – Preventing Torture



OBLIGATIONS TO PREVENT

The UN Convention Against Torture (UNCAT) obligates all States parties to take 'effective legislative, administrative, judicial and other measures to prevent torture' (Article 2(1)). This is also 'indivisible, interdependent and interrelated' with respect to the prevention of cruel, inhuman and degrading treatment (per Article 16).¹ Prevention can be *direct* (reducing risk and addressing causes) and *indirect* (deterring repetition through investigation and prosecution; see respective factsheets).

The obligation to prevent torture is binding, absolute and without exception. The persistence of torture in the face of decades of concerted international efforts towards its prevention and eradication is indicative of the complexities involved. As the following set out, prevention is an oversight- and rights-based effort targeted at the full continuum of state use of force, whether in or outside detention.²

Additional obligations to prevent torture are found in the UNCAT, namely in articles 3, 10 and 11. Article 3 embodies the principle of non-refoulement which prohibits states from returning or extraditing a person to another state where there is a real risk of that person being subject to torture (see Torture and Migration factsheet). Article 10 requires states to educate and inform its law enforcement personnel, civil or military, medical personnel, public officials involved in the custody, interrogation or treatment of the prohibition against torture. Article 11 requires that interrogation rules, instructions, methods and practices as well as arrangements for custody and treatment are kept under systematic review with a view to preventing torture.

TRINITY OF RIGHTS: LEGAL SAFEGUARDS IN POLICE CUSTODY

The first hours in police custody are generally recognised as entailing the greatest risk of torture and CIDTP. Recognising such ill-treatment thrives in the absence of transparency, a trinity of rights (lending oversight and thereby limiting opportunity for perpetration) have proven paramount to preventing torture in practice.

The trinity of legal safeguards includes

- i. the right to a lawyer,
- ii. the right to a doctor, and
- iii. the right to notify a relative or a third party of choice.³

Persons must be informed of and afforded their rights promptly, independently and freely. The significance of these rights have been widely-recognised.⁴ (See further factsheet on 'Safeguards in Police Custody'.)

PRE-TRIAL DETENTION

Excessive periods of pre-trial detention expose detainees to gross violations of internationally and regionally enshrined human rights. Primarily, the conditions of pre-trial detention (overcrowding and poor physical conditions) generally also strengthen the link between the excessive use of pre-trial detention and torture and cruel, inhuman and degrading treatment.^{5,6} This means that if fewer people are kept in detention fewer people would be exposed to such a risk. Therefore, pretrial detention should be used 'as a last resort, for the shortest time possible, and only for the most serious offences'.⁷ Related violations include freedom from arbitrary arrest or detention,⁸ the right to a fair and public trial,⁹ without due delay¹⁰ and the right to be presumed innocent.¹¹ (See factsheet on 'Pre-Trial Detention').

Effective judicial oversight, namely the right to be brought before a judge within a short time after arrest, is not of any less importance. A maximum period of 48 hours' police custody is generally accepted as best practice.¹² Bail (the practice of releasing suspects pending trial, conditionally or not) should be a presumed right, rebuttable where risks of non-appearance at trial, further offending or obstructing justice exist.

DETENTION MONITORING & STANDARDS

Regular monitoring places of detention by an independent national preventive mechanism provides checks on relevant risk factors. This is promoted by the *Optional Protocol* to the UNCAT. Establishing clear and detailed detention procedures and standards, in accordance with the UN Nelson Mandela Rules as a minimum, are necessary.

See the relevant, separate factsheets.

STRUCTURAL CHALLENGES

There exists a multitude of causes for torture on a multitude of plains: individual, institutional, cultural and situational. Public institutions, such as the police and courts, may not be structured or equipped to adequately protect human rights, for reasons of susceptibility to political interference, being under-resourced or merely unaware that their practice is not lawful under international law. Community understanding and expectations also naturally inform such practices.

The notion of *progressive realisation*, namely that state obligations could be legitimately dependent on the stage of development of the country or available economic resources, does not apply to the prevention and prohibition of torture, or indeed any of the obligations under the UN Convention Against Torture.¹³

As a side, the importance of related and indivisible rights such as the right to life, liberty and security of the person, the right to be treated with dignity, fair trial and the right to private life, to name but a few, must also be respected to ensure that the freedom from torture is realised.

REFERENCES

¹ UN Committee Against Torture, General Comment No 2, para. 3.

² See Amnesty International's 12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State.

³ UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16.1; UN Declaration on the Protection of all Persons from Enforced Disappearance, Article 10.2: of the authorities responsible, the times and locations of detention and release, and state of the health of detainee.

⁴ CAT A/48/44/Add.11 para 26; CAT/C/SR.50, para. 21; CAT/C/SR.91, para. 56; CAT/C/SR.201 paras. 16, 26. Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press, 2017).

⁵ Ludwig Boltzmann Institute and University of Bristol Human Rights Implementation Centre, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (2011), p 11.

⁶ ICCPR, Article 7; CAT, Article 16; African Charter on Human and Peoples' Rights, 1981, Article 5.

⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 1990, rule 6.2.

⁸ ICCPR, Article 9 (1); African Charter on Human and Peoples' Rights, 1981, Article 6.

⁹ ICCPR, Article 14 (1); African Charter on Human and Peoples' Rights, 1981, Article 7.

¹⁰ ICCPR, Article 14 (3) (c).

¹¹ ICCPR, Article 14 (2).

¹² A/54/44, para. 103

¹³ CAT/C/SR.101, para. 15. A/47/44, para 65.

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Legal N° 4 – Investigating Torture



INVESTIGATIONS AS INDISPENSABLE

Under Article 12 of the UN Convention Against Torture, States parties are obligated to **promptly, impartially, and effectively** investigate acts where there are reasonable grounds to believe that any form of ill-treatment has been committed,¹ in any territory under its jurisdiction,² even in the absence of a formal complaint (*ex officio*) or physical marks.³

Reasonable grounds are assessed on the context, where in some contexts any allegation will be considered to amount to such, whereas, in other contexts, a higher standard of proof may be needed. Moreover, the information justifying an investigation may be sourced from those other than the victim including witnesses, doctors (especially during medical screenings),⁴ family members, NGOs or lawyers.⁵

This is central to affecting prosecution and redress.⁶ Complaint and investigative mechanisms need to be established and accessible under domestic law. Any criminalization is clearly ineffective without effective investigation and prosecution.⁷ The burden of investigating an allegation of torture rests with the state.

ELEMENTS OF AN INVESTIGATION: PROMPT, IMPARTIAL, EFFECTIVE

Prompt: Initiating an investigation within hours or days of complaint limits time and opportunity for tainting evidence and the intimidation of victims and witnesses.⁸ The failure to promptly investigate may also constitute 'a de facto denial of redress and therefore violation of article 14'.⁹ In terms of medico-legal documentation, access to a forensic doctor should be immediately granted upon request as traces of torture and ill-treatment can disappear.¹⁰

Impartial: The authority responsible for conducting the investigation should be neutral (or external)¹¹, and if possible independent, from the authority being accused by the victim (e.g. police) or prosecuting (e.g. Director of Public Prosecutions) a case against the victim. Also, there should be 'no institutional or hierarchical connection between the investigators and the alleged perpetrators'.¹² Impartiality also requires thoroughness taking all reasonable steps to obtain and examine all relevant information.¹³

Effective: has been defined as needing to be 'capable of leading to the identification and punishment of those responsible'.¹⁴ Investigators are also to be conferred with the sufficient powers to this end, including power to: obtain all the information necessary;¹⁵ summon and compel testimony;¹⁶ access to or power to commission impartial medical or other experts.¹⁷ Importantly, the investigators must also be provided with the 'necessary budgetary and technical resources'.¹⁸ The investigation should be transparent and engage with the victims and their lawyers and with the public to ensure accountability.¹⁹ This is essential if justice is not only done but also seen to be done.

COMPLAINT MECHANISMS

Article 13 of the UNCAT provides victims with the 'right to complain to competent authorities, and to have their case promptly and impartially examined'. Complaints need not be filed for an investigation to be initiated. Officials such as judges and prosecutors should exercise their official capacity to order investigations (*ex officio*).

Basic principles guiding effective complaint mechanisms are:²⁰ i. **availability:** any detainee or interested parties should have the right to lodge a formal complaint to a designated authority; ii. **accessibility:** ability to make both oral and/or written statements, both internally and/or externally to their place of detention, freely and through a user-friendly process; iii. **confidentiality:** direct and confidential access to the designated authority with steps taken to avoid intimidation and reprisals; iv. **effectiveness:** processing to be independent, prompt and thorough, leading to redress and accountability; v. **traceability:**²¹ requires a record of complaints in a specific register and a system for compiling statistics.

VICTIM AND WITNESS PROTECTION

CAT Article 13 provides that steps should be taken so that complainants and witnesses are protected against ill-treatment or intimidation.²² The alleged perpetrators of torture or ill-treatment are to be removed from positions of power over victims, witnesses and investigators.²³ The suspect must be suspended or reassigned pending investigation.²⁴

PURPOSES OF AN INVESTIGATION: CLARIFY, IDENTIFY, PROSECUTE, REDRESS

The *Principles of the Effective Investigation and Documentation of Torture* set out the purposes of an investigation as being to i. clarify facts and establish responsibility, ii. identify measures needed to prevent recurrence, and iii. facilitate prosecution and redress.²⁵ Those ill-treated by state authorities rarely have access to corroborative documentation.²⁶

MOREOVER

- Related investigatory mechanisms include more systemic, reform-oriented approaches such as parliamentary inquiries, commissions, internal investigations.
- In addition to the *Principles*, the *Istanbul Protocol* and *Principles for the Investigation of Arbitrary Executions* provide guidance on effective investigations.
- Obligations to investigate are arguably further strengthened where public officials are also required to formally report whenever they are made aware of allegations.²⁷
- Similarly, prosecutorial and judicial authorities are in positions and therefore have a responsibility to initiate investigations where there are indications, whether explicit or not, that those being brought before them could have been subjected to ill-treatment.²⁸

REFERENCES

- ¹ UN Convention Against Torture, Articles 12, 13, 16; UN Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), CCPR/C/21/Rev.1/Add.13, para. 15; *Assenov v. Bulgaria*, 90/1997/874/1086, 28 October 1998, European Court of Human Rights, para. 102; Inter-American Convention Against Torture, Article 8.
- ² Manfred Nowak and Elizabeth McArthur (eds.). *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), p. 414. ('Nowak')
- ³ *Principles on the Effective Investigation and Documentation of Torture Other Cruel, Inhuman or Degrading Treatment or Punishment*, para 2. ('Principles'); CPT Standards, 2004, 'Combating impunity' CPT/Inf(2004)28-part, para. 27. ('CPT Standards 2004')
- ⁴ For medical screenings, see Nowak p. 432.
- ⁵ Nowak, p. 431.
- ⁶ *Aksoy v. Turkey*, 100/1995/606/694, 18 December 1996, European Court of Human Rights, para. 98: 'Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13'.
- ⁷ *Principles*, 2.
- ⁸ Nowak, p. 434; UN Committee Against Torture, *Evloev v Kazakhstan*, CAT/C/51/D/441/2010 (2013), para. 9; UN Committee Against Torture, *Blanco v Spain*, CAT/C/20/D59/1996 (1998): three weeks delay was held not to be prompt.
- ⁹ UN Committee Against Torture, General Comment No. 3, 2012: Implementation of article 14, para. 17.
- ¹⁰ CPT Standards 2004, para. 30.
- ¹¹ Nowak, pp. 436-438.
- ¹² UN Special Rapporteur on Torture, Report, A/68/295 (2013), para. 64: 'Although article 12 of the Convention against Torture does not exclude the possibility of the investigation being carried out by prison administration, in most cases internal investigations lack transparency and are marred by a conflict of interest. Allegations of torture and other ill-treatment should be investigated by an external investigative body, independent from those implicated in the allegation and with no institutional or hierarchical connection between the investigators and the alleged perpetrators.'; see also UN Special Rapporteur on Torture, Mission to Mexico, 29 December 2014, A/HRC/28/68/Add.3, para. 82(e).
- ¹³ UN Committee Against Torture, *Blanco v Spain*, CAT/C/20/D59/1996 (1998), para. 8.8; UN Committee Against Torture, *M'Barek v. Tunisia*, CAT/C/23/D/60/1996 (1996), para. 11.10; CPT Standards 2004, para. 33.
- ¹⁴ *Assenov v Bulgaria*, para 102.
- ¹⁵ *Principles*, 3.
- ¹⁶ *Principles*, 2.
- ¹⁷ *Principles*, 2.
- ¹⁸ *Principles*, 3(a).
- ¹⁹ *Principles*, 4; see Nowak, p. 437.
- ²⁰ CPT Standards, 'Complaints Mechanisms', CPT/Inf(2018)4-part, paras. 75-91. ('CPT Standards 2018')
- ²¹ UN Committee Against Torture, Report of the Committee, Supplement No. 44, A/56/44, para. 97(e).
- ²² UNCAT, Article 16; see also *Principles* 3(b):
- ²³ See also *Principles*, 3(b).
- ²⁴ UN Committee Against Torture, Report on Nepal, CAT/C/NPL/CO/2 (2007), para. 24.
- ²⁵ *Principles*, 1 (a)-(c).
- ²⁶ Freedom From Torture, 'Proving Torture: Demanding the impossible, Home Office mistreatment of expert medical evidence', November 2016, p.11.
- ²⁷ CPT Standards 2004, para. 27.
- ²⁸ CPT Standards 2004, para. 28.

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Legal N° 5 – Criminalising Torture



CODIFYING THE CRIME OF TORTURE

A central aspect of domestic implementation of the United Nations Convention Against Torture (UNCAT) is to ensure that its national criminal law criminalises the act of torture in line (at a minimum) with the definition in Article 1 of the UNCAT, as a specific and distinct crime.¹ It is not sufficient to solely have a prohibition in constitutional law.² (see further ‘Defining Torture’ factsheet) Distinct codification advances recognition of the ‘special gravity of the crime of torture’, thereby enhancing punishment, deterrence and monitoring.³ Some states have legislated to define torture more broadly to include acts by private actors.⁴

MODES OF CULPABILITY

Article 4 (1) of the UNCAT requires states to ‘ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.’⁵ Different modes of liability need to be included in national anti-torture legislation including: commission; attempt; complicity and other degrees of participation; encouragement; incitement; acquiescence.⁶

APPROPRIATE PENALTIES

Article 4 (2) of the UNCAT requires states to ‘make these offences punishable by appropriate penalties which take into account their grave nature’.⁷ Whilst not establishing a firm rule, the Committee Against Torture has generally recommended that torture be punished with a minimum of six to a maximum of twenty years of imprisonment, depending on the severity.⁸

The difficulty here lies in the particularity of what severe punishment means in different jurisdictions. In any case, punishment where torture is proven should be equal to that of the most serious offences in that jurisdiction, except the death penalty.⁹

NO JUSTIFICATIONS: DEROGABILITY, DEFENCES, IMMUNITIES & AMNESTIES

There are no exceptional circumstances, such as state or threat of war, political or public emergency, or defences, such as obeying orders or ‘necessity’, under which torture can legitimately be inflicted.¹⁰ Resort to torture and CIDT has been observed to increase in exceptional circumstances which further underscores the need to reject derogations.¹¹ Traditional or religious justifications are equally rejected.¹²

Relatedly, immunities and amnesties are also not applicable to the crime of torture.¹³ Statute of limitations (i.e. a time limit on prosecution) also do not apply.¹⁴ If still enshrined in the domestic law, such limitations to the absolute nature of the prohibition must be repealed.

ESTABLISHING JURISDICTION

Article 5 of the UNCAT requires states to establish jurisdiction over the crime of torture committed on any territory under its jurisdiction and over perpetrators and victims who are its nationals.¹⁵ Article 7 embodies the extradite or prosecute principle (aut dedere, aut judicare), requiring states to either extradite or prosecute alleged perpetrators of torture.

The domestic law should also provide for universal jurisdiction over torture. In other words, a state should be able to prosecute non-nationals for the crime of torture, if they are present on its territory.¹⁶ Customary international law permits the exercise of universal jurisdiction over torture, including when committed in states not party to the UNCAT.¹⁷ (For exercise of jurisdiction, see the factsheet on ‘Prosecuting Torture’.)

MOREOVER

- The obligations to criminalise torture do not apply to CIDTP. Instead, Article 16 of the UNCAT merely requires states ‘undertake to prevent’ acts amounting to CIDTP.
- Article 11 of the UNCAT requires states to systematically review ‘interrogation rules, instructions, methods and practices as well arrangements for the custody and treatment of person subjected to any form of arrest, detention or imprisonment’.
- Discrepancies between Article 1 and domestic law are seriously scrutinized by the Committee Against Torture as they are seen to create ‘loopholes for impunity’.¹⁸ The UNCAT requires that national laws and performance are continually reviewed and, if ineffective, revised.¹⁹
- It is corollary that persons be protected against any retaliation who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials.²⁰

REFERENCES

- ¹ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/, paras. 8 and 11. ('GC II')
- ² Report to Togo CAT/C/TGO/CO/1, para. 10.
- ³ GC II, para 11.
- ⁴ Uganda Prevention and Prohibition of Torture Act, Section 7.
- ⁵ See also similar provision in Article 6, *Inter-American Convention to Prevent and Punish Torture*.
- ⁶ GC II, para. 17.
- ⁷ For a detailed discussion, see Manfred Nowak and Elizabeth McArthur (eds.). *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), p. 241. ('Nowak')
- ⁸ Nowak, p. 250.
- ⁹ Burgers and Danelius, *The UN Convention Against Torture* (1988), p. 129.
- ¹⁰ Article 2 (2) and (3) of UNCAT; see also Articles 4 and 5 of the *Inter-American Convention to Prevent and Punish Torture*.
- ¹¹ CAT/C/PER/CO/4, para. 15.
- ¹² GC II, para. 5.
- ¹³ GC II, para. 5: CAT stated that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability"; see also UN Human Rights Committee, General Comment No. 20, para. 15: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future". See also *Case of Barrios Altos (Chumbipuma Aguirre and other v. Peru)*, Inter-American Court of Human Rights, 14 March 2011, para. 41: 'it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under international human rights law.'
- ¹⁴ See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/CO/3 (2013) §8; Guatemala, UN Doc. CAT/C/GTM/CO/5-6 (2013) §8; Japan, UN Doc. CAT/C/JPN/CO/2 (2013) §8. See also Prosecutor v Furundzija, Yugoslavia Tribunal (1998) §157; Principle 23 of the Updated Impunity Principles; Basic Principles on Reparation, §6; Article 29 of the Rome Statute.
- ¹⁵ Article 5 of UNCAT: 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.
- ¹⁶ UNCAT, Article 5 (2): See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/CO/3 (2013) §7; Estonia, UN Doc. CAT/C/EST/CO/5 (2013) §8; Kenya, UN Doc. CAT/C/KEN/CO/2 (2013) §8; UK, UN Doc. CAT/C/GBR/CO/5 (2013) §17; Tajikistan, UN Doc. CAT/C/TJK/CO/2 (2012) §6; Armenia, UN Doc. CAT/C/ARM/CO/3 (2012) §10; Rwanda, UN Doc. CAT/C/RWA/CO/1 (2012) § 7
- ¹⁷ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) §140
- ¹⁸ GC II, para 9.
- ¹⁹ GC II, para 4.
- ²⁰ GC II, para 26; UN Human Rights Committee, General Comment No. 20, para 13.

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Legal N° 6 – Prosecuting Torture



ACCOUNTABILITY

State parties to the UN Convention against Torture (UNCAT) are duty-bound to hold perpetrators to account by means of a fair trial. This includes any person involved in torture whether their involvement has been one of 'encouraging, ordering, tolerating or perpetrating'.¹ (See 'Investigating Torture' and 'Criminalising Torture' factsheets respectively).

CULPABILITY

Varying degrees of involvement for which one could be prosecuted must be recognized and pursued. Besides the act or attempt of committing the torture, **complicity** and **participation** must also be prosecuted. **Complicity** and **participation** have been held to include: ordering, soliciting, inducing, inciting, encouraging, aiding and abetting. Joint prosecutions are also envisaged. Those in positions of power who failed to prevent (acquiesced) or report cases of torture should also be prosecuted.²

PROTECTION IN PROCESS

Fair trial rights under international and national laws must be fully adhered to in prosecuting suspected perpetrators of torture. Article 7(3) of the UNCAT provides that suspects are to be 'guaranteed fair treatment at all stages of the proceedings'. This includes access to effective legal representation.

UNCAT Article 13 provides that steps should be taken so that complainants and witnesses are protected against ill-treatment or intimidation.³ It is important those conducting the investigation are also afforded protection.⁴

EVIDENCE & PROOF

Prosecutors are duty-bound to bring charges against those identified by investigations as suspected perpetrators. Yet, a number of factors can hinder effective prosecution. Standard of proof for criminal convictions (**beyond reasonable doubt**), given the usual lack of direct evidence in torture cases, renders prosecution difficult. In most cases, it is unusual to have anything other than the testimony of the victim.⁵ This is because, the control of the evidence, be it through witnesses or official documentation, is generally guarded by the authorities responsible, and for this reason, international law has recognized the need for the burden of proof to shift to the state in cases where torture takes place in a context of custody (see next section).

Importance of corroborative evidence, therefore, must be borne in mind, namely in terms of registers, CCTV, witness statements. This is especially key where the victim was detained in a secret or unofficial facility, incommunicado or in prolonged isolation; where custody records were not properly kept; where the detainee was not fully informed of their rights, i.e.

denied access to a lawyer or doctor or to notify a third person; where medical examinations did not occur immediately upon detention and release. Systematic documentation is also of demonstrable value.

BURDEN OF PROOF

Direct evidence of torture is scarce.⁶ The burden of proof should, in instances of evidentiary imbalance, evasiveness or absence, be directly shifted onto the authorities. Illustrating this is the *Selmanni* principle which states that: 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused'.⁷ Whilst this has been the practice of human rights litigation, it should inform criminal prosecutions with respect to the crime of torture particularly where there has been state inaction (whether due to unwillingness or inability) in documenting, investigating and prosecuting alleged violations.

'NECESSITY' & 'SUPERIOR ORDERS'

International law prohibits the use of torture for any reason including 'necessity'.⁸ Given the ineffectiveness of torture or CIDT for any purpose, their use in a so-called 'ticking-bomb scenario' contravenes the prohibition and must never be accepted by a court as a legitimate defence. 'Superior orders' is similarly rejected as a legitimate defence.⁹ In other words, where an act amounts to torture or CIDT, no defence can ever be recognised.¹⁰

MOREOVER

- It is deemed to be a violation of the UNCAT where a prosecutor elects to prosecute a lesser crime of ill-treatment where all elements of torture are present.¹¹
- Public officials must be suspended while the prosecution is pending.¹²
- Various forms of redress (restitution, compensation, rehabilitation, non-satisfaction etc.) are to be made available to victims in an accessible and effective way (see factsheet on 'Redressing Torture').
- Punishment should be proportionate to the gravity of the crime (see factsheet on 'Criminalising Torture').
- Universal jurisdiction requires that any suspected perpetrator, regardless of nationality or location of crime, must be prosecuted by the state on whose territory the suspect is found or, alternatively, extradited for prosecution.
- Statute of limitations, i.e. a time-limit before which prosecutions are to be brought, must not be applied to the crime of torture.¹³

REFERENCES

¹ UN Human Rights Committee (HRC), General Comment 20, paras. 13 and 14.

² See also HRC, General Comment 20, para. 13.

³ UNCAT, Article 16; see also Principles 3(b) Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000.

⁴ Principle 3(b).

⁵ Gabriela Echeverria, Mario López-Garelli, Hari Phuyal, Juan E. Méndez, 'Panel IV: Challenges to Proving Cases of Torture before the Committee against Torture' (2013) 20 Human Rights Brief 4 (5) as relating to American University Washington College of Law, Seminar: 'Litigation before the UN Committee against Torture: Strengthening this Important Tool against Torture', 15 April 2013

⁶ Ibid.

⁷ *Selmouni v. France*, 25803/94, 28 July 1999, para. 87.

⁸ Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights.

⁹ Art 2(3) UNCAT; see Manfred Nowak and Elizabeth McArthur (eds.), *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), pp. 100-105.

¹⁰ Nowak, p. 100, A/57/44, para 34(f).

¹¹ GC II, para. 10.

¹² Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, E/CN.4/2003/68, 17 December 2002, Annex 1, para. j.

¹³ See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/CO/3 (2013) §8; Guatemala, UN Doc. CAT/C/GTM/CO/5-6 (2013) §8; Japan, UN Doc. CAT/C/JPN/CO/2 (2013) §8; see also Prosecutor v Furundzija, Yugoslavia Tribunal (1998) §157; Principle 23 of the Updated Impunity Principles; Basic Principles on Reparation, §6; Article 29 of the Rome Statute.

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Legal N° 7 – Safeguards in Police Custody



TORTURE & POLICING

Whilst acknowledging that the police play a vital role in preventing and combating crime as well as in maintaining law and order in our societies, police powers to apprehend, detain and question suspects, particularly when coupled with public and political pressure applied to police, bring with them an inherent risk for abuse. In fact, experience shows that the risk of police torture and ill-treatment is greatest during the first few hours after a person has been apprehended. Legal safeguards against torture and ill-treatment, as described below, guide authorities in their treatment and protection of detained persons to reduce the risk of torture and ill-treatment. This linkage is uncontested, yet the gulf between legislation and practice remains pronounced.

RIGHT TO NOTIFY A THIRD PERSON¹

is an essential safeguard to establish contact between the detainee and the outside world and, in turn, facilitate social and professional support and a means to follow their treatment. The information to be provided should necessarily include the detaining and supervising authorities, the time and location of detention, and the health state of the detainee.² This should be provided to a person of the detainee's choosing, at the outset of their apprehension.³ The person can be notified in a number of ways including directly by the detainee or by a police officer in the presence of the detainee. The details of time and person contacted, or when intended notification is not successful, should be registered. Should the detained person choose not to notify a third person, this should also be recorded and countersigned by the detainee. It may also be legitimate for notification to be delayed in certain cases.⁴

ACCESS TO A LAWYER⁵

must be extended to any person held in official custody including for administrative purposes, irrespective of legal status (i.e. whether deemed a witness, formally declared a suspect or not). The lawyer should be able to communicate privately with the detainee from the outset of their custody, including before and during questioning, whether preliminary, informal or official. The lawyer should be able to attend police questioning.

Access to a lawyer during trial preparation is a distinct, albeit related, right as the purpose is to ensure a fair trial (and not to necessarily to prevent torture) and does not satisfy the broader need as illustrated in the earlier phases. Effective legal aid covering these stages and not just at a court hearing, as it is often seen to be the case, needs to be provided to those who cannot afford to pay for a lawyer. That is, where a suspect cannot appoint or pay for their own lawyer, a legal aid lawyer needs to be appointed for them (ex officio) by the authorities. Otherwise, the right of access to a lawyer becomes elusive for those in police custody who cannot afford one.

ACCESS TO A DOCTOR⁶

upon request, without delay or limitations, possibilities for denial or discretion on the part of the police to make an assessment whether medical care is needed, must be respected. This right is not the same as the provision of emergency care. Medical examinations must be conducted by an independent, competent health professional, who properly documents and reports detected injuries to a competent authority, conducted in a confidential manner and not in the presence of a police officer, as that is likely to discourage detainees from revealing any torture or ill-treatment by the police.

INFORMATION ON RIGHTS⁷

It is axiomatic to state that a person needs to know, from the outset of apprehension, of their rights and how to ask for them in order to be able to exercise them. The authorities bear the onus to effectively (verbally and in writing), accessibly and promptly (and not depending on a formal declaration of being a suspect) inform a person, upon deprivation of liberty, in a manner that they fully understand, as depending on their age, education, language and other factors effecting mental capacity.

LENGTH OF POLICE CUSTODY & THE ROLE OF JUDGES AND PROSECUTORS⁸

Persons in police custody need to be brought before a judicial authority as soon as possible. Delays beyond 48 hours must be absolutely exceptional and justified.⁹ The importance of this safeguard lies in the fact that it is the first authority, independent of the police, to see arrested persons and scrutinize the legality of detention, a detainee's treatment at the hands of the police, (in terms of the provision of their rights, physical treatment) and observe any visible injuries. It is crucial to extend the safeguards to all forms of detention to counter any abuse by the authorities.

MOREOVER

- Separating the detention and investigative functions of the police has been emphasized by both the UN Committee Against Torture and the European Committee for the Prevention of Torture as significant to the prevention of torture and ill-treatment.¹⁰
- A comprehensive custody record, detailing when an individual was detained, interviewed, transferred, offered food, medically examined, informed of rights, visited by third parties etc., is a fundamental safeguard.¹¹

REFERENCES

¹ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988):

Principle 16: 1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

² UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16.1; UN Declaration on the Protection of all Persons from Enforced Disappearance, Article 10.2: of the authorities responsible, the times and locations of detention and release, and state of the health of detainee.

³ CPT, 'Developments concerning CPT standards in respect of police custody', CPT/Inf(2002)15-part, para. 41.

⁴ See CPT, 12th General Report, para. 43: A detained person's right to have the fact of his/her detention notified to a third party should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefor, and to require the approval of a senior police officer unconnected with the case or a prosecutor).

⁵ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principles 17 and 18; see also CPT, 'Access to a lawyer as a means of preventing ill-treatment', paras. 18-25 of 21st General Report (CPT/Inf (2011)28).

⁶ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988):

Principle 24: A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25: A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

CPT, 'Developments concerning CPT standards in respect of police custody', CPT/Inf(2002)15-part, para. 42.

⁷ CPT, 'Developments concerning CPT standards in respect of police custody', CPT/Inf(2002)15-part, para. 44. See Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: "a person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands" information regarding the charges against him and the records of his arrest. Article 9(2) of the ICCPR provides that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Article 7(4) of the American Convention on Human Rights provides that "anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him"; Article 5(2) of the European

Convention on Human Rights, "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him".

⁸ International Covenant on Civil and Political Rights: Art. 9 (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

UN Human Rights Committee, General Comment No. 35, Article 9 CCPR (Liberty and security of person), CCPR/C/GC/35, 2014, paras. 32-33 (footnotes omitted): Paragraph 3 requires, firstly, that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. That requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it. The requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity. The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control. [...] It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. [...]

See also CPT, 'Developments concerning CPT standards in respect of police custody', CPT/Inf(2002)15-part, para. 45.

⁹ UN Human Rights Committee, General Comment No. 35, para. 33: While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded. An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.

¹⁰ CAT/C/SR.14, para. 17; CAT/C/SR.44, para. 39; CAT/C/SR.61, para. 73; Council of Europe et al, 'Seminar Report: Seminar on combatting torture during police custody and pre-trial detention 22-23 March 2018 in Copenhagen, Denmark', p. 4.

¹¹ CPT, Police Custody, Extract from the 2nd General Report, 1992, CPT/Inf(92)3-part1, para. 40.

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Legal N° 8 – Torture & Migration



There is, and as has historically been, a high prevalence of torture survivors amongst asylum seekers due primarily to experiences in their countries of origin. The resulting trauma may be exacerbated during transit and in receiving states. The tendency for receiving states to detain asylum seekers upon arrival, criminalise and punish 'irregular' arrivals, deny the right to family reunification, subject asylum seekers to lengthy status determination processes, provide inadequate living conditions, and the risk of deportation contributes to an 'escalating cycle of repression and deterrence'.¹

NON-REFOULEMENT

As a cornerstone of international protection, both customary and treaty law (Article 3 of UNCAT) **absolutely** and **without exception** prohibit states to **expel, return or extradite** individuals, from any territory under its control, to a territory where they would be at a 'foreseeable, personal, present and real' risk of torture or ill-treatment.² While it is the risk of torture that is explicitly addressed, any other form of ill-treatment 'constitutes an indication that the person is in danger of being subjected to torture (and) should be taken into account'.³

'**Deportation**' is explicitly and broadly defined to include '**expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the frontier, pushback operations** (including at sea)'.⁴ Relatedly, **dissuasive measures** and policies such as delays in process, poor conditions of indefinite detention are to be avoided.⁵ **Territory** is any territory subject to the de jure or de facto control of the state party, including where **non-state actors** perpetrate torture or ill-treat with impunity.⁶ **Collective deportation** is prohibited.⁷ **Procedural guarantees**, prior to an intended deportation, must be provided to individuals at risk of deportation, such as informing and enabling timely appeals of the decision before a competent, impartial and independent body.⁸ Interim measures are usually called by UN bodies to stop or delay deportation until legal proceedings are finalised.⁹ Such measures have proven to be an important tool to prevent torture in serious and urgent individual cases, stopping states from executing decisions which would have been irreparably harmful.

ASYLUM PROCESSES

Determining the risk of *refoulement*, on an individual basis, is integral to asylum processes. Linguistic, legal, medical, social and financial support and safeguards need to be provided to asylum seekers to ensure the effectiveness of asylum processes.¹⁰ Internal flight alternatives, an assessment of whether a part of a territory where an asylum seeker might be returned, are not reliable or effective and, as such, a territory needs to be assessed in its entirety.¹¹ Risk must be assessed on a number of factors including: whether the person concerned, or a family member, has previously had experience of torture, or been detained (or would be detained) in inhuman and degrading conditions; whether they have been denied fundamental guarantees in police custody (see factsheet on 'Safeguards in Police Custody').¹² Article 3 (2) of the UNCAT also requires assessment of whether the country of return has a 'consistent pattern of gross, flagrant or mass violations of human rights.'

States must put into place processes for systematic screening and medical examination of all asylum seekers to identify torture victims by qualified personnel throughout the asylum process.¹³ Where an asylum seeker claims to have been tortured, the state is obliged to rigorously investigate the claim in line with the *Istanbul Protocol*.¹⁴ Findings such as psychological trauma, which may hinder asylum seekers from satisfying credibility assessments, must be taken into account by the legal process.¹⁵

DETENTION OF ASYLUM SEEKERS

The law recognizes narrow grounds for states to legitimately detain asylum seekers for brief periods, i.e. documentation of entry and claim and determination of identity.¹⁶ Detention must be individually justified as 'lawful, necessary and proportionate in the circumstances and, in case of administrative or preventative detention, must be periodically re-assessed as it extends in time'.¹⁷ Alternatives to detention including reporting conditions or sureties need to be considered and pursued.¹⁸

People at risk, including children, women, older people, persons with disabilities, medical conditions, torture trauma, and ethnic or social minorities (e.g. LGBTI), warrant particularly stronger protections.¹⁹ Detention of children fails the best interest, necessity and proportionality tests, particularly in cases of short term detention and if solely on the basis of their or their parents' migration status.²⁰ Such unjustified instances of detention amount to arbitrary detention. As a general rule, the longer the arbitrary detention, the more likely it would amount to ill-treatment.²¹ Detainees are to enjoy the same legal safeguards regardless of legal status.²²

DIPLOMATIC ASSURANCES

Diplomatic assurances, whereby states bilaterally agree that an individual being deported would not be subjected to torture, have been questioned and criticized as not being effective and for circumventing the non-refoulement principle.²³ They should, therefore, be 'exercised with great caution'.²⁴ Extradition treaties are also subject to the principle of non-refoulement. In case of any conflicts, the principle as found in Article 3 of the UNCAT will prevail.²⁵

MOREOVER

- Restrictive state policies have heightened the risk for those in transit to be exploited, by smugglers, human traffickers and corrupt officials, in terms of 'forced labour, slavery or servitude, all forms of sexual exploitation, forced adoption, child soldiering, begging, criminal activities and, arguably, also exploitation for ransom'.²⁶
- To avoid *refoulement*, rehabilitation services in receiving state are to be taken into account, bearing in mind that victims of torture and ill-treatment may require sustained specialized rehabilitation services. Once their health fragility and need for treatment have been medically certified, no deportation should occur to states where such services are not available or guaranteed.²⁷

REFERENCES

- ¹ UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report. (2017). A/HRC/37/50. para. 8. ('UNSRT Report 2017')
- ² Article 3, UNCAT: 1. *No State Party shall expel, return ("refoul") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.* 2. *For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights;* UN Committee Against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 11. ('CAT GC IV')
- ³ CAT GC IV, para. 28.
- ⁴ CAT GC IV, para. 4.
- ⁵ CAT GC IV, para. 14.
- ⁶ CAT GC IV, para. 30.
- ⁷ CAT GC IV, para. 13.
- ⁸ UNSRT Report 2017, para. 40.
- ⁹ CAT GC IV, paras. 36-37; see also Fanny de Weck, *Non-Refoulement under European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill Nijhoff, Leiden; 2017), p. 67.
- ¹⁰ CAT GC IV, para. 41.
- ¹¹ CAT GC IV, paras. 46 and 47.
- ¹² CAT GC IV, Pt VIII.
- ¹³ CAT, Concluding observations on the combined sixth and seventh periodic reports of Denmark, 4 February 2016, CAT/C/DNK/Q/6-7, para. 23.
- ¹⁴ UNSRT Report 2017, para 43; CAT GC IV, para. 41.
- ¹⁵ UNSRT Report 2017, para 42; CAT GC IV, paras. 42, 49.
- ¹⁶ UN Human Rights Committee, *Bakhtiyari v. Australia*, 1069/2002, paras. 9.2–9.3.
- ¹⁷ UNSRT Report 2017, para. 22; CAT GC IV, para. 12.
- ¹⁸ UN Human Rights Committee, General Comment No. 35 (2014): Article 9 (Liberty and security of the person), CCPR/C/GC/35, para. 18
- ¹⁹ UNSRT Report 2017, para. 28.
- ²⁰ UNSRT Report 2017, para. 28
- ²¹ UNSRT Report 2017, para. 28.
- ²² See 'Safeguards in Police Custody' factsheet.
- ²³ UNSRT Report 2017, paras. 47-50; see also Manfred Nowak and Elizabeth McArthur (eds.), *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), p. 215.
- ²⁴ UN Committee Against Torture, Report on Georgia, CAT/C/GEO/ CO/3 (2016), para. 11.
- ²⁵ CAT GC IV, Pt VI.
- ²⁶ UNSRT Report 2017, para. 32.
- ²⁷ CAT GC IV, para. 22; CAT, *A.N. v. Switzerland*, CAT/C/64/D/742/2016, 3 September 2018.

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Legal N° 9 – Pre-Trial Detention



The legitimate use of pre-trial detention aims to safeguard the integrity of the criminal justice process, including to prevent suspects from absconding or tampering with evidence before trial, pending trial or appeal, and from committing further crimes. However, the right to liberty and the presumption of innocence require that liberty awaiting trial should be the rule and detention the exception. Article 9 of the ICCPR provides that pre-trial detention should not be the general rule for those awaiting trial and that release should be subject to guarantees to appear when needed for the purposes of criminal proceedings.¹ Pre-trial detention, therefore, should be used as a last resort, for the shortest time possible, and only for the most serious offences.² Related violations include freedom from arbitrary arrest or detention,³ the right to a fair and public trial,⁴ without due delay⁵ and the right to be presumed innocent.⁶

JUSTIFICATIONS

Lawful use of pre-trial detention is governed by the principles of necessity, proportionality and reasonableness. Detention is to be based on a reasonable suspicion and substantively determined on an individual basis taking into account all circumstances with respect to the legitimate aims mentioned above. When considering whether pretrial detention is warranted, judges must assess the seriousness and nature of the alleged offence, the strength of the evidence, the likely sentence if convicted and the personal circumstances of the accused.⁷ Relatedly, any instance of detention must be subject to a regular review and to the right of the detainee to be brought to trial within a reasonable time.⁸ Where detention is no longer justified, the accused must be released, otherwise the detention is rendered to be arbitrary.⁹ Competent authority: the decision to impose pre-trial detention can only be conferred to a judicial authority. Judges must stipulate a maximum duration of detention as part of their decision.¹⁰

ALTERNATIVES & SOLUTIONS

Non-custodial alternatives are to be considered and, where appropriate, implemented as early as possible.¹¹ Possible alternatives to pre-trial detention include: bail; reporting requirements; supervision; residence; restrictions; surrender of travel documents; financial or other guarantees.

Beyond alternatives, solutions to excessive use of pre-trial detention include but are not limited to decriminalising petty crimes, enshrining time limits on a person's detention, ensuring that accused persons are able to access legal aid and monitoring places of detention. Access to and the presence of legal and health professionals are key safeguards against abuse and demonstrably vital in improving the transparency of detention processes. Proper registration and documentation of pre-trial detention are also important.

EXCESSIVE USE: CAUSES & COSTS

Excessive use of pre-trial detention is a problem in many legal systems around the world.¹² This results from a number of factors including: where the risk of

absconding is interpreted (unduly) broadly; where there is a lack of means for financial guarantees; where criminal justice processes are confession-based; the lack of legal assistance; its over-use with respect to petty crimes; ineffective (i.e. ill-trained, ill-equipped etc.) law enforcement authorities; where there are a lack of alternatives; where there are delays in judicial system due to organizational capacity (e.g. distances, available judges); corruption.¹³ Excessive pre-trial detention affects the individual, state and society. For the individual, it might amount to a violation of his right to liberty (arbitrary detention) and will expose to an increased risk of ill-treatment. Often, it leads to loss of employment and, in turn, livelihood not just for an individual but also dependent family and community. Overcrowding increases levels of tension in relations between staff and inmates and among inmates, which may result in physical ill-treatment by staff and inter-prisoner violence. Relatedly, overcrowding also puts increased strain on the prison system to provide for basic needs such as food, medicine, and facilities, leading to sub-standard conditions of detention. It also carries a public health hazard as it increases the risk of contagious disease being spread. Further, for the authorities, it will place additional, unnecessary strain who, in turn, cannot ensure humane conditions, safety and security and resocialisation. For the society, excessive use of pre-trial detention represents a strain on family ties, an unjustified financial burden and increases the risk of recidivism.

MOREOVER

- Investigative capacity: it is imperative to enable law enforcement authorities to conduct investigations in a timely and effective manner in order to avoid undue delays and to avoid over-reliance on confessions.
- Defence preparation: pre-trial detainees 'lessen a suspect's possibilities of defence, particularly when the person is poor and cannot rely on a defence counsel or support to obtain evidence in his favour'.¹⁴
- Access to the outside world: pre-trial detainees must be allowed, 'under necessary supervision, to communicate with their family and friends at regular intervals'.¹⁵ Restrictions cannot be total.
- Segregation: to protect their presumption of innocence, pre-trial detainees must also be segregated from convicted prisoners. Solitary confinement should however not be used as a general rule, given its harms and potential use as a coercive tool.¹⁶
- Redress: Those subjected to unlawful or arbitrary arrest or detention are entitled to effective remedies and reparations.¹⁷
- The right to trial within a reasonable time: There is no specific time limit of what amounts to arbitrary or unlawful. Reasonable time is a matter of assessment on a case-by-case basis. Considerations of resources for criminal justice administration and delays in evidence gathering were not found to be legitimate justifications in one case.¹⁸ International bodies have however provided guidance on outer limits in some cases.¹⁹

REFERENCES

¹ See also UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly, 9 December 1988, A/RES/43/173, Principles 36-39.

² United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 1990, rule 6.2.

³ ICCPR, Article 9 (1); African Charter on Human and Peoples' Rights, 1981, Article 6; UNSRT, Report on Mission to Georgia, A/HRC/31/57/Add.3, 1 December 2015, para. 111.

⁴ ICCPR, Article 14 (1); African Charter on Human and Peoples' Rights, 1981, Article 7.

⁵ ICCPR, Article 14 (3) (c).

⁶ ICCPR, Article 14 (2).

⁷ Report prepared by the Secretariat, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990) A/CONF.144/28/Rev.1 p 158

⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR), Article 5(1)(3); Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 7(1)(d); Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 7(5).

⁹ UN, Working Group on Arbitrary Detention, Annual Report presented to the Human Rights Council, A/HRC/7/4, para. 72.

¹⁰ ECHR, 'Guide on Article 5 of the Convention: Right to Liberty and Security' (2012); UN Human Rights Committee (HRC), Communication No 1547/2007, Munarbek Torobekov v Kyrgyzstan, 27 October 2011, CCPR/C/103/D/1547/2007, para. 6.3; UN HRC, Comm No. 1369/2005, Felix Kulov, 26 July 2010, CCPR/C/D/1369/2005.

¹¹ Tokyo Rules, para. 6.2; HRC, Griffiths v. Australia, Comm No 1973/2010, 21 October 2014, CCPR/C/112/D/1973/2010, para 7.2; UNSPT, Eighth annual report, CAT/C/54/2, para. 89; UNCAT on alternatives: CAT/C/BHR/CO/2-3; CAT/C/NAM/CO/; CAT/C/ARM/CO/4; CAT/C/MNG/CO/2; CAT/C/PHL/CO/3; A/HRC/31/57/Add.3.

¹² Open Society Foundations (OSF), Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk, 24 June 2011, p. 22; see also World Prison Brief.

¹³ OAS, Inter-American Commission on Human Rights, Report on the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.Doc. 46/1330 December 2013, para. 50.

¹⁴ SPT, Report on Paraguay, 7 June 2010, CAT/OP/PRY/1, para. 64; see also Principle 9 of United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, A/HRC/30/37, 6 July 2015, para. 25; Luanda Guidelines, Article 4.D.

¹⁵ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly, 8 January 2016, A/RES/70/175, Rule 58(1).

¹⁶ UN, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report, A/66/268,

published on August 5, 2011, para. 73: While physical and social segregation may be necessary in some circumstances during criminal investigations, the practice of solitary confinement during pretrial detention creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation. When solitary confinement is used intentionally during pretrial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture as defined in article 1 or to cruel, inhuman or degrading treatment or punishment under article 16 of the Convention against Torture, and to a breach of article 7 of the International Covenant on Civil and Political Rights.

¹⁷ HRC General Comment 35, para. 49; See also Principle 15 of United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, A/HRC/30/37, 6 July 2015, para. 25; Luanda Guidelines, Article 38.

¹⁸ N. Fillastre v. Bolivia, 5 November 1991,336/1988, A/47/40, p. 306, para. 6.5.

¹⁹ While there is no specific time limit to what is excessive, the Human Rights Committee and Working Group on Arbitrary Detention have found violations in cases where the individual was detained for two and a half years, six years, and seven years prior to execution of the judgment. See respectively HRC, Raymond Griffiths v. Australia, Comm. No. 1973/2010, adoption of views, Oct. 21, 2014, CCPR/C/112/D/1973/2010; HRC, Medjnoune v. Algeria, Comm. No. 1297/2004, Jul. 14, 2006, CCPR/C/87/D/1297/2004; HRC, Taright, et al v. Algeria, Comm. No. 1085/2002, Mar. 15, 2006, CCPR/C/86/D/1177/2003; See also, A. Perkins v. Jamaica, 19 March 1998, Comm. No.733/1997, A/53/40, (vol. II), p. 210, para. 11.3 (1 year and 9 months); F. Kone v. Senegal, 21 October 1994, Comm. No. 386/1989, A/50/40 (vol. II), p. 8, para. 8.6 (4 years and 4 months without trial date); L. Shatto v. Trinidad and Tobago, 4 April 1995, Comm. No. 447/1991, A/50/40 (vol. II), p. 19, para. 7.2 (almost 4 years between ruling for retrial and its commencement).

Prisoners' contact with the outside world is typically understood as central to the protection of prisoners' human rights; to the regulation of prison life; or, as a means of repression and punishment.¹ There exists a multitude of international legal standards, binding and non-binding, global and regional, governing the contact rights of prisoners and others deprived of their liberty. This factsheet is to underscore the importance of contact rights for ensuring prisoner wellbeing, as well as against the perpetration of torture and other ill-treatment. As with any crime, torture is a crime of opportunity. Denial of a prisoner's communication rights increases the perpetrator's opportunity.

FAMILY VISITS²

Visits are a means to safeguard social relationships, in accordance with the right to private and family life. Article 17 (1) of the International Covenant on Civil and Political Rights (ICCPR), mirroring article 12 of the UDHR, states that 'no one shall be subjected to arbitrary unlawful interference with his or her privacy, family, home or correspondence'. This principle is also echoed in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that:

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations. [Principle 19]

Importantly, visitation rights are not solely for the prisoner but also for family and friends. According to the UNODC Handbook on Dynamic Security, they must be seen as 'entitlements rather than privileges', and, in turn, not used as reward or punishment.

Rules should be flexible (e.g. visit duration extended, teleconference facilities provided, or telephone rights increased) given that some families may not be able to visit regularly due to distance. Similarly, the term 'family' must also be viewed with some flexibility and breadth to allow for different cultural conceptions of what it constitutes.

Rules 68 to 70 of the Mandela Rules also concern the right of the prisoner to notify and to be informed of their imprisonment, his or her illness or death and those related to his or her family.

RESTRICTIONS ON CONTACT

Rule 58 (1) of the Mandela Rules qualifies the right to communication with 'under necessary supervision', entailing what would usually be visual control. A similar qualification is found in principle 19 of the Body of Principles which subjects the communication 'to reasonable conditions and restrictions as specified by law or lawful regulations'. On security concerns, the prison authorities are also afforded a degree of control over who is admitted for visitation. This is found in rule 60 of the Mandela Rules. According to rule 43 (3), while family contact cannot be prohibited, it can however be restricted for 'a limited time period and as strictly required for the maintenance of security and order'.

WOMEN PRISONERS

All aspects of these rights are to be provided without any discrimination.³ Recognising the prevailing practical needs, the Bangkok Rules (rules 26 to 43) provide authoritative guidance on better realising the broader international legal standards for women prisoners. Given that there generally exists fewer women's prisons compared to those for men, the distance required for family visits may render visits onerous. Particular emphasis is also placed on facilitating visits for those prisoners with children.

Whilst the foregoing legal standards in the Mandela Rules still apply, the Bangkok Rules underscore the importance of visits for the mental health and post-release social integration of women prisoners (rule 43). Also, of significance is rule 44 which provides that women prisoners should be consulted on their visitors lest visits be harmful and undesired, given that women are usually disproportionately subjected to domestic violence. Rule 23 of the Bangkok Rules prohibits punitive limitations to family contact, especially with children.

MOREOVER

- The **geographical placement** of the prisoner is also highlighted as an access issue. Rule 59 of Mandala Rules provides, reiterating principle 20 of the Body of Principles, that 'Prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation'.⁴
- **Conjugal Visits:** Rule 58 (2) of the Mandala Rules states that: where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity. Rule 27 of the UN Bangkok Rules echoes this principle in relation to women prisoners.
- **Religious Visits:** Rule 66 of the Mandala Rules provides that: So far as practicable, every prisoner shall be allowed to satisfy the needs of his or her religious life by attending the services provided in the prison and having in his or her possession the books of religious observance and instruction of his or her denomination.⁵
- **Isolated Prisoners:** Rule 44 of the Mandala Rules defines solitary confinement as 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'. There exist varying purposes for which solitary confinement is imposed, including as punishment and protection. Such restrictions do not necessarily entail denying affected prisoners any contact with the outside world, such as the right to visitation. Tailored, partial restrictions directly necessary and proportional to a legitimate purpose are however justified. International legal jurisprudence is clear that total isolation of a prisoner from other inmates and from the outside world can readily amount to torture or cruel, inhuman or degrading treatment.

REFERENCES

¹Whilst it is framed universally, this factsheet emerged from research undertaken for the Legacies of Detention in Myanmar Project. For a contextual analysis of prisoners' contact with the outside world, please visit . <https://legacies-of-detention.org/research-publications/>

²The recently revised UN Standard Minimum Rules, now referred to as the Mandela Rules, together with the deliberative support provided by the Essex Expert Group, provide specific guidance in relation to the minimum parameters within which contact rights should be realised.

³ Rule 2 (1) of the Mandela Rules.

⁴ The focus on rehabilitation is found again in rules 106 and 107, which provide that:

Rule 106: Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.

Rule 107: From the beginning of a prisoner's sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner's rehabilitation and the best interests of his or her family. The Mandela Rules enshrines the modality of this right, in rule 58 (1), as follows: Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and, (b) By receiving visits.

⁵ According to rule 65 of the Mandela Rules:

(1)If the prison contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies if and conditions permit, the arrangement should be on a full-time basis,

(2)A qualified representative appointed or approved under paragraph 1 of this rule shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his or her religion at proper times,

(3)Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his or her attitude shall be fully respected.

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Corruption & Torture



Corruption is a complex phenomenon that is encountered worldwide; it is present in both developed and developing countries.¹ There is no universally authoritative definition of corruption but it has been broadly understood as 'the dishonest misuse or abuse of a position of power to secure undue personal gain or advantage, or to secure undue gain or advantage for a third party'.² Corruption includes acts as bribery, money-laundering, embezzlement, trading in influence, abuse of function, illicit enrichment and obstruction of justice.³ Corruption may be direct or indirect, through acts or omissions, pecuniary (bribery) or non-pecuniary (favours), all underpinned by the threat of violence.

LINKAGES & CAUSES

Torture and other ill-treatment and corruption must be recognized as inextricably linked; more instances of torture and ill-treatment are usually found where there are higher levels of corruption. Corruption prevails in non-custodial settings as well as in the context of deprivation of liberty, as documented in the literature and by international monitoring bodies, such as the CPT and SPT.

The UN Special Rapporteur on Torture has also illustrated a number of manifestations, such as being forced to 'engage in a sexual act in return for the performance of an official duty', where acts or threat of torture are instrumentalized as a 'tool to extort money and other valuables from victims, their families or friends', conversely undue advantage may be deliberately offered to induce acts of torture or prevent accountability.⁵

POLICING & POLICE CUSTODY

Most analyses of police violence and police corruption point to fragile institutional frameworks and impunity coupled with low pay and low prestige in policing.⁷ In countries where state agents may not receive proper or adequate pay, there will be a greater temptation to resort to corruption, abuse of power and incomes. During police custody and the early phases of pre-trial detention suspects may be forced to pay the investigating officer(s) money to avoid being subjected to torture or other forms of ill-treatment, such as extraction of confessions or information. While policing poor urban neighbourhoods, the police and other public authorities may use force and threats thereof to extort money – or services, such as sexual services – from vulnerable groups living on the margins of society and on the fringes of the law, incl. juveniles in conflict with the law, sex workers, slum dwellers and street vendors.

DETENTION

During detention, prison officials may resort to extortion of money from prisoners in return for granting them access to basic needs (such as access to medical care, family visits) and to certain privileges, services or benefits (e.g. being placed in a cell instead of a dormitory, liberty to move around more freely within the prison). Corruption may cause or contribute to lack of resources to provide for basic needs.⁸ In understaffed institutions, a system based on the use of trusted inmates is more likely to be in place, and the trusted inmates themselves may take advantage of their privileged position to extort money or favours from other, more vulnerable inmates.⁹

JUDICIAL PROCESS

Similarly, corrupt practices during the judicial process also engender conditions of torture and ill-treatment.¹⁰ Conversely, torture or its threat may also be used to influence judicial processes whether in terms of obtaining favourable outcomes in ordinary criminal trials or interfering with accountability for corrupt practices themselves. For instance, the difference between whether a detainee is brought before a judge or not is in some jurisdictions dependent on bribes. The detainee who is not able to pay can conceivably languish in arbitrary detention and poor conditions.

IMPACTS & SOLUTIONS

Corruption 'facilitates, perpetuates and institutionalizes' violations of human rights.⁴ According to the Human Rights Council, it is 'difficult to find a human right that could not be violated by corruption'.⁵ Corruption disproportionately aggravates and compounds existing disadvantage, the most vulnerable.

Efforts to improve institutional transparency and accountability should be complemented by understandings of the complex relational and contextual realities pertaining to pre-conditions, causes and consequences.¹¹ It is relevant to focus more specifically on the negative impact of corruption concerning prevention, reporting and accountability as areas where existing measures or identified areas of concern may be overlapping and mutually reinforcing. This is the case concerning e.g. legal and procedural safeguards, education and information in training of law enforcement personnel, and cooperation between preventive bodies/authorities. Conversely, limitations with respect to conventional approaches, such as prosecution and documentation, need to be accepted. The 'under-perceived' experiences and needs of the urban poor must be featured.¹²

Other solutions include adoption of legislation to criminalize corruption and preventing persons in vulnerable situations at particular high risk of becoming victims of torture and corruption. Strengthening independent monitoring and reporting, transnational efforts, and synergies within United Nations bodies are significant.¹³

REFERENCES

¹ UN Subcommittee for Prevention of Torture, Seventh Annual Report, CAT/C/52/2, 24 February 2014, (hereafter 'SPT Report'), para. 73; UN Special Rapporteur on Torture, Report to the Human Rights Council, A/HRC/40/59, 16 January 2019, (hereafter 'SRT Report'), para. 12. Historically, torture and corruption have been addressed in separate normative, policy and research domains. Corruption has been dealt with in the context of governance, whereas torture and other forms of ill-treatment have been addressed as human rights violations. Both phenomena are governed by an international legal framework, notably the UNCAC and UNCAC, that seeks to prevent and eradicate torture and corruption respectively. While the existing frameworks are arguably sufficient on a normative level, there remains a need to increase understanding on how to prevent corruption as a decisive factor increasing the risk of torture or ill-treatment.

² SPT Report, para. 73: "the acts that it includes can be derived from the prohibitions included in various international and national texts, including *United Nations Convention against Corruption*, the *African Union Convention on Preventing and Combating Corruption*, the *Inter-American Convention against Corruption* and the *Criminal Law Convention on Corruption of the Council of Europe*".

The African Union Convention on Preventing and Combating Corruption: Art. 1 of the Convention defines corruption as "acts and practices including related offences proscribed in this convention." Counting bribery art. 15-16 and art. 21, Embezzlement, misappropriation or other diversion of property by a public official art. 17, trading in influence 18, abuse of functions art. 19, illicit enrichment art. 20, Embezzlement of property in the private sector art. 22, Obstruction of justice art. 25, and so forth.

The Inter-American Convention: There is no definition but several acts that constitute corruption are listed. 1. This Convention is applicable to the following acts of corruption: (a) The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; (b) The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; (c) Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party; (d) The fraudulent use or concealment of property derived from any of the acts referred to in this article; and (e) Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article. Transnational Bribery Article VIII, and Illicit Enrichment article IX.

The Criminal Law Convention on Corruption of the Council of Europe: There is no exact definition but it is enhanced that measurers must be taken against certain acts such as: Bribery article 2-11, Trading in influence article 12, Money laundering of proceeds from corruption offences article 13, Account offences article 14, Participatory acts article 15.

³ *United Nations Convention against Corruption:* Some offences are bribery, art. 14-15 and art. 21, embezzlement, misappropriation or other diversion of property by a public official art. 17, trading in influence art. 18, abuse of functions art. 19, illicit enrichment art. 20, abuse of function, laundering of proceeds of crime art. 23. obstruction of justice art. 25

⁴ SPT Report, para. 76.

⁵ Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73, 5 January 201, para. 17.

⁶ See UN Special Rapporteur on Torture, Report to the Human Rights Council, A/HRC/40/59, 16 January 2019 (SRT Report).

⁷ Steffen Jensen and Morten Koch Andersen, *Corruption and Torture: Violent Exchange and the Policing of the Poor* (Aalborg University Press, 2017), p. 40.

⁸ SRT Report, para. 40.

⁹ SRT Report, paras. 34-35.

¹⁰ SRT Report, para. 24; SPT Report, para. 82.

¹¹ HRC 'Analysing the link between corruption and impairment of the enjoyment of human rights may contribute to a better understanding of the effects of corruption – notably its human dimension and social implications – can be an important step towards making corruption a public issue'

¹² Steffen Jensen, Tobias Kelly, Morten Koch Andersen, Catrine Christiansen, Jeevan Raj Sharma, 'Torture and Ill-Treatment Under Perceived: Human Rights Documentation and the Poor', *Human Rights Quarterly*, Volume 39, Number 2, May 2017, 393-415.

¹³ See SRT Report, paras. 69-76.