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Torture in Asia: The law and practice

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REDRESS
Ending Torture, Seeking Justice for Survivors

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Introduction

In collaboration with the Asian Human Rights Commission (AHRC), REDRESS held a three-day regional expert meeting on torture in Hong Kong from 21-23 September 2011. The Meeting provided an opportunity for those engaged in litigation and advocacy on torture from a number of countries in Asia, namely Bangladesh, Cambodia, East Timor, India, Indonesia, Kazakhstan, Nepal, Pakistan, the Philippines, Sri Lanka and Thailand, to discuss the law and practice relating to torture across the region. The discussions focused on structural factors, such as legislative deficiencies, weak institutions and impunity, which perpetuate torture as well as on strategic responses, including documentation, litigation and advocacy.

This study presents the key findings of the regional expert meeting in relation to patterns of torture and common challenges experienced in the region, together with a number of detailed country studies based on contributions by participants and supplementary research. The country studies provide a review of the practices and patterns of torture, the legal framework, the availability and effectiveness of safeguards and accountability mechanisms as well as avenues for reparation for torture.

The regional meeting and the present study have been organised in the context of *Reparation for Torture: Global Sharing of Experiences*, a project funded by the European Union through the European Instrument for Democracy and Human Rights. This initiative aims to foster regional and international networking opportunities for lawyers and civil society working on reparation for torture, enhance comparative expertise and promotedomestication of the UN Convention against Torture[1] and related international standards. REDRESS has organised a series of regional meetings within the context of this project, bringing together experts from Europe, Africa, the Americas and the Middle East and North Africa (MENA). These meetings have resulted in

[1] UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.unhcr.org/refworld/docid/3ae6b3a94.html.

publications considering the law and practice in respect of torture in each region and globally,[2] as well as two thematic reports.[3]

REDRESS and AHRC wish to express their gratitude to the country experts who participated in the regional meeting, and particularly those who contributed papers and materials that were used for the individual country studies, namely Saira Rahman Khan (Bangladesh); Kirity Roy and Anjuman Ara Begum (India); Chris Biantoro (Indonesia); Mushegh Yekmalyan (on Kazakhstan); Tika Ram Pokhrel and Diraj Pokhrel (Nepal);Sayed Rizvi (Pakistan); Jose Manuel Diokono (the Philippines); Fr. Nandana Manthunga (Sri Lanka); and Pornpen Khongkachonkiet (Thailand).REDRESS also wishes to thank Matthew Stephenson, Craig Bradshaw, Yusuke Hara, Ryan Vachon, Melanie Horn, Dan Shindle, Jessica Fernandoand Wen Haur Hiewfor their valuable research assistance and contributions to the revised drafts of the country studies.

A. Comparative findings

Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries[4] published by REDRESS in 2003 found that torture was endemic in most countries considered, and that the vast majority of victims had no recourse to reparation due to inadequatelaws, the large discrepancy between law and practice, inadequate safeguards and the prevalence of impunity. Five of the countries covered by the present report were included in that survey, namely, India, Indonesia, Nepal, the Philippines and Sri Lanka.

A decade later, it is apparent that those problems remain deeply entrenched across the region. Tangible reform initiatives in relation to the prohibition of torture and reparation for victims remain the exception. This includes the enactment of anti-torture legislation in the Philippines in 2009 and draft anti-torture bills currently under consideration in Nepal and India. While the end of

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[2] See REDRESS and the European Centre for Constitutional and Human Rights, Torture in Europe: The Law and Practice, September 2012, available at: http://www.redress.org/downloads/publications/121012%20Europe%20Report%20FINAL.pdf; REDRESS and IMLU, *Torture in Africa: The Law and Practice*, September2012, available at: http://www.redress.org/downloads/publications/Africa%20regional%20report%20FINAL%208%20OCT%202012.pdf; and REDRESS and Coordinadora Nacional de Derechos Humanos, *Torture in the Americas: The Law and Practice*, July 2012, available at: http://www.redress.org/downloads/publications/130626%20Torture%20in%20the%20Americas.pdf.

[3] See, REDRESS, Extraordinary Measures, Predictable Consequences: Security Legislation and the Prohibition of Torture, September 2012, available at: http://www.redress.org/downloads/publications/1209security_report.pdf, and Redress for Rape: Using international jurisprudence on rape as a form of torture or other ill-treatment, October 2013, available at: http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture.pdf.

[4] REDRESS, *Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries*, April 2003, available at: http://www.redress.org/downloads/publications/AuditReport-Text.pdf.

major conflicts in Nepal and Sri Lanka provided potential openings to foster accountability for serious human rights violations and carry out law reform, several years on, concerns about institutionalised torture abound in both countries, highlighting the systemic nature of these practices.

Overall, torture remains prevalent to a varying degree in all the countries examined. Allegations are rarely investigated promptly, impartially or effectively, if at all, and victims do not have effective access to remedies, which frustrates their right to reparation. While each situation differs, the country studies point toward certain common structural problems and deficiencies that account for the prevalence of torture and lack of remedies for victims across the region.

There is an entrenched culture of disregard for human rights that characterises law enforcement agencies and security institutions in most countries. This institutional culture is reinforced by the absence of an adequate legal and institutional framework for the prevention and punishment of torture and reparation for victims, lack of human rights training among State agents and widespread corruption. Poverty and marginalisation significantly heighten vulnerability. Socially and economically disadvantaged groups, including women, ethnic minorities and others, find themselves at an increased risk because of discrimination, and a lack of awareness and means to access justice. This is frequently compounded by victims' fears of bringing lawsuits, complaints or testifying against authorities due to the risk of reprisals.

There are considerable gaps in relation to safeguards against torture and ill-treatment for individuals deprived of their liberty. In many countries, such guarantees are either simply disregarded by the authorities or rendered ineffective by the operation of special or emergency laws. In countries such as Bangladesh, India, Nepal, Pakistan and Sri Lanka, the legacy of prolonged armed conflicts or political instability has contributed to enhanced recourse to security policies and laws that grant unfettered powers to law enforcement agencies and security forces and perpetuate immunity.

These developments take place in an environment characterised by a lack of political commitment and adequate institutional rule of law guarantees, which include a genuine separation of powers, a strong and independent judiciary and an accountable government. Even in countries such as India, which has a long experience with democratic institutions, the courts have failed to assert their authority vis-à-vis the security forces or executives of federal states. Such security forces are vested with broad powers,and canbenefit from immunity and generally wield considerable power at the local level.

Tackling the problem of torture in such contexts requires a comprehensive approach involving both structural reforms aimed at strengthening the institutional framework protecting human rights as a whole, and specific measures to implement effectively the prohibition of torture and the right to reparation. Such a comprehensive approach consists of:

- Reforming the police, security services and armed forces with a view to enhancing adherence to international human rights standards in their operation, including by reforming relevant legislation, strenghtening internal and external oversight and putting in place effective accountability mechanisms;

- Strengthening the independence, efficiency and effectiveness of the judiciary at all levels and making sure that members of disadvantaged and marginalised groups have access to justice;

- Making torture a criminal offence, and where this has been done, ensuring thatthe definition conforms to CAT and that the punishment provided adequately reflects the gravity of the offence;

- Guaranteeing the rights of individuals deprived of their liberty and amending laws infringing these rights, including measures that grant immunity to security forces;

- Putting in place adequate and accessible complaint procedures, with special provisions for socially and economically marginalised groups, including legal aid and translation services;

- Ensuring training for law enforcement agents and security forces on human rights and humanitarian law standards, particularly on the prohibition of torture and the use of force;

- Guaranteeing the effective and impartial investigation and prosecution of acts and setting up mechanisms for the protection of victims and witnesses;

- Ensuring that victims have an enforceable right to reparation under domestic law.

Progress requires that civil society undertake concerted efforts and develop synergies aimed at advancing human rights protection and enforcement at domestic level. These include awareness rasing targeting the public as well as State actors, advocacy for legislative and institutional reforms, ensuring accountability of State officials, including security forces, as well as more specific reforms. Furthermore, monitoring of detention

facilities and the functioning of other key institutions such as the judiciary contribute to greater transparency, and potentially accountability.

In addition, civil society can document and pursue cases of torture and related violations, help survivors file complaints to the relevant bodies, fill gaps relating to access to counsel and medical examinations/treatment for survivors, howeverthese support functions should not replace the obligations of the State. Reform efforts at domestic level need to be complemented by a multi-pronged strategy that targets a range of external actors, including for instance the relevant mandate holders and procedures of the UN human rights system, particularly the UN Human Rights Committee (ICCPR), the Committee against Torture (CAT) and the Committee on the Elimination of Discrimination of Women (CEDAW), the thematic procedures, especially the Special Rapporteur on Torture, and the Universal Periodic Review commonly referred to as UPR.

Contexts and prevailing patterns

Perpetrators and purposes of torture

Torture is routinely committed to varying degrees by law-enforcement officials and security forces in all the countries examined. Police and security forces use torture to extract confessions and information about alleged criminal activities or as a form of punishment against suspected rebels and terroists as well as persons suspected of ordinary crimes. Torture and ill-treatment are also committed on discriminatory grounds, which include rape and other forms of sexual violence, particularly against female detainees in a number of countries such as India and Nepal. Another common practice, as highlighted in the studies on Sri Lanka, Bangladesh and India, is the use of torture as a means of coercion or intimidation to extort bribes from detainees and their relatives.

Authorities often resort to torture for a combination of purposes. For example, suspected rebels and their supporters in Sri Lanka and the Philippines are tortured as part of counter-insurgency strategies to obtain information, punish or intimidate victims and others. Civil society activists, lawyers, journalists and political opponents are targeted in a number of countries, including Sri Lanka and Bangladesh, for a combination of purposes aimed at containing or suppressing dissent.

While the police and security forces are frequently the main perpetrators, in a number of countries, responsibility is diffused across a number of governmental institutions endowed with law enforcement functions, such as the power to arrest and/or detain suspects. Such a proliferation of actors is likely to increase recourse to torture while at the same time impede exposure of

and accountability for such acts. In Nepal, such institutions reportedly include 'forest officers' or Rangers and civilian district officials. In India, apart from the police and the army, the Border Security Forces (BSF) are reported to be among the most notorious perpetrators of human rights violations, including routine acts of torture.

Armed conflicts and the genuine or perceived threats of terrorism in a number of countries have resulted in a greater involvement of the army and various security agencies in law enforcement, leading to serious human rights violations, including torture, being committed, particulary against civilians living in conflict zones.[5] Such violations, however, are not limited to State actors. Armed groups have also been responsible for a range of human rights violations, including acts amounting to 'torture' and ill-treatment in a number of countries.[6]

Torture and ill treatment in the context of criminal investigation

Torture appears to be regarded de facto as an acceptable method of criminal investigation in most countries, including Bangladesh, India, Pakistan and Sri Lanka, due to a lack of adequate training and resources and a pervasive institutional culture that fails to respect basic human dignity. This practice is sometimes reinforced by a system of unofficial incentives that encourage police officers to establish cases against suspects by all means. These include reliance on confessions as a principal form of evidence and a quota system of "resolved cases" that is used to evaluate the performance of police officers, particularly in Kazakhstan. Most cases of torture are linked to criminal investigations and take place in police custody. In Kazakhstan, for example, torture and ill-treatment often occur between the time when a person is arrested and when he or she is formally registered at a police station. In Bangladesh, on the other hand, detainees are usually subjected to torture and ill treatment after they are brought to a magistrate and remanded in custody to avoid having torture complaints brought up during their initial appearance. The 15 day period for which the detainees are usually remanded leaves them vulnerable to torture at the hands of police

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[5] See discussion on North East India and the Armed Forces (Special Powers) Act, under the Country Studies.

[6] See, e.g., Human Rights Watch, "*Targets of Both Sides": Violence against Students, Teachers and Schools in Thailand's Southern Border Provinces*, September 2010, pp. 29-30, available at: http://www.hrw.org/sites/default/files/reports/thailand0910webwcover.pdf; Amnesty International, *India: Maoist armed group should immediately release Chhattisgarh district administrator and Orissa legislator*, April 2012, available at: http://www.amnesty.org/pt-br/library/info/ASA20/018/2012/en. In Nepal, armed groups, especially members of the Young Communist League (YCL) and other groups in Terai, have reportedly carried out torture. See Advocacy Forum, *Criminalize Torture*, 26 July 2009, available at: http://www.advocacyforum.org/downloads/pdf/publications/criminalize-torture-june26-report-english-final.pdf.

officers and, eventually, deters them from filing complaints due to fear of retribution and distrust of the justice system.[7] The two examples demonstrate the dissuasive potential of requirements such as official registration and judicial scrutiny as well their limits in contexts such as Kazakhstan and Bangladesh.

Torture and ill treatment in prisons or pentitentiaries

The treatment of convicted prisoners and persons detained in correctional facilities raises serious concerns in a number of countries where they are subjected to torture and ill-treatment by prison officials as punishment for alleged misconduct or violations of prison rules.

In Bangladesh and Pakistan, for example, superintendents are legally authorised to administer whipping, the imposition of handcuffs or fetters and solitary confinement, in violation of the United Nations Minimum Standard Rules for the Treatment of Prisoners.[8] Similarly, allegations of torture and inhuman treatment have been levelled against the prison system, boarding schools, psychiatric hospitals and drug-related correction centres in Kazakhstan.[9] A notable example is the practice of sending detainees who are considered particularly "difficult" to a prison where they are subjected to beatings and other forms of physical and psychological violence in order to break their personality.[10] Prison overcrowding, denial of adequate medical treatment and hygiene are the most common forms of ill-treatment to which detainees are subjected in most countries.

Torture as an integral part of armed conflicts and counter-insurgency strategies

The experiences of countries that have recently emerged from or are experiencing armed conflict confirm that serious human rights violations, including torture and ill treatment, are integral features of prolonged armed conflicts. Theseare linked to some of the well known consequences of such conflicts which includea greater involvement of the army and security forces in law enforcement activities, the proliferation of security legislation guaranteeing impunity, the erosion of safeguards against abuses with limited or no judicial oversight and lack of effective remedies.

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7 See Odhikar, Fact-finding reports on torture, available at: www.odhikar.org.

8 Only solitary confinement for a period exceeding one month requires the confirmation of the Inspector General. The Prison Act of 1894 of Bangladesh, ss.46, 48, available at: http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=69.

9 See UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, Thirteenth Session, UN Doc. A/HRC/13/39/Add.3, 16 December 2009, 7-11, available at: http://www.unhcr.org/refworld/country,,UNHRC,,KAZ,4562d8cf2,4d872f4c2,0.html.

10 The Special Rapporteur on Torture made specific reference to penal colony UK-161/3 in Zhitykara. See, ibid.,7.

The use of torture has been a common feature of the conflict between the Liberation Tigers of Tamil Eelam (LTTE) and various Sri Lankan governments.[11] In Nepal, members of the Armed Police Force are reportedly responsible for torture and other serious human rights violations in areas such as the Terai region in the context of the conflict with Madhesi militant groups,who demand greater representation and autonomy. Torture and ill-treatment by Pakistani Armed Forces has been prevalent in parts of Pakistan including the regions bordering Afghanistan, such as the North-Western Frontier Province and Waziristan, as well as the Balochistan region where the Pakistani government has been battling against a range of militant groups, some of which are allegedly linked to the Taliban, and the Baloch nationalists. Similarly, there are persistent reports of violations, including torture, by the Indian Army and security forces in the North–East and in Jammu and Kashmir, which have experienced conflicts fuelled by demands for greater autonomy. In Indonesia, the military is responsible for widespread violations, particularly in areas where the Government faces resistance by separatist/ nationalist movements such as West Papua, Aceh and the Republic of South Moluccas (RMS). In the Philippines, many of the documented torture cases involve victims who the military or police perceive to be insurgents or their supporters, as well as suspected members of Islamist groups.[12]

In addition to violations by police and security forces, non-state actors including insurgents and extremist groups have been responsible for various forms of ill-treatment, with the private 'torture' cells linked to extremist groups in Pakistan offering perhaps an extreme example.[13]

Vulnerable groups and communities

One of the salient features of the country reports is the extent to which torture is widespread, even in the context of the investigation of ordinary offences, which makes many strata of society, particularly socially and economically disadvantaged

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[11] See for example, United Nations, Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, available at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf; Amnesty International, *Sri Lanka Amnesty International Report 2008: Human Rights in the Socialist Republic of Sri Lanka*, available at http://amnesty.org/en/region/sri-lanka/report-2008; Amnesty International, *Amnesty International Report 2007: Human Rights in the Socialist Republic of Sri Lanka*, available at: http://amnesty.org/en/region/sri-lanka/report-2007.

[12] On 23 June 2011, Asraf Jamiri Musa, a 17-year-old college student in Basilan, Mindanao, was reportedly arrested and tortured by the military. He was forced to confess that he was part of the Abu Sayyaf group. See, Asian Human Rights Commission, *Philippines: Tortured boy temporarily released to his parent's custody*, Appeal: AHRC-UAU-040-2011, 12 September 2011, available at http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-040-2011.

[13] Ashley J Tellis, *Pakistan and the War on Terror: Conflicted Goals, Compromised Performance*, Carnegie Endowment for International Peace, 2008, pp. 4-6, available at: http://www.carnegieendowment.org/files/tellis_pakistan_final.pdf.

persons, extremely vulnerable to violations. Most such incidents of torture and ill-treatment remain underreported because of the identity of its victims and/or because they happen in remote regions or in poor urban centres that are outside the focus of the media and public debate.

The link between poverty and torture is particularly highlighted in the reports on Bangladesh, India, Pakistan, and Sri Lanka. The vulnerability of members of poor and disadvantaged groups is exacerbated in some countries because of their association with communities and neighborhoods where people have to engage in illegal activities to earn their living, such as cattle smuggling in India. Prejudice and lack of empathy on the part of law enforcement officials and the suspect's inability to hire a lawyer often combine to make members of such groups prone to victimisation by law enforcement officials who deprive them of access to justice.

Discrimination, social inequalities and cultural practices contribute to torture and ill treatment inflicted by both state and non - state actors. Sexual violence against female detainees is common in several countries. The country studies further show that persons belonging to religious and ethnic minorities or 'lower' castes, particularly in India, immigrants and homosexuals are vulnerable to torture and other violations due to discrimination, which is often a reflection of general societal prejudices towards such groups. Victimisation of women is reported to be particularly pronounced where forms of ill-treatment are sanctioned by law or tradition. In Pakistan, for example, women are particularly subjected to cruel and inhumane treatment either at the hands of their spouses or their families.[14] In addition, parents routinely subject their children to corporal punishment in Pakistan, where this is sanctioned by law, but also in parts of Indonesia, such as Aceh.

Inadequacies in legal and institutional framework for the prevention of torture

The prohibition of torture

The prohibition of torture is firmly established under both treaty and customary international law as a non-derogable

[14] This is mainly due to traditional/religious practices linked to the status of women in sections of the society. They are subjected to domestic physical and psychological abuse for perceived illicit behaviour, failure to bring a substantial dowry or when initiating divorce. See Human Rights Commission of Pakistan, *State of Human Rights in 2011*, March 2012, p. 155, available at: http://www.hrcp-web.org/pdf/AR2011/Complete.pdf; Parveen Azam Ali & Maria Irma Bustamente Gavino, *Violence against Women in Pakistan: A Framework for Analysis*, Journal of Pakistan Medical Association, April 2008, p. 201, available at: http://jpma.org.pk/PdfDownload/1372.pdf.

norm even in times of emergency.[15] The absolute nature of the prohibition is expressly recognised in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[16] as well as in a range of other international and regional human rights treaties.[17]

Similarly, the prohibition of torture and ill treatment is central to international humanitarian law applicable in times of armed conflict. Common Article 3 of the Geneva Conventions prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons *hors de combat*.[18] Torture and cruel treatment are also prohibited under other articles of the four Geneva Conventions[19] as well as their additional protocols.[20]

Furthermore, the prohibition of torture is well established as ajus cogens norm that supersedes all other treaties and customary law.[21] As a consequence, States are not permitted to enter reservations in respect of their treaty obligation that modify the scope of the prohibition.[22]

International law places an obligation on States to take measures to prevent, criminalise, investigate and prosecute acts of torture and to ensure that victims of torture obtain reparation, including adequate restitution, compensation, rehabilitation,

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15 Human Rights Committee, General Comment 29, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras 7 and 11.

16 Art 5 UDHR; Art 7, ICCPR; Arts 1 and 16 CAT.

17 Art 37(a) of the UN Convention on the Right of the Child (CRC); Art 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); and Art15 ofthe Convention on the Rights of Persons with Disabilities (CRPD). The prohibition is also found in the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) at the regional level.

18 Common Article 3 of the four Geneva Conventions of 1949.

19 See Art 12 of the First and Second Geneva Conventions; Arts 12, 17, 87 and 89 of the Third Geneva Convention; Arts 31 and 32 of the Fourth Geneva Convention.

20 Art 75(2)(a) and (e)of Additional Protocol I and Art 4(2)(a) and (h) of Additional Protocol II. The prohibition of torture and ill treatment is also recognised as a customary rule applicable to both international and non-international armed conflicts. See ICRC, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, List of Customary Rules of International Humanitarian (Annex)*, Rule 90. The summary of the study is available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0860.pdf.

21 See in particular, International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija* (Trial Judgment), IT-95-17/1-T, 10 Dec. 1998, paras.144, 153-157, available at: http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

22 Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, paras. 8 and 10.

satisfaction and guarantees of non-repetititon. In its General Comment No. 20, the UN Human Rights Committee affirmed that the prevention of torture and ill-treatment presupposes not just the prohibition and criminalisation of such violations under domestic law but also taking concrete measures to prevent and punish them.[23] Article 4 of UNCAT specifically requires States parties to make torture a criminal offence.

All of the countries covered by the present report have expressly subscribed to the prohibition of torture by becoming party to the ICCPR and most of the other treaties referred to above. Moreover, allStates, with the exception of India, are parties to the UNCAT, which provides a comprehensive definition of torture and reaffirms the absolute nature of the prohibition. However, the majority of countries have failed to adopt appropriate domestic legislation to implement their international law obligations. This poses a significant problem given that all the legal systems require incorporation in order for national judges to apply at least some if not most of the provisions of international treaties, particularly in their criminal law.

While nearly all of the countries examined have included the prohibition of torture in their Constitutions, only Kazakhstan, the Philippines and Sri Lanka have made torture a specific offence under their domestic law. However, even in some of these countries, the definitions of torture are defective. The relevant definition under the Sri Lankan Act limits torture to acts causing pain and omits the reference to suffering, whereas the relevant provision of Kazakhstan's Penal Code contains an ambiguous clause that exempts pain and suffering arising from 'lawful' actions of officials.[24] While the above may have been intended to reflect the exception provided under Article 1 of UNCAT in relation to "pain or suffering arising only from, inherent in or incidental to lawful sanctions", the language used is vague and can give rise to a broader interpretation.

Despite the limited number of specific criminal law prohibitions of torture, certain acts of torture and ill-treatment can, in principle, be prosecuted in almost all countries. Prosecutions can be brought forcommon crimes such as assault, assault causing grave bodily injury and abuse of power. However such offences do not cover all the elements of torture as defined under UNCAT and the penalties prescribed do not reflect the seriousness of the crime and its impact on survivors. Even where torture is recognised as a specific offence under domestic criminal law, the law may still

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[23] Human Rights Committee, General Comment No. 20: Replaces General Comment 7concerning the prohibition of torture and cruel treatment or punishment (Art. 7), 10 March 1992, para. 8.

[24] See,the Convention against Torture (CAT) Act No. 22 of 1994, Sri Lanka; The Criminal Code of the Republic of Kazakhstan, Law No. 167 as amended on 2 August 2011, Art 347-1.

fail to provide penalties that are commensurate with the gravity of the offence as is the case with Kazakhstan. The experience of countries such as Sri Lanka, where the criminalisation of torture has resulted in only three convictions in almost twenty years, highlights the limits of laws criminalising torture in the absence of a corresponding commitment to its enforcement and an adequate system of effective investigations and prosecutions.

Safeguards against torture and preventive mechanisms

Statesare obligated to undertake speficic measures and provide legal safeguards that can serve to minimise the risks of violations and/or limit the circumstances under which torture and ill treatment usually take place. UNCAT also requires States to train law enforcement agents and other relevant offficials on the prohibition of torture. As most instances of torture are committed during arrest and detention, custodial safeguards against the risks of torture are particularly important and widely recognised in international law and many legal systems. These safeguards comprise the prohibition of arbitrary detention, the right to inform family members or others of the arrest, the right to be promptly brought before a court after arrest, the rights to challenge the legality of one's detention, access to a lawyer of one's choice and the right to regular medical examination and health care.[25]

The UN has developed a series of important principles, particularly on the prohibition of excessive use of force by police officers during arrest, the right of detainees to access a lawyer and a doctor and to communicate with a third person. International standards providing for detailed safeguards for detainees include the UN Code of Conduct for Law Enforcement Officials, the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment(in addition to the relevant provisions contained in particular in the UNCAT, the ICCPR and regional human rights treaties).Custodial safeguards should be complemented by monitoring of detention, as envisaged bythe Optional Protocol to the UNCAT. In addition, evidence and confessions obtained under torture should not be admitted as valid evidence, which acts as an important disincentive to resort to torture in the criminal justice process.[26]

States are also under an obligation not to extradite,deport or expel a person to a State where he or she is at risk of torture or ill-treatment. However, as the country studies highlight,custodial safeguards and other preventive measures are frequently either absent or not effectively implemented so as to fulfil their function of protecting against, and reducing the risk of torture.

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[25] Art 9 of the ICCPR and alsoGeneral Comment No. 08, Right to liberty and security of persons (Art. 9), 30 June 1982 and General Comment No. 20, paras. 11, 12 and 14.

[26] See in particular Art 15 UNCAT.

Custodial safeguards

Arbitrary arrest and prolonged pre-trial detention: Safeguards and pervasive exceptions

All of the Statesare parties to the ICCPR and have provisions in their constitutions or statutory laws providing guarantees against arbitrary arrest and detention, including the right to a prompt review of the lawfulness of one's detention by a judicial authority.[27] A significant gap remains, however, between the law and practice.Law enforcement agents frequently fail to bring detainees to court within the prescribed time frame. Similarly, the initial appearance of detainees tends to be considered as a mere formality whereby the judges readily remand detainees to custody without carrying out a proper examination of the grounds for and conditions of detention, including allegations of torture and/or other ill-treatment. Procedures are in place in most countries to challenge the lawfulness of detention by way of habeas corpus petition or so called fundamental rights application (India, Pakistan, Philippines, Bangladesh, Sri Lanka). However, only a small proportion of detainees are able to use the recourse available due to lack of awareness and resources whereas fear of retaliation by the authorities is also an important obstacle.

One of the most common and chronic problems in the majority of the countries examinedis that custodial safeguards are undermined by exceptions provided by law and, in some cases, by constitutional provisions. In Bangladesh, for example, although the general rule is that a person should not be arrested without a court warrant, the exceptions provided under the Criminal Procedure Code are too broad to serve as a safeguard against arbitrary arrest.[28]

In Indonesia, a person can be detained for up to 20 days by virtue of a warrant issued by an investigator, which can be renewed for a further 40 days upon authorisation from a prosecutor. The law does not require a detainee to actually be brought before a judge, denying the detainee a crucial opportunity for asserting

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[27] Indonesia provides an exception in that its Constitution does not provide for the right against arbitrary arrest, although this was provided in the human rights act without specifying the corresponding remedies or limits on the power of arresting officers. See Art 34 of Legislation No. 39 of 1999 concerning human rights, available at http://www.asiapacificforum.net/members/full-members/indonesia/downloads/legal-framework/indonesiaact.pdf.

[28] Those exceptions were successfully challenged before the Supreme Court in *BLAST and Others v. Bangladesh and Others*. However, the Government has failed to implement the guidelines set out in the Supreme Court's judgement, which, *inter alia*, recommended an amendment to the relevant provisions of the Criminal Procedure Code. 55 DLR (2003)363, available at: http://www.blast.org.bd/content/judgement/55-DLR-363.pdf.

his or her rights before a court.[29] The Indian Constitution, for its part, recognises exceptions to the provision requiring officials to bring detainees to the nearest court within 24 hour in respect of an 'enemy alien'[30] and individuals arrested under laws providing for preventive detention.[31] Similarly, the Pakistani Constitution provides that constitutional protections of persons deprived of their liberty donot extend to individuals arrested or detained under any law providing for preventive detention.[32]

The majority of the countries reviewed also have special or emergency laws that allow exceptions to the general rules, particularly those applicable to the length of pre-trial detention. Indonesia's anti-terrorism law of 2002, for example, permits the police and prosecutors to keep a suspect in pre-trial detention for up to six months.[33] India'sArmed Forces (Special Powers) Act,which is examined in a separate section ofthe present study, is notable for authorising the security forces to arrest and detain suspects without warrant and judicial supervision.[34] In Thailand suspects can be detained without a court order for 37 days (under the Emergency and Martial Laws).[35] Sri Lanka's Prevention of Terrorism Act similarly grants broad powers to the security forces to detain and interrogate suspects with limited judicial supervision.[36] In combination with limited custodial safeguards, these exceptions frequently enhance vulnerability to torture and ill-treatment.

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[29] Art 25 of the Indonesian Criminal Procedure Code, *Kitab Undang-Undang Hukum Acara Pidana (KUHAP)*, and Art 198(1) (unofficial version available at: http://defensewiki.ibj.org/images/6/62/Indonesia_Law_of_Criminal_Procedure.pdf (KUHAP)).

[30] Art 22(3)(a) ibid.

[31] Art 22(3)(b) ibid.Bangladesh's Constitution contains identical provisions and a person can be held in preventive or pre-trial detention for more than 6 months. See Art.33 (3) and (4), Constitution of the People's Republic of Bangladesh, 4 November 1972.

[32] Art 10(3), the Constitution of the Islamic Republic of Pakistan, 1973.According to Art 10(4) and (7), individuals suspected of "acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services" can be kept in preventive detention for up to one year. In both Bangladesh and Pakistan, the power to review and approve preventive detention is bestowed on non-judicial organs although they are composed of judges and former judges.

[33] See Art 25(2) of Law No. 15 of 2003 confirming Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism. The law on emergency situations on the other hand permits a maximum of fifty days detention by the armed forces without judicial supervision. Art 32 (3), Law No. 23 of 1959.

[34] The Armed Forces (Special Powers) Act 1958, as amended in 1972 and 1986, ss. 4-6.

[35] Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005), ss. 11 (1) and 12; Martial Law Act B.E. 2457 (1914), s. 15bis.

[36] Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. According to s. 9(1) of the Act, a person can be held for up to 18 months in preventive detention upon an order of the Minister where the latter "has reason to believe or suspect" that the person is "connected with or concerned in any unlawful activity."

Right to access a lawyer of one's own choice

Unrestricted early access to a lawyer can help minimise the risks of torture and other ill treatment in detention, andalso facilitates the prompt filing of complaints on behalf of those who have been already exposed to such violations. While the right to counsel is generally recognised in most countries, such a right is not guaranteed from the moment of arrest in countries such as Sri Lanka[37] and few countries provide indigent detainees access to a State appointed lawyer upon arrest. The Philippinesand India are among the exceptions in this regard; the right to counsel, including the right to a State appointed counsel for indigent detainees, is enshrined under their respective Constitutions.[38] In India, the Supreme Court has actually held that the right of access to a lawyer upon arrest or near custodial interrogation is an inalienable right.[39]

In Indonesia, the Criminal Procedure code provides that a detainee can, upon arrest, request assistance from a lawyer of his or her own choice or from a lawyer designated by the State if he or she is indigent.[40] However, such legal assistance is compulsory only if the individual risks the death penalty or a sentence of five years or more. In a number of other countries, including Bangladesh, Kazakhstan, Nepal and Pakistan, detainees have the right to counsel upon arrest but most detainees are unable to excercise it because they cannot afford to hire counsel and the right to a State appointed counsel is not guaranteed by law.

In addition to these gaps in the law, detainees' access to lawyers is severely curtailed in most countries because of a lack of resources and of a sufficient number of legal practitioners, a failure to inform detainees of their rights or the outright refusal by the authorities to provide access to lawyers. Moreover, as the Sri Lanka country report demonstrates, lawyers representing torture

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[37] In Sri Lanka, by contrast, the Constitution links the right to counsel to a trial and does not contain a provision on indigent defendants. See Art 13(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

[38] Art 12(1) of the Philippine Constitution and Arts 22 and 39A of the Indian Constitution.

[39] Nandini Satpathy vs Dani (P.L.) and Another, 1978 AIR 1025.

[40] Art 54 of the KUHAP.

survivors are sometimes subjected to intimidation, harrrasment, detention and even murder and enforced disappearance.[41]

Access to an independent medical examination

Compulsory and independent medical examination upon and after arrest is an important safeguard against custodial torture and ill treatment, providing the means to establish evidence of such violations. Access to a medical examination is a requirement under international standards such as the Basic Principles for the Protection of All Persons under any form of Detention or Imprisonment[42] and the Istanbul Protocol.[43] It has also been recognised as an important safeguard by the UN Human Rights Committee[44] and the Committee Against Torture.[45]

The right to an independent medical examination is not recognised in most of the jurisdictions examined save for the Philippines. Notably, section 12 of the Philippine Anti-Torture Act recognises the right of a detainee to physical and medical examination by an independent and competent doctor of his or her own choice, both before and after interrogations. The State is also under an obligation to provide an indigent detainee with access to a free medical examination.[46]

In India, the right of access to a medical examination has been upheld by the Supreme Court, which ruled that an arrestee

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41 Asian Human Rights Commission, *Sri Lanka: A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment*, 8 July 2011, para.4.1, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-095-2011 (hereafter "AHRC, *A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment* 2011"). In Thailand, Somchai Neelapaijit, a lawyer representing five torture survivors, was abducted in 2004 and his whereabouts remain unknown, while one of his clients was convicted and sentenced to two years imprisonment. See Asian Human Rights Commission, *Thailand: Consolidating internal security State, complaisant judiciary*, AHRC-SPR-012-2011, 2011, p. 8, available at: http://www.humanrights.asia/resources/hrreport/2011/AHRC-SPR-012-2011.pdf/view.

42 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly Resolution 43/173 (9 December 1988),principles 24 and 25. See also the United Nations Code of Conduct for Law Enforcement Officials, General Assembly Resolution 34/169 (17 December 1979),Art 6; Basic Principles on the Use of Force and Firearms by Law EnforcementOfficials, adopted by the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August–7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990), principle 5.c.

43 See the Office of the UN High Commissioner for Human Rights, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2004, Ch. II (D)(1) available at: http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

44 General Comment 20, para. 11.

45 See Committee against Torture, *Consideration of reports submitted by States Parties under Article19 of the Convention, concluding observations*, 47th session, 31 October-25 November 2011 at (C)(15), (20),(24), &(29).

46 Act 9745 the Anti-Torture Act of 2009. Section 2(f) of the Republic Act 7438 (Code of Custodial Investigation) further provides that detainees shall have access to visits medical doctors, lawyers and family members.

should be examined every 48 hours.[47] According to Article 58 of the Indonesian Criminal Procedure Code (KUHAP), detainees can have access to a doctor of their own choice, but this is a right that most detainees are unable to exercise for lack of both awareness and resources. In some of the other jurisdictions, detainees can have access to government appointed health professionals while in some cases ordering such a medical examination falls within the discretion of the authorities. In Kazakhstan, health professionals affiliated with the Ministry of the Interior and the penitentiary administration undertake examinations upon the admission of detainees but are said to lack the independence to report anything that would implicate colleagues with whom they work on a daily basis. Under Sri Lankan law, a medical examination can be ordered if found useful by investigators and magistrates. However, there are no provisions guaranteeing a compulsory medical check up. Access to a doctor tends to be limited in some juridictions to prisons[48] or to detainees who are already charged with an offence.[49]

In practice, even where detainees are granted access to doctors, there are often serious doubts about the independence and/or integrity of the medical professionals who are either government employees or monitored by the authorities. In some cases, the consultation is a mere formality where doctors reportedly fill out reports that are prepared in advance.[50] Shortage of qualified medical professionals is also a common problem in most countries.

Monitoring of places of detention

Regular monitoring of all detention centres by independent organisations is another important safeguard against torture. OPCAT states in its preamble:

> [t]hat the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention.

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47 See D K Basu v State of West Bengal AIR 1997 SC 610; see a summary of the guidelines at http://humanrights-justice.com/landmark_initiative/d.k.basu_vs_State_of_west_bengal.php.

48 See the Prisons Act Bangladesh.

49 See Kishali Pinto-Jayawardena, *The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, The Rehabilitation and Research Centre for Torture Victims (RCT), May 2009, p. 50, available at: http://defensewiki.ibj.org/images/4/48/RuleofLawIn_Decline_Sri_Lanka.pdf. (hereafter Kishali Pinto-Jayawardena (2009)).

50 See UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: mission to Sri Lanka*, 26 February 2008, A/HRC/7/3/Add.6, para. 38, available at: [accessed 27 March 2013] (hereafter UN Special Rapporteur Mission Reporton Sri Lanka).

OPCAT provides for the establishment of the Subcommittee on Prevention of Torture (SPT) as well as designated National Prevention Mechanisms (NPM). However, with the exception of Kazakhstan and the Philippines, none of the countries examined are parties to OPCAT and are therefore neither subject to the competence of the SPT[51] nor have they designated a NPM. The Philippines and Kazakhstan, though State parties to OPCAT, have yet to establish NPMs.

Most of these countrieshave National Human Rights Institutions (NHRIs), the latest one to be established being the Pakistani National Human Rights Comission, which was created in May 2012.[52] NHRIs are state institutions that are mandated by law or constitution to promote and protect human rights.[53] While the scope of their mandate varies from one country to another, it often includes the investigation of allegations of human rights violations, visiting places of detention and helping individuals whose rights have been violated to obtain redress. However, most of the NHRIs lack independence and/or resources, and often do not havethe necessary leverage to follow through with the implementation of their recommendations. The National as well as State Human Rights Commissions in India play an important role in investigating individual complaints, documenting and reporting human rights violations, including torture. The National Commission, however, has no competence to address the conduct of the armed forces, notwithstanding the allegations of torture and other human rights violations made in this regard, and its recommendations are not always implemented by the authorities in other cases. The law establishing the NHRI in Pakistan requires the police and armed forces to disclose lists of all detention facilities and details regarding the detainees. The NHRIs can also receive private complaints, seek an explantion from the Government, and make recommendations. However, the law does not place any express obligation on the State to comply and the commission can only refer the complaint to the relevant authority. In addition, it cannot even seek an explanation in respect of complaints against the intelligence agences.[54]

Unique among the NHRIs examined is the Human Rights Commission of the Philippines, which has been established by the Constitution. It is vested with a broad mandate, which includes ensuring the country's compliance with its human rights treaty obligations and can visit places of detention. However, it has been criticised for its failure to investigate complaints promptly and for

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[51] The Philippines has additionally registered reservations suspending the application of the visitation mandate of SPT under Art11(1)(a) OPCAT.

[52] National Commission for Human Rights Act, 2012, available at: http://www.na.gov.pk/uploads/documents/1342437418_845.pdf.

[53] See UN General Assembly, Principles relating to the status of national institutions, A/RES/48/134, 4 March 1994, Annex.

[54] Ibid., s. 15.

the lack of competence and expertise of its members.The National Human Rights Commission of Thailand[55] can also visit detention centres, at least official ones. However, such visits are subject to prior approval and tend to be in reaction to complaints rather than being systematic, which severely limits their preventive function.[56]

Exclusion of evidence obtained under torture

The exclusion of evidence obtained under torture is an important safeguard against torture. Nearly all of the countries have constitutional or legal prohibitions against the use of confessions obtained through torture. However, the prohibition is not effective where, contrary to international standards, the burden of proof is placed on the victims to demonstrate that they confessed under the duress of torture. Victims are by definition in a much weaker position vis–á-vis the State to provide evidence of torture.[57] This is reported to be common practice even in countries like Kazakhstan, despite the fact that the law places the burden of establishing that evidence is obtained lawfully, on the prosecution. Judges are also often found to be reluctant to order an examination into allegation of torture by detainees in countries such as Nepal, Sri Lanka and Indonesia.

In view of the prevalence of the use of confessions obtained under torture, a more effective deterrent would seem to be the exclusion of out of court statements given to the police. However, only few countries apply such an exclusionary rule. In Bangladesh , for example, in order to be admissible, evidence should be given before a magistrate, although a statement made to police officers can be used to obtain admissible evidence. In practice, however, this safeguard seems to have limited impact, reportedly because magistrates fail to excercise due diligence in filtering tainted evidence, owing to pressure or inducements from the authorities or other interested parties. These reports, in turn, point to the broader problem of lack of independence and widespread corruption among magistrates.

Non-refoulement

Article 3 of UNCAT places an obligation on States both to protect individuals from being subjected to torture within their territory and not to sendpersons to countries where they may be

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[55] As established under the National Human Rights Commission Act, B.E. 2542 (1999), available at: http://www.unhcr.org/refworld/type,LEGISLATION,,THA,474d303d2,0.html. See also the Office of the National Human Rights Commission of Thailand's website, available at: http://www.nhrc.or.th/2012/wb/en/index.php.

[56] Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, January 2009, available at: http://www.amnesty.org/en/library/info/ASA39/001/2009.

[57] UN HRC, *Nallaratnam Singarasa v Sri Lanka*, Communication No. 1033/2001, 23 August 2004, UN Doc. CCPR/C/81/D/1033/2001.

exposed to torture or ill-treatment.[58] This prohibition, known as the principle of non-refoulement, is not specifically provided for in the laws of most of the countries examined, with the exception of the Philippines, whose Anti-Torture Act states that no person shall be expelled, returned or extradited to another State where there are substantial grounds to believe that such person shall be in danger of being subjected to torture.[59] The courts in India have ruled that refugees shall not be deported if such action can endanger their lives.[60] Although the ruling focuses on risks to life, it arguably provides a scope for the application of the principle in favour of people facing the risk of torture given that loss of life is one of the possible consequences of torture.

Lack of Accountability

International law places an obligation on States to investigate and prosecute serious human rights violations, including torture. The UN Human Rights Committee (HRC) has emphasised in a number of cases and in its General Comment that states have the obligation to ensure that those responsible for "violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and, frequently, 6)" are brought to justice.[61] It is also part of the HRC's established jurisprudence that an effective remedy for certain fundamental human rights violations requires a criminal investigation, prosecution where sufficient evidence is available, adequate punishment and compensation as well as other forms of reparation.[62]

The UNCAT similarly sets out core obligations on States, including the obligation to criminalise torture, to conduct prompt, impartial and effective investigations into allegations of torture and to prosecute where there is sufficient evidence suggesting that torture has been committed (Article 4 and 12). This obligation exists regardless of where the crime was committed, the nationality

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[58] Art 33(1) of the 1951 United Nations Convention Relating to the Status of Refugees (CRSR) also prohibits the expulsion or refoulement of refugees to countries where they would face risks to their life or freedom because of their "race, religion, nationality, membership of a particular social group or political opinion."Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[59] Republic Act No. 9745 or "Anti-Torture Act of 2009", s. 17, available at: http://www.lawphil.net/statutes/repacts/ra2009/ra_9745_2009.html.

[60] *Zothansangpuri v State of Manipur* (C.R. No.981 of 1989).

[61] See General Comment No. 31, para 18.

[62] *Pathmini Peiris v. Sri Lanka* Communication No. 1862/2009, *Gapirjanova v. Uzbekistan*, Communication No. 1589/2007, 11 May 2010; See also *Zyuskin v Russian Federation*, Communication 1605/2007 and *Rodriguez v. Uruguay*, Communication 322/1988.

of the victim or the alleged perpetrator (Article 5).[63] States are also obliged to provide protection to victims and witnesses, also with a view to ensuring the effectiveness of investigations and prosecutions.[64] Moreover, as has been reiterated by the Committee Against Torture, impediments to to the prosecution of torture and ill treatment such as statutes of limitation, amnesties and immunities "violate the principle of non-derogability" of the prohibition of torture under Article 2[65] and prevent the exercise of the right to effective redress under Article 14 UNCAT.[66]

Most of the countries examined have a poor record concerning the investigation and prosecution of torture and ill treatment. While there are a range of factors that are specific to each country, the most common obstacles to accountability include lack of an adequate legal framework, weak institutions, legislative barriers to prosecution and fear of reprisals on the part of victims. In short, entrenched impunity.

Inadequate legal framework

As noted earlier, all but three of the countries examined have yet to make torture a criminal offence. While this means that torture is not regarded and prosecuted as a serious offence in the majority of countries, perpetrators of torture and ill treatment are also rarely brought to justice for related but less serious offences, such as causing grievous injury, assault or abuse of power that are provided for in most legal systems. Equally, the situation is not significantly better in the three countries that have criminalised torture, though the enactment of the anti-torture law in the Philippines is too recent to assess its impact on accountability for torture.

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[63] See the CommitteeAgainst Torture's decision in *Guengueng v. Senegal*, holding that Senegal had violated Art 5 (2) and Art 7 of the convention by failing to prosecute or extradite former Chadian President Hissène Habré for his alleged responsibility for torture committed in Chad in the 1980s. *Guengueng v. Senegal*, Communication No. 181/2001, CAT/C/36/D/181/2001, 19 May 2006. The position was confirmed by the International Court of Justice the case brought by Beligium against Senegal over the latter's failure comply with its obligation to prosecute Habré or extradite him to a country with jurisdiction for prosecution, in that case, Belgium. See ICJ, *Questions relating to the obligation to prosecute or extradite(Belgium v. Senegal)*, Judgment of 20 July 2012, available at: http://www.icj-cij.org/docket/files/144/17064.pdf

[64] See REDRESS, Testifying to Genocide: Victim and Witness Protection in Rwanda, October 2012, available at: http://www.redress.org/downloads/publications/TestifyingtoGenocide.pdf

[65] CAT, General Comment No. 2(2007), *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP. 1/Rev.4, 23 November 2007, paras.1 and 5.

[66] CAT, General Comment No. 3(2012), *Implementation of Article 14 by States Parties*, CAT/C/GC/3, 13 December 2012, paras.38 and 41.

Weak institutional guarantees for the rule of law and separation of powers

In the majority of countries, the normative/constitutional framework for the rule of law are in place but are not backed by strong institutional guarantees, such as a robust and independent judiciary, an accountable executive and a parliament that is capable of acting as a counterweight to the power of the executive. Accordingly, investigators and prosecutors either lack the capacity or the will to investigate violations committed by law enforcement agencies and security forces where failure to do so does not entail adverse consequences and may, in fact, be rewarded. Similarly, investigations into the conduct of law enforcement agents is often difficult because those whose duty it is to document and investigate the offences tend to be bound by a sense of group solidarity with the suspects and, therefore, are more likely to protect rather than to expose their colleagues. As the study demonstrates, this may take a number of forms – denial that violations have taken place or that a person is under their custody, intimidation directed against the victims and witnesses, refusal to divulge information or tampering with evidence, or collusion with magistrates and prosecutors.

Even in those countries with a long tradition of judicial independence and the rule of law such as India, widespread corruption especially, at the lower levels of the judicial structure, guarantees impunity for torture and ill-treatment affecting the majority of the population, particularly the poor. In Pakistan, the institutions have been seriously weakened by a series of coups and ongoing conflict.

Lack of confidence in the justice system and fear of reprisal

The weakness of the justice systems in most of the countries examined, including the absence of judicial independence and widespread corruption, as well as the attendant lack of accountability, has contributed to a lack of public confidence in the integrity and effectiveness of the relevant institutions. There is thus a vicious circle of impunity whereby victims refrain from filing complaints of torture against the police or security forces, either because they do not see the utility or are fearful of possible retaliation, which, in turn, encourages the perpetrators to carry on with the practice without facing any consequences. A number of examples highlight the reality of the risks faced by those who dare to complain or bring suits against the authorities. Victims, witnesses and lawyers have been subjected to retaliation, which has included criminal charges, torture and even murder in

Nepal,[67] the Philippines,[68] Sri Lanka,[69] and Thailand.[70]

In most of these countries, there are no official mechanisms in place for the protection of witnesses or they are largely ineffective and/or of limited scope. Indonesia is one of the few countries that has a Witness and Victims Agency (LPSK) established under Law No. 13 of 2006. The agency, however, is unable to provide adequate protection due to financial and logistical constraints and its independence has been seriously questionedby human rights organisations.[71] The mechanism is set up under the Witness Protection, Security and Benefit Act[72] of the Philippines is empowered to afford protection to witnesses before judicial or quasi-judicial organs but not to victims who are not testifying or to witnesses appearing before other bodies including the police.[73]

Notably, the Thai Constitution provides that victims and witnesses are entitled to appropriate treatment, protection and assistance.[74] However, the only mechanism in place is the Witness Protection Bureau, which extends protection to witnesses and family members. Such protection does not extend to victims who are not witnesses or to individuals accused of crimes. Criminal defendants happen to be among the majority of victims of torture and, therefore, they need protection to be able to challenge evidence obtained under torture.[75] Moreover, the mechanism has proved incapable of allaying the fears of witnesses or affording effective protection because the police retain a significant role in the protection scheme.[76]

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[67] See Asian Human Rights Commission, *NEPAL: Trial of Hom Bahadur Bagale's torture case must put an end to a nine-year long denial of justice*, 11 May 2011, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-060-2011.

[68] A number of victims, witnesses, lawyers and even judges were killed in the Philippines in connection with the human rights cases they were involved in. FIACAT-ACAT, *Alternative Report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 February 2009 , available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/FIACAT_ACAT_Philippines42.pdf; see also *Sixth Philippine massacre witness killed, BBC*, 28 June 2012, available at: http://www.bbc.co.uk/news/world-asia-18621705.

[69] See for example the assassination of Gerald Perera and Sugath Nishanta Fernando as well the threats and harassment directed at lawyers in Sri Lanka.AHRC, *A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment* 2011

[70] See *Thailand: Consolidating internal security State, complaisant judiciary*, p. 8.

[71] Asian Human Rights Commission, *Indonesia: Lack of effective witness and victim protection*, AHRC-STM-029-2010, 18 February 2010, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-029-2010.

[72] Republic Act No. 6981 of April 24, 1991, "Witness Protection, Security and Benefit Act", available at: http://www.lawphil.net/statutes/repacts/ra1991/ra_6981_1991.html.

[73] Witness Protection, Security and Benefit Act, s. 3.

[74] Art 40(4) and (5).

[75] Witness Protection Act, B.E. 2546 (2003), s. 6, unofficial translation available at: http://www.Article2.org/mainfile.php/0503/235/.

[76] Article 2, *Protecting witnesses perverting justice in Thailand*, Asian Human Legal Resource Centre, June 2006, p. 18

Immunities and other legislative impediments to accountability

One common feature is the extent to which governments seek to use the law to protect their agents from criminal and/or civil proceedings through either requiring prior government sanctions or barring prosecutions altogether for acts deemed to have been undertaken in 'good faith'. In Bangladesh, for example, certain categories of public servants, including members of the armed forces, are protected from prosecution unless the Government sanctions it.[77] Similarly, the Indian Criminal Procedure Code provides that public servants cannot be prosecuted without prior sanction by the Government in respect of "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty".[78] Similar clauses are incorporated in various special laws that are in force in parts of India.[79] These provisions in effect guarantee impunity because even in the few instances where investigations are attempted, requests for prior sanction have to go through a prolonged bureaucratic process and are rarely granted. Section 132 of the Code of Criminal Procedure of Pakistan also provides that members of law enforcement agencies acting in "good faith" shall not be prosecuted without the sanction of the Government.

In addition, countries such as Bangladesh, Nepal and Pakistan have laws extending immunity from prosecution for acts committed 'in good faith" in the maintenance of public order. Bangladesh's Constitution empowers parliament to pass laws exempting anyone in the service of the Republic for acts "committed in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh".[80] Accordingly, the Bangladeshi Parliament passed the Indemnity Act of 2003, granting impunity to the armed forces and the police for acts committed during the Operation Clean Heart in late 2002 and early 2003, which was reportedly characterised by murder, torture, arbitrary arrests and detention.[81] The Armed Police Battalions Ordinance similarly exempts members from prosecution for anything that is done or intended to be done in good faith under the Armed Police Ordinance.[82]

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77 Criminal Procedure Code, ss.132 (acts done to stop unlawful assemblies), 197.

78 Section 197 (1) Criminal Procedure Code, 1973.

79 See ss. 125 and 126 of the Army Act 1950, s. 6 of the Armed Forces (Special Powers) Act 1958, s. 45 of the Unlawful Activities (Prevention) Act 1967 and s. 7 of the Armed Forces (Special Powers) Act (Jammu and Kashmir) 1990.

80 Constitution, s.46.

81 See, Asian Human Rights Commission, *Bangladesh: Disappearance will never stop unless impunity is ended*, AHRC-STM-094-2012, 20 April 2012, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-094-2012/; Amnesty International, *Bangladesh: Indemnity Bill – A Human Rights Challenge for Parliament*, 26 January 2003, available at: http://www.amnesty.org.uk/news_details.asp?NewsID=14315.

82 Armed Police Battalions Ordinance 1979, s.13.

In Nepal, laws such as the Nepal Army Act,[83] the Nepal Police Act[84] and the Armed Police Force Act[85] extend immunity to members of the security forces "acting in good faith", which may thereforego unpunished even in the case of serious human rights violations. Other laws such as the Essential Goods Protection Act[86] and the National Parks and Wildlife Act[87] provide for specific immunities attached to the use of "necessary force." Pakistan's Anti-Terrorism Act provides that no law enforcement personnel acting in good faith or acting with the intention to fulfil the obligations provided by the Anti-Terrorism Act can be held accountable.[88] Moreover, the conduct of law enforcement agents, such as the police, the armed forces or "related" agencies in the course of the maintenance of public order are exempt from petitions for fundamental rights violations under the Consitution.[89]

The sweeping powers vested in security forces, coupled with the immunity clauses using such vague standards as "good faith" encourage a sense of impunity that is rarely challenged because of the structural problems highlighted above. In fact, the highest court of India has failed to take the opportunity to curb the abusive potential of the good faith standard by holding that action by security forces can benefit from immunity if it had a reasonable connection to their duty irrespective of whether it amounts to a serious human rights violation.[90] In addition, there have been concerns over unduly short statutes of limitation, particularly the 35 day period provided in Nepalese law and the two year limitation period envisaged in India's draft torture bill, which fall short of international standards and, in the case of Nepal, have contributed to the perpetuation of impunity.[91]

Jurisdiction over torture committed abroad

Most of the countries examined do not provide a legal basis for the exercise of criminal jurisdiction for torture committed abroad, unless the suspect happens to be a national, despite their treaty obligation to extradite or prosecute torture suspects. Sri Lanka is the only exception in that it explicitly provides for

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83 Section 22, Army Act, 2063 (2006).

84 Section 37, Police Act, 2012 (1995).

85 Section 26, Armed Police Force Act, 2058 (2001).

86 Section 6, Essential Good Protection Act, 2012 (1955).

87 Section 24(2), National Parks and Wildlife Act, 2029 (1973).

88 Section 39 of the Anti-terrorism Act.

89 Art 8 (3) (a) of the Constitution prescribes that "[t]he provisions of this Article shall not apply to (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them".

90 *General Officer Commanding v. CBI and Anr.*, Criminal Appeal No. 257 of 2011, Supreme Court of India, Judgment of 1 May 2012, available at: http://judis.nic.in/supremecourt/helddis3.aspx.

91 Public Offences (and Punishment) Act 2027 (1970), s.4.

the possibility to prosecute suspects who happen to be in its territory irrespective of their nationality and has criminalised torture, albeit, defectively.[92] The procedure, however, has not been tested in practice. The fact that many of the other countries have yet to criminalise torture constitutes a further hinderance to the prosecution foreign nationals for torture committed abroad.

In addition to obligations assumed by most countries under the Geneva Conventions to prosecute torture committed within the context of international armed conflicts,[93] the Philippines provides for the possibility of exercising jurisdiction over acts of torture constituting crimes against humanity.[94] However, these procedures have yet to be tested in practice. Overall, the lack of exercise of universal jurisdiction is an important lacuna across the region as such practice by at least some of the countries is likely to encourage accountability at the domestic level. It therefore constitutes an important area of advocacy focus for civil society in the region.

Reparation

Reparation refers to measures aimed at repairing the damage caused by an illegal act and restoring the dignity of of the victim.[95] Several human rights treaties, including Article 2(3) ICCPR and Article 14 UNCAT, impose an obligation on the State to provide an individual with an effective remedy and redress. The UN Basic Principles on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('UN Basic Principles and Guidelines'), also underline that States have the responsibility to provide victims with "adequate, effective and prompt reparation"[96] which should be "proportional to the gravity of the violations and the harm suffered".[97] Most recently, the CAT clearly articulated the scope of the obligation under Article 14, in its General Comment No. 3,[98] recognising the five elements of

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92 Art 4(1) of CAT Act.

93 See for example India's The Geneva Conventions ACT NO. 6 OF 1960, s. 3, http://indiankanoon.org/doc/1954823/.

94 See the *Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity Philippinnes*, Crimes against Humanity, s. 17. Republic Act No. 9851," signed into law on 11 December 2009.

95 REDRESS, *Reparation: A sourcebook for victims of torture and other violations of human rights and international humanitarian law*, 2003, available at: http://www.redress.org/downloads/publications/SourceBook.pdf; REDRESS, *Implementing Victims' Rights—A Handbook on the implementation of Basic Principles and Guidelines on the Right to a Remedy and Reparation*, March 2006, available at: http://www.redress.org/downloads/publications/Reparation%20Principles.pdf; see also *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985, at http://www2.ohchr.org/english/law/pdf/victims.pdf.

96 Principle 15.

97 Principle 18.

98 CAT, General Comment No. 3(2012), Implementation of Article 14 by States Parties, CAT/C/GC/3, 13 December 2012

the right to reparation as outlined in theUN Basic Principles and Guidelines, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[99]

The country studies reveal signficant gaps both in the legal framework and the practice of providing reparation for victims of serious human rights violations, including torture and ill-treatment. To begin with, few countries provide for forms of reparation other than compensation. The exceptions include Indonesia's Human Rights, Law No. 26/2000 and its implementing regulations, which provides that victims are entitled to compensation, restitution and rehabilitation.[100] Yet this avenue is only available to victims of genocide, crimes against humanity and war crimes and leaves out the large majority of victims of torture that do not fall into these categories. Moreover, the reparation measures envisaged have not been effectively implemented, even in respect of most victims of the crimes covered by the law due to serious irregularities in the relevant proceedings put in place to implement the law. The recent Philippines' Anti-Torture Act alsoprovides for the right to claim compensation and the creation of a comprehensive rehabilitation programme within one year since the coming into force of the law.[101]

In most countries, torture victims can only seek compensation. Nepal specifically provides for the right to compensation for torture victims under its Interim Constitution and its law on Compensation Relating to Torture (CRT). This framework appears to have led to the perception among the authorities in Nepal that the payment of compensation could absolve the Government from its other responsibilities including criminal prosecution and other forms of reparation.[102] Moreover, the amount provided by the CRT is extremely low and cannot be considered adequate.[103]

While other countries do not have specific compensation regimes for torture victims, such victims can, in principle, seek compensation in the form of damages either through civil tort actions, fundamental rights applications or through complaints to NHRIs. Many of these avenues, however, involve procedural hurdles including the requirement that criminal proceedings be completed or unduly short time limits for filing applications.In practice, even the avenues for the limited right to compensation

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99 UN General Assembly in 2005; see UN Doc. A/RES/60/147, 16 December 2005.

100 Government Regulations No. 2/2002 and Government Regulation No.3/2002.

101 Section 18 of Anti-Torture Act.

102 There is actually a case where an appeals court upheld a finding of torture under the CRT Act, and the award of compensation, but overturned an order for departmental action against the perpetrators on the grounds that to do so would 'hamper the work of police'. See Judgment of the Appellate Court, Biratnagar, 2 June 2011, on appeal from the order of the District Court, Morang, 29 March 2010; see Advocacy Forum and REDRESS report of December 2011, p.52.

103 Section 5 of CRT.

are beyond the reach of most victims as a result of some of the same factors that hinder accountability for torture. These include limited awareness among victims, fear of adverse repercussions, lack of independence among judges especially in lower courts, inadequate resources and lengthy proceedings. Victims also face significant procedural and evidentiary hurdles to bring civil suits, such as unduly short time limits for filing applications.These hurdles are particularly pronounced where criminal proceedings need to be completed first, but this has not happened in practice. In Kazakstan, a civil suit for damages can only be brought after the institution of criminal proceedings. Unsurprisingly, the then Special Rapporteur on Torture noted during his 2008 visit to Kazakhstan that he could not find a single example of a case where compensation has been awarded. This applied even when there was a conviction for torture.There are also a series of specific additional obstacles. In India and Bangladesh,for example, the requirement of prior sanctions by the authorities frustrate the effectiveness ofcivil suits for damages. The draft Prevention of Torture Bill in India maintains a requirement of prior sanction in order to bring a civil suit against public officials, which needs to be removed in order to make remedies more effective.As mentioned earlier, NHRIs often lack the independence or the authority to order and enforce compensation awards against states.

B. Conclusion: challenges and opportunities ahead

The challenges to the implementation of the prohibition of torture and the right to reparation in most of the countries examined are numerous and daunting, requiring a concerted effort and willingness to undertake fundamental legal and institutional reforms. Such reforms should be aimed at putting in place an adequate legal and institutional framework, removing legal obstacles to accountability and tackling the entrenched culture of disregard for human rights and widespread corruption among law enforcement agencies and in the administration of justice. In sum, while the nature and content of the reforms required may vary from one country to another, a comprehensive approach consisting of the elements set out below is needed to promote the absolute prohibition of torture and survivors's right to reparation across the region.

The criminalisation and punishment of torture

Lack of acountability in the form of effective investigation and prosecution of suspectsof torture and ill treatment is a common problem across the countries examined in the report, irrespective of whether torture is proscribed as a specific offence or not. Yet, the criminalisation of torture is an important first step for most of the countries considered, to develop a practice in which perpetrators are adequately held to account. To this end,States need to make torture a criminal offence in their domestic laws,

in line with the definition provided for under CAT, and provide for appropriate sentences. In order to be effective, however, such legislative steps need to be complemented by other measures aimed at incorporating the relevant prohibitions in laws and regulations and thorough and compulsory training for law enforcement agents and security forces as well as justice sector officials, as appropriate. Given the pervasive insensitivity of officials to the gravity of torture as noted in many of the reports, the criminalisation and prosecution of torture can provide a valuable opportunity for sensitising state agents as well as the wider population.

Amendment of special laws and guarantee protection of people deprived of liberty

Laws granting unfettered powers and immunity to security forces should be revised in line with international law standards applicable to the rights of individuals deprived of their liberty. Detainees should be guaranteed access to legal counsel, including provisions for legal aid for indigent detainees, access to independent medical examination upon arrest and release from detention and access to visits by family members. They should also be given the right to be promptly brought before a judicial authority in the course of criminal proceedings and the right to be able to challenge the lawfulness of arrest and detention, which applies to all forms of deprivation of liberty.These rules and standards should also be included in the internal rules and regulations of institutions that have the power to arrest, or detain individuals and conduct investigation at both the national and local levels and shall be part of the training programmes for their staff. The use of confessions made to the police or investigators as evidence should be discouraged so as to remove one of the primary incentives behind most acts of torture.

It is equally important for states to ratify OPCAT, set up NPMs and allow unrestricted access to places of detention to independent oversight mechanisms including the SPT, NPMs, NHRIs and other national international organisations.

An enforceable right to reparation and mechanisms for the protection of victims and witnesses

There is a need in most of the countriesto enact laws providing for a comprehensive and enforceable right to reparation in line with the UN Basic Principles and Guidelines. States need to ensure that victims' access to justice and reparation is not curtailed by prohibitive fees, undue delays and evidentiary requirements. The exercise of such rights as well as the effective investigation and prosecution of torture requires the establishment of credible protection schemes for victims and witnesses against reprisal on account of their complaints or testimony and the removal of obstacles such as immunities or statutes of limitation. It is

also important for India to ratify UNCAT and for the majority of countries examined, including India, to accept the competence of the HRC and CAT to receive individual complaints.

Strengthening the judiciary and police reform

Legislative reforms alone would be meaningless in the absence of a strong and independent judiciary that is capable of safeguarding the rights guaranteed by law. This requires putting in place a mechanism that would ensure appointments to judicial positions are based on merits and integrity; and guaranteeing the security of tenure for judges and procedures according to which complaints into allegations of abuse of office by judicial officers are investigated by an independent body and with full transparency. The judiciary at all levels must be free from executive interference and provided with adequate resources to be able to function independently and avoid long delays in adjudication. States also need to take appropriate measures to stamp out corruption from the justice sector and introduce reforms within the police and security institutions. Such reforms should include the introduction of internal guidelines and rules that are in line with international standards, putting in place effective complaint and investigation procedures, and vetting of officials alleged to have been involved in human rights violations.

The role of civil society and lawyers

The challenges outlined above require concerted efforts by civil society, focusing on the promotion of the different strands of human rights protection and implementation at the domestic level. These would include awareness raising targeting the public as well as the relevant state actors, advocacy for legislative and institutional reforms while also demanding the enforcement of existing laws. Civil society, including lawyers, can also monitor that appointment to judicial positions are based on critera such as integrity and that competence plays an important role in monitoring detention facilities and the functioning of other key institutions such as the judiciary, thereby contributing to greater transparency, and potentially accountability. Other crucial tasks for civil society in the region include the investigation and documentation of cases of torture and other abuses; helping survivors file complaints to the relevant bodies and filling gaps in the areas of access to counsel and medical examination/treatment for survivors. Civil society efforts at the domestic level, however, need to be complemented with a multi-pronged strategy that targets all the relevant mandate holders and procedures of the UN human rights system, which should include the relevant treaty bodies, as appropriate (ICCPR, CAT, and CEDAW), the thematic procedures (the Special Rapporteur on Torture and the Special Rapporteur on the Independence of Judges and Lawyers) and the Universal Periodic Review.

COUNTRY STUDIES

1. Bangladesh*

1.1. Practice and patterns of torture

Bangladesh gained independence in 1971 after separating from Pakistan. Following a period of military rule, Bangladesh became a parliamentary democracy in 1990. Much of Bangladesh's legislation has its origins in British law, due to British control of India and Pakistan until 1947. A Constitution was adopted in 1972, outlining certain fundamental legalprinciples and providing for the continuity of pre-existing laws.[104]

Reports of torture by public officials span Bangladesh's history and date back to the conflict resulting in Bangladesh's independence, which was characterised by serious human rights violations, including torture.[105] Bangladesh's International Crimes Tribunal (ICT) has been established to try alleged perpetrators of genocide, war crimes, and crimes against humanity committed during the war in 1971.[106] The tribunal has indicted eight people accused of committing such crimes, including a prominent leader of the main Islamist party, Delwar Hossain Sayeedi. However, it has been criticised over its procedural rules, and for failing to guarantee the safety of defence witnesses, lawyers, and investigators involved in cases.[107]

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* Based on initial contribution by Saira Rahman Khan, founding member of Odhikar and Associate Professor of Law, BRAC University, Bangladesh.

[104] Constitution of the People's Republic of Bangladesh, 4 November 1972 ("Constitution"), s. 149: "*Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution*."

[105] See for example, REDRESS, *Torture in Bangladesh 1971-2004*, August 2004, available at: http://www.redress.org/downloads/publications/bangladesh.pdf.

[106] See the International Crimes (Tribunals) (Amendment) Act, 2009, No. LV of 2009. The establishment of such a tribunal was initially foreseen in the 1973 International Crimes (Tribunals) Act but was abandoned following the blanket amnesty issued in the same year by a presidential order. See the International Crimes (Tribunals) Act, No. XIX of 1973,and Presidential Order No. 16, 1973. For a brief background, see Jon Lunn and Arabella Thorp, *Bangladesh: The International Crimes Tribunal*, 3 May 2012, available at: www.parliament.uk/briefing-papers/SN06318.pdf.

[107] Human Rights Watch, *Country Summary: Bangladesh*, January 2012, available at: http://www.hrw.org/sites/default/files/related_material/bangladesh_2012.pdf.pdf

The constitutional prohibition of torture is hollow in Bangladesh and torture is frequently used as a method of interrogation and extortion.[108] According to the Asian Legal Resource Centre:

> Torture is not the exception or the result of a few rogue elements in Bangladesh, but is near-systematic in its use and systematically accompanied by impunity for the perpetrators. Those who attempt to register a complaint of torture not only fail but then face reprisals. The system of impunity further propagates the practice of torture.[109]

There are well-documented allegations of widespread torture perpetrated by law enforcement personnel as part of an institutionalised practice in Bangladesh. An increase in specialised law enforcement agencies – the Rapid Action Battalion (RAB), Cobra and 'joint forces' – to assist the civilian force, has reportedly resulted in an increase in the use of torture and other cruel and inhuman treatment.[110]

One of the main purposes of torture by law enforcement officials is to obtain a "confessional statement." There is a basic pattern leading to the torture of an accused person; he or she is first arrested by the police and may be verbally abused and subjected to a few slaps or kicks during that time. He or she has to be presented before a Magistrate within 24 hours of the arrest, when the police may ask for up to 15 days remand in order to 'question' the arrestee. Remand is what all detainees fear. It is during that time that they are beaten, intimidated, given electric shocks, kicked and verbally abused in order to extract a confession and a quick "solution" to the crime.

According to the Bangladeshi human rights organisation Odhikar's annual reports on torture cases spanning the last 10 years,[111] the following categories of victims of torture are identified:

1. Poor and marginalised groups, including pavement hawkers, small shop owners and shop workers. Such individuals-who cannot afford legal representation - can be tortured into giving a confession and consequently implicated in a pending investigation, regardless of their innocence or guilt in the alleged offence.

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[108] Asian Legal Resource Centre (ALRC) on the 10th Session of the Human Rights Council, 16 February 2008. Ref: ALRC-CWS-10-02-2009.

[109] Ibid.

[110] Asian Human Rights Commission, *Bangladesh: Rulers establish an illusion of rule of law and democracy to deprive people by all means*, 2011, available at: http://www.humanrights.asia/resources/hrreport/2011/AHRC-SPR-003-2011/view/

Also in Odhikar, Fact finding Reports, 2012, available at: http://www.odhikar.org/FF/ff2012/Disappearence/English/FFReport[English]Mukaddas_and_Waliullah.pdf and http://www.odhikar.org/FF/ff2012/RAB/English/FFReport[English]Momin_Molla.pdf.

[111] Available at: www.odhikar.org.

2. Religious minorities -such as Hindus, Buddhists and Christians- have also been subject to torture and ill-treatment, with abuses reportedly being committed by the armed forces, extremist groups and Bengali settlers in the Chittagong Hill Tracts region of southeast Bangladesh.
3. Opposition political party activists, including the main opposition group the Bangladesh Nationalist Party (BNP) and all other organisations that contest the governing party. This category also includes 'banned' organisations, such as the Hizb-ut-Tahrir.
4. Members of 'underground' or 'outlawed' political parties.
5. Individuals who are vocal about human rights issues, including journalists, human rights defenders, lawyers, social workers and teachers.

Prisoners are also at risk of torture and ill-treatment in detention. They can be punished for committing certain offences, including feigning illness, wilfully bringing a false accusation against any officer or prisoner, the use of insulting or threatening language or disorderly behaviour.[112] Possible punishments, to be determined by the Superintendent, include hard labour, the imposition of handcuffs or fetters, solitary confinement and whipping.[113] The Superintendent also has the discretion to, with reference either to the state of the prison or the character of the prisoners, keep a prisoner in irons.[114]

Methods documented by Human Rights Watch and other human rights organisations include burning with acid, hammering nails into toes, drilling holes in legs with electric drills, electric shocks, beating on legs with iron rods, beating with batons on backs after sprinkling sand on them, ice torture, finger piercing and mock executions.[115]

Extra-judicial killings and disappearances have also been widely reported. Such killings are often dismissed as 'encounter killings' or 'crossfire killings.' Bodies recovered from open spaces, fields, etc. of persons earlier claimed to have been picked up by police or RAB personnel, frequently bear marks of torture and abuse, including extensive bruising, loss of nails, wounds and broken bones.[116]

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[112] The Police Act 1894, s.45.

[113] Ibid., s. 46: Only separate confinement for a period exceeding one month requires the confirmation of the Inspector General.

[114] Ibid., s. 56.

[115] Human Rights Watch, *The Torture of Tasneem Khalil*, February 2008, available at: www.thinkweb.hrw.org/en/reports/2008/02/13/torture-tasneem-khalil.

[116] See Odhikar, *Human Rights Report on Bangladesh 2010*, available at: http://www.odhikar.org/documents/2010/English_Reports/Annual_Human_Rights_Report_2010_Odhikar.pdf and other fact finding reports on torture cases, carried out and reported by Odhikar at www.odhikar.org.

There are also reports of law enforcement officials demanding bribes from detainees or their families if they with to avoid torture or further detention. For example, on 6 November 2008, Shahidul Islam and Monirul Islam Monir were summoned to the Paikgachha police station in Khulna district in connection with an alleged theft. In detention, they were beaten with bamboo sticks in various parts of the body including the soles of their feet, knees, elbows and backs. The police sought to extort money from the two men, but they could not afford to pay the bribes, leading to their repeated torture. Monir's mother borrowed 2,000 Taka (about $ 29) and paid it to the police. Later that same day, Monir and Shahidul were produced before the Magistrate's Court. The police fabricated a case under section 34 of the Police Act 1861, which allows the police to arrest people for petty offences without any prior direction from a magistrate. In the complaint, the police falsely claimed that Shahidul and Monir were found shouting in the street near the Magistrates' Court the previous night. Prior to being produced before the Court, the police reportedly instructed both men to confess to the offence if they wanted to be released after paying a fine.[117]

Torture and cruel and inhuman treatment are also used by law enforcement to demoralise, scare and stop the activities of specific groups, such as journalists, political activists and human rights defenders. There have been times, especially during the State of Emergency in 2007-2008, when newspaper offices have been monitored, their reports closely censored and journalists threatened and tortured for exposing flaws in law enforcement or for criticising government actions.[118]

1.2. Legal framework

International law

Bangladesh acceded to the Convention against Torture (CAT) in October 1998, with a reservation to Article 14(1), which states that:

> *Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*

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[117] Ibid. See also, Asian Human Rights Commission, *Bangladesh: Two men arbitrarily detained and tortured by police to elicit bribes*. Available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-049-2009

[118] See for example Odhikar'sfact-finding report, Journalist Noor Ahmed Tortured and Forced to Stay Away from Profession by RAB in Sylhet, 2008, available at: http://www.odhikar.org/FF_report.html.

Bangladesh declared that it would apply this Article "in consonance with the existing laws and legislation in the country."[119]

The country also acceded to the International Covenant on Civil and Political Rights (ICCPR) on 6 September 2000, but is not party to the Optional Protocols to the CAT or the ICCPR or the Convention for the Protection of All Persons from Enforced Disappearance. Additionally, it has not recognised the competence of any international body to receive individual complaints.

In 2006, Bangladesh became a member of the UN Human Rights Council and was re-elected on 12 May 2009. It made voluntary pledges regarding the promotion and protection of human rights, in which it promised to "continue to cooperate with the special procedures and mechanisms of the Council with a view to further improve its human rights situations."

International treaties are not directly applicable and must be incorporated into domestic legislation. Courts may consider principles of international law;however, there is no consistent practice in this regard.[120]

National legal system

The Constitution of the People's Republic of Bangladesh is the highest law in Bangladesh. It contains a chapter on Fundamental Rights, largely borrowed from the Universal Declaration of Human Rights. According to section 35(5), "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."

Section 35(4) of the Constitution states that "no person accused of any offence shall be compelled to be a witness against himself." The main objective of section 35(4) is to protect an accused person from any compulsion to make self-incriminating Statements, including confessions.

The definition of torture and its prohibition are noticeably absent from criminal legislation. References to the prohibition of torture and ill-treatment are also absent from regulations and operating procedures governing prisons, mental institutions, juvenile detention centres, schools and the like. The Code of Criminal Procedure prohibits police officers threatening suspects or any other persons, but does not specifically refer to torture.[121]

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[119] See Status of Ratifications, United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

[120] REDRESS, *Torture in Bangladesh 1971-2004*, pp.16-17.

[121] The Code of Criminal Procedure 1898, s.163 (1).

The Penal Code 1860 provides for the crimes of hurt, grievous hurt, intimidation and wrongful confinement. Under the Code, "whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."[122] Grievous hurt, according to the Penal Code, includes the following acts:

- Emasculation
- Permanent blindness of one or both eyes
- Permanent loss of hearing of one or both ears
- Privation of any member or joint
- Destruction or permanent privation of the power of any member or joint
- Permanent disfiguration of head or face
- Fracture or dislocation of bone or tooth
- Any hurt that endangers life/causes the sufferer to be in severe bodily pain for 20 days or more.

Furthermore, the Penal Code states that it is a criminal offence to cause hurt or grievous hurt in order to extort a confession or information leading to the detection of an offence or the restoration of any property or valuable security or to extract information that may lead to such restoration.[123] Depending on the particular circumstances or methods, punishment for hurt may extend to up to seven years imprisonment and include a fine.[124] Punishment for grievous harm may extend to ten years imprisonment and a fine.[125]

Mental pain or suffering is not expressly recognised and psychological torture is hardly ever documented. Examples of inhuman and degrading treatment that may amount to torture are mock executions, extended solitary confinement and the violation of social norms (stripping the victim, mocking, etc.).

On 5 March 2009, a draft Bill on criminalisation of torture and custodial deaths was tabled in the Parliament as a Private Member's Bill.[126] The Bill remains under review by the Ministry of Defence, the Ministry of Home Affairs and the Ministry of Law, Justice and Parliamentary Affairs. The new government has a 3/4 majority in parliament and should therefore be able to pass such a Bill. However, it has yet to make a clear commitment concerning the criminalisation of torture.

The Extradition Act 1972 prohibits the extradition of a fugitive if the offence for which he or she is sought is of a political character or, if surrendered, the fugitive might be prejudiced

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122 Penal Code 1860, s.319.

123 Ibid., ss.330 and 331.

124 Ibid., ss.319-338.

125 Ibid.

126 Torture and Custodial Death (Prohibition) Bill, 2009, draft available at: http://www.bangladesh.ahrchk.net/docs/TortureandCustodialDeathBill2009.pdf.

at his or her trial or punished, detained or restricted in his or her personal liberty by reason of his race, religion, nationality or political opinions.[127] Bangladesh is a member of the 1966 Asian-African Legal Consultative Committee, which adopted the Bangkok Principles on the Status and Treatment of Refugees, recognising the principle of non-refoulement. However, there are no provisions in Bangladeshi legislation providing for the prohibition of refoulement, extradition or transfer of an individual to a country where he or she faces a real risk of torture or ill-treatment. Additionally, Bangladesh has not enacted any laws relating to universal jurisdiction.

1.3. Safeguards and complaints mechanisms

Limits to and supervision of pre-trial detention

The Constitution provides certain safeguards as to arrest and detention. Namely, it provides that no person who is arrested shall be detained in custody without being informed of the grounds for such arrest, nor shall he or she be denied the right to consult and be defended by a legal practitioner of his or her choice.[128] Moreover, it provides that every person who is arrested and detained must be produced before the nearest magistrate within 24 hours of arrest and no person will be detained in custody beyond that period without the authority of a magistrate.[129] A magistrate may authorise detention for up to 15 days.[130]

The Police Act requires officers to keep a diary to record all the names of persons arrested, the names of the complainants, the offences charged, the weapons or property that was taken from their possession or otherwise, and the names of the witnesses who were examined.[131] The Magistrate of the district is at liberty to call for and inspect such diary.

Although the general rule is that a person should not be arrested without a court warrant, the exceptions provided under the Code of Criminal Procedure are too broad to serve as a safeguard against arbitrary arrest. Section 54 provides nine circumstances in which the police may arrest an individual without a warrant,[132] including where a "person…has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned."[133]

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127 Extradition Act 1972, ss. 5(2)(a) and (h).

128 Constitution, s. 33(1).

129 Ibid.,s.33(2).

130 Code of Criminal Procedure, s.167.

131 Police Act, s.44.

132 Code of Criminal Procedure, s. 54(1).

133 Ibid.

The above provision and the power granted to magistrates under section 167 of the Code of Criminal Procedure[134] to remand a suspect in police custody were the subject of a writ petition filed by several human rights organisations in *Bangladesh Legal Aid and Services Trust (BLAST) and Others v. Bangladesh and Others*.[135] The petitioners requested the Court to enunciate safeguards to prevent or curtail police abuse of powers and arbitrary actions by Magistrates, which constitute violations of several fundamental rights guaranteed in the Constitution.[136]

In a landmark ruling, the Supreme Court observed that sections 54 and 167 of the Code of Criminal Procedure 1898 are not fully consistent with constitutionally guaranteed freedoms and safeguards. The Court laid down a comprehensive set of recommendations regarding necessary amendments to both sections of the Code of Criminal Procedure 1898, the Penal Code 1890 and the laws pertaining to 'evidence' and the police, and directed that these should be acted upon within six months. It also set out a set of fifteen guidelines with regard to the exercise of powers of arrest and remand, such as: the obligation to inform the individual of the reasons of his arrest within three hours of bringing him to a police station, to inform relatives of his arrest, and to require that the police must satisfy the magistrate that the investigation could not be completed within twenty four hours and that the accusation and information are well founded.[137]

The Court also ordered the Government to amend the law relating to the interrogation of individuals remanded in custody. It further directed that glass-partitioned rooms in prisons be constructed for interrogation purposes and until such rooms are constructed, arrestees are to be interrogated at the prison gate in the presence of relatives and lawyers. However, the Government has failed to implement the above recommendations and the construction of glass-partitioned rooms have not materialised.

Consequently, there are currently no effective guarantees against police abuse and custodial torture. There are reports that the police lie about the date on which an individual was taken into custody so that they can detain him or her for longer than 24 hours before being taken in front of a magistrate. When family members attempt to locate a person they have reason to believe

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[134] Code of Criminal Procedure, s.167: "If an investigation cannot be completed within 24 hours of arrest, and there are grounds to believe that the accusations are well-founded", the Magistrate can order that the accused be further detained "for no more than 15 days."

[135] *BLAST and Others v. Bangladesh and Others*, 55 DLR (2003) 363.

[136] Section 27 of the Constitution states that all citizens are equal before the law and are entitled to equal protection of law. Other constitutional provisions includes. 31 (the right to protection of the law); s. 32 (the protection of right to life and personal liberty); s. 33 (safeguards in relation to arrest and detention); and s. 35 (guarantees in connection with trial and punishment).

[137] For a list of all 15 recommendations, see: *BLAST and Others v. Bangladesh and Others*, pp. 36 - 38.

is in police custody, the police deny knowledge of the arrest or whereabouts of such person, as is demonstrated in one of the telling cases of custodial death reported by Odikhar. On 13 April 2008, Fakir Chan called his wife, Rahela, and told her that he had been arrested, but could not say where he was being kept. Rahela immediately went to the Siddhirganj Police Station, but was told he was not there. She then went to the Narayanganj Police Station, and was told that they did not hold him. However, on leaving, she saw Fakir Chan through a window on the first floor. She went back inside and told the police that she had seen him and they told her to return the next day. After having been denied access to Fakir Chan on her subsequent visits to the police station, Rahela went to the Detective Branch of Police and learned that her husband was being interrogated there but she was again denied access. On 19 April, Rahela learned from a local TV reporter that her husband had died and he was buried the following day under police scrutiny.[138]

Some constitutional guarantees of due process do not apply to 'enemy aliens' or those arrested or detained under a law providing for preventive detention.[139] The Constitution allows the enactment of laws providing for preventive detention for up to six months, which can be extended by an Advisory Board that considers sufficient cause for continued detention.[140] The authority making the order is only obliged to communicate the grounds for the order "as soon as may be" and afford the "earliest opportunity of making a representation against the order."[141]

Furthermore, there are problematic provisions in national security legislation that grant the State extraordinarily broad powers of arrest and detention. The Special Powers Act of 1974 gives the Government and magistrates the power to order the detention of an individual with a view to preventing him from carrying out any 'prejudicial act'.[142] Prejudicial activity includes any act which is intended or likely to prejudice the sovereignty or defence of Bangladesh, prejudice the maintenance of friendly relations of Bangladesh with foreign states, endanger public safety or the maintenance of public order, to create or excite feelings of enmity or hatred between different communities, classes or sections of people, to interfere with or encourage or incite interference with the administration of law or to cause fear or alarm to the public or to any section of the public.[143]

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[138] Odhikar fact finding report, A Man Allegedly Tortured to Death by Police at Narayanganj, 2008, available at: http://www.odhikar.org/FF_report.html.

[139] Constitution, s. 33(3).

[140] Ibid., s. 33(4).

[141] Ibid., s. 33(5).

[142] Special Powers Act 1974, s. 3.

[143] Ibid., s. 2(f).

A person arrested under the Act can be detained in such place and under such conditions, including conditions as to discipline and punishment for breaches of discipline, as the Government may order.[144] An Advisory Board composed of two judges and an official, all appointed by the Government, establishes whether there is sufficient evidence to detain a person and is required to submit its report within 170 days from the date of detention.[145] If the board considers there to be sufficient cause for the detention, the Government may continue the detention of the person concerned for such period as it thinks fit; the Board is only required to review the detention every six months.[146] The Special Powers Act overrides all other laws.[147]

There is no independent mechanism for regularly monitoring prisons and detention facilities and visits by human rights groups and international organisations are uncommon. Although district magistrates and senior officials are expected to visit prisons within their jurisdiction once a week, it is reported that they rarely do so. Moreover, prisoners do not often complain against prison staff for fear of retaliation.[148] There is also a general lack of confidence in the magistracy, which is largely viewed as corrupt. A household survey of 6,000 homes, conducted by Transparency International Bangladesh between June 2009 and May 2010, found that a total of 88% of the households had been subject to judicial corruption and 58.9% had to pay bribes to the Magistrates Court.[149]

The National Human Rights Commission (NHRC) was established in 2009 with powers to analyse human rights laws, develop policies, investigate violations and promote human rights in Bangladesh.[150] The NHRC is also empowered to visit detention centres and to request information from law enforcement agencies or government agencies regarding an allegation of human rights violations. The NHRC enjoys the power of a civil court, including the power to issue summons and to recommend the Government to provide temporary monetary grant to the aggrieved person or his family.[151] In case of non-compliance of the reports and recommendations, the NHRC can bring the matter to the notice of the President who shall cause it to be laid before parliament.[152]

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144 Ibid., s. 5.

145 Ibid., ss. 8-11.

146 Ibid., s. 12.

147 Ibid., s. 34B.

148 See UNDP, Human Security in Bangladesh, in Search of Justice and Dignity, September 2002, pp. 84, available at: http://www.undp.org.bd/info/hsr/.

149 Transparency International Bangladesh, *Corruption in the Service Sectors: National Household Survey*, 2010, p. 10, available at: http://ti-bangladesh.org/documents/annualreport/TIB%20Annual%20Report%202010.pdf.

150 The National Human Rights Commission Act of 2009, available at: http://www.nhrc.org.bd/PDF/NHRC%20Act%202009_1_.pdf.

151 Ibid, Arts 16 and 19 (2), Id.

152 Ibid, Art 14(6), Id.

The NHRC may also lodge an application to the High Court Division if the case fits with the conditions of filing writ petitions under the Constitution.[153] However, the NHRC has yet to assert itself as a fully functioning and independent organisation owing to resource constraints and the Government's failure to approve its internal rules.[154]

Access to a lawyer and compulsory medical check-up upon arrest

Although the Constitution provides that detainees shall have the right to consult and be represented by their counsel, most detainees have limited access to a lawyer because of lack of resources and shortage of lawyers.[155] Under the Prisons Act of 1894, every criminal prisoner shall, as soon as possible, be examined by a medical officer.[156] Moreover, "the Jailer shall, without delay, call the attention of the Medical Subordinate to any prisoners desiring to see him, or who is ill, or whose state of mind or body appears to require attention, and shall carry into effect all written directions given by the Medial Officer or Medical Subordinate respecting alterations of the discipline or treatment of any such prisoner."[157] In reality, however, even ailing prisoners do not have access to adequate medical treatment because of lack of medical facilities and staff in Bangladeshi prisons.[158]

Admissibility of evidence obtained under torture

The Evidence Act 1872 states that:

> *A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*[159]

The Code of Criminal Procedure 1898 provides that a confession "shall not be made to a police officer" and that "it must be made to

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153 Ibid, Art 19(b), Id.

154 Sayeed Ahmed, For an independent human rights commission, 14 March 2011, available at: http://www.thedailystar.net/suppliments/2011/anniversary/part1/pg8.htm.

155 Freedom House, Freedom in the World: Bangladesh, 2011, available at: http://www.freedomhouse.org/report/freedom-world/2011/bangladesh.

156 The Prisons Act 1894, s. 24(2).

157 Ibid., s. 37.

158 See UNDP, Human Security in Bangladesh, in Search of Justice and Dignity.

159 Evidence Act of 1872, s. 24.

a Magistrate". It also lays down that "the Magistrate must record it in the prescribed format and only when so recorded does it become relevant and admissible in evidence".[160] Under section 164 of the Code of Criminal Procedure 1898 the Magistrate must be satisfied that: "I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

Notably, under section 27 of the Evidence Act, a statement made by the accused in police custody, which leads to the recovery of incriminating information may be relied upon when it is found to be true and consequently, other corroborative evidence that is adduced as a result of a forced confession may be admissible in such cases.[161]

1.4. Accountability

Complaint and investigation

Victims of torture may report violations to the police or a magistrate.[162] Depending on whether the alleged offence is defined as a cognisable or non-cognisable offence, there are different procedures that follow.[163] Most notably, the police are obliged to investigate cognisable offences, while they must seek an order from a magistrate to investigate non-cognisable offences. Both the police and the magistrate have discretion in deciding whether there are sufficient grounds to investigate.[164]

The police must report all deaths to a magistrate and conduct an inquiry where the victim "has been killed by another" or "has died under circumstances raising a reasonable suspicion that some other person has committed an offence".[165] When any person dies while in police custody, the nearest magistrate empowered to hold inquests shall hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer.[166]

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160 Huq, Zahirul. *Law and Practice of Criminal Procedure*, 10th ed., Bangladesh Law Book Company 2006, p. 258.

161 Evidence Act, s. 24.

162 Code of Criminal Procedure, ss. 154, 200 and 225.

163 Ibid., s.4 (f) and second schedule of the Code of Criminal Procedure according to which, *inter alia*, ss. 302, 304, 324, 325, 326, 330, 331 and 348 of the Penal Code are cognizable offences whereas ss. 166, 323 and 352 are not.

164 Code of Criminal Procedure, s. 157.

165 Ibid., s. 174.

166 Ibid., s. 176.

The Police Internal Oversight (PIO) unit of the Bangladesh Police was set up in 2007, with the objective of ridding the police force of corruption, restoring discipline, increasing efficiency and building credibility.[167] Individuals may submit complaints or suggestions via the PIO website. According to a press release in 2011, they had received 124 'informations' against police, 86 'informations' against others and 129 'suggestions', all information having been disseminated for investigation.[168] The PIO is not independent of the police, but is headed by an Additional Inspector General at the Police Headquarters and reports directly to the Inspector General of the Police. The PIO operates by carrying out surveillance of police practice throughout the country and disseminating information received via complaints.[169] Despite having a limited budget, the PIO has reportedly investigated over 17,000 cases of police malpractice in the previous 2 years as of December 2009.[170]

Still, victims or their families rarely report instances of torture for fear of retribution and due to a feeling of distrust of the justice system. Most victims also cannot afford the massive bribes and costs of the complaint process. Another problem is the investigation procedure. It is usual for the officers of the same police station to investigate an allegation of torture against a colleague. As a result, the report is usually biased.[171]

In very rare cases, the police or the Ministry of Home Affairs may start an investigation into an alleged instance of torture, usually as a result of pressure from human right organisations, lawyers, international human rights groups or members of certain civil society groups, but these investigations do not result in prosecutions or punishments that are in line with international standards. Sanctions against the perpetrators amount at most to temporary suspensions or the curtailment of benefits for a period, or transfer to another district. Corruption – which is rife throughout the police force in Bangladesh – combined with influences from inside and outside the police and judiciary, plays a key role in ensuring impunity for the perpetrators. Below is an example of what appears to be a cover-up of the torture and death of an individual by navy officials.

> *Khabirul Islam Dulal was detained by a naval contingent from the camp in Bhola. They accused Dulal of possessing illegal weapons and beat him and his wife before taking Dulal to the navy camp.*

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167 See the website of the Police Internal Oversight, available at www.pio.gov.bd.

168 Ibid., http://www.pio.gov.bd/index.php?menu_id=78&exmenu=78&page=1.

169 Ibid.

170 International Crisis Group, Bangladesh: Getting Police Reform on Track, Asia Report No.182, December 2009, p. 21, available at: http://www.crisisgroup.org/~/media/Files/asia/south-asia/bangladesh/182%20Bangladesh%20Getting%20Police%20Reform%20on%20Track.

171 See Odhikar fact finding reports on torture, available at: www.odhikar.org.

Dulal drowned in a pond at the camp. Navy officials stated they had conducted an internal investigation and found that Dulal had fallen into the pond and drowned while attempting to flee. According to an autopsy, at the time of Dulal's death, his body, including his genitalia, was severely bruised, some of his finger and toenails were missing, and his throat was distended. An Odhikar investigator was threatened when he questioned navy personnel about the case. Later, navy intelligence officers picked up Odhikar's acting director and held him at navy headquarters for five hours. The officers verbally abused and threatened him and his family and allegedly held a gun to his head to make him sign a blank piece of paper. The government supported the navy's version of events, no further investigation was conducted, and no disciplinary action was taken.[172]

Applicability of amnesties and immunities

Certain public servants, including judges, magistrates, life-term public servants and members of the armed forces, are protected from prosecution unless sanctioned by the Government.[173] The Rapid Action Battalion is also indemnified from prosecution for anything which is done or intended to be done in good faith under the Armed Police Ordinance.[174] Furthermore, "Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area."[175] The Indemnity Act 2003, for example, granted impunity to the armed forces and the police for killing, torture, arbitrary arrests and detention during the Operation Clean Heart in late 2002 and early 2003.[176] However, the High Court has recently questioned the legality of the Indemnity Act, and has challenged the Government to explain why it is not unconstitutional in light of the abuses committed during Operation Clean Heart.[177] There have been concerns that the continuing application of various mechanisms providing

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[172] This incident was also reported by Odhikar and on the websites of the OMCT, *Bangladesh: Arbitrary detention, torture and subsequent death in Navy custody*, March 2007, available at: http://www.omct.org/urgent-campaigns/urgent-interventions/bangladesh/2007/03/d18492/.

[173] Code of Criminal Procedure, ss. 132 (acts done to stop unlawful assemblies) and 197.

[174] Armed Police Battalions Ordinance 1979, s. 13.

[175] Constitution, s. 46.

[176] See, Asian Human Rights Commission, *Bangladesh: Disappearance will never stop unless impunity is ended*, AHRC-STM-094-2012, 20 April 2012, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-094-2012/; Amnesty International, *Bangladesh: Indemnity Bill – A Human Rights Challenge for Parliament*, 26 January 2003, available at: http://www.amnesty.org.uk/news_details.asp?NewsID=14315.

[177] Kaiser Ahmed, *Why 'Operation Clean Heart' indemnity not illegal: HC*, Bangla News 24, 29 July 2012, available at: http://www.banglanews24.com/English/detailsnews.php?nssl=0b2dc5b52bfadc656ccc226aac89c006&nttl=2012073048733.

for immunity, such as the Indemnity Act and Article 46 of the Constitution, has created a climate of impunity in Bangladesh.[178]

The protection of victims and witnesses

The Penal Code prohibits criminal intimidation.[179] However, there is no specific framework for the protection of victims and witnesses in Bangladesh. There are certain statutes targeted at the protection of women and children in the context of domestic violence.[180] The High Court has held that the State has a duty to provide protection and to safeguard the rights of its citizens, including victims and witnesses, to ensure equality before the law, equal protection and the right to life and personal liberty.[181]

1.5. Reparation

There is no express right to a remedy for harm caused by public officials and the law does not provide for compensation for torture. Punishments for crimes are comprised of prison sentences, the death penalty and fines payable to the court.

The Constitution grants the right of judicial recourse to the High Court for the enforcement of rights conferred therein,[182] and the High Court has recognised its competency to award compensation for violations of fundamental rights.[183] The Supreme Court in Blast v. Bangladesh also held that it was able to award other forms of reparation, for example by directing the State to take measures of rehabilitation, satisfaction and guarantees of non-repetition.[184]

It is not possible for a victim of a crime to claim reparation as part of criminal proceedings. However, the court does have discretion to order the whole or any part of the fine recovered to be applied in the payment to any person for compensation for any loss or injury caused by the offence, when substantial

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[178] See, Asian Human Rights Commission, *Bangladesh: Disappearance will never stop unless impunity is ended*, AHRC-STM-094-2012, 20 April 2012, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-094-2012/; Asian Human Rights Commission, *Bangladesh: Rulers establish an illusion of rule of law and democracy to deprive people by all means*, from *The State of Human Rights in Ten Asian Nations*, AHRC, 2012, pp. 18-20 ; Asian Legal Resource Centre, *Bangladesh: UPR outcome adopted, but impunity persists*, ALRC-COS-11-14-2009, 10 June 2009, available at: http://www.alrc.net/doc/mainfile.php/alrc_st2009/569/.

[179] Penal Code, s. 503.

[180] Act For Suppression of Cruelty to Women and Children 2000; Act for the Disable Person 2001; Control of Acid Act 2002; Acid Offences Act 2002; The Legal Aid Act 2000; The Children Act 1974 and The Children Rules.

[181] *Tayazuddin and another vs. The State* 21 BLD (HCD) (2001) 503.

[182] Constitution, s. 44 (1).The right does not extend to POWs or those accused of international crimes and it may be suspended in emergencies.

[183] *Bilkis Akhter Hossain vs. Bangladesh & Others*, Supreme Court of Bangladesh (High Court Division), Judgment of 7 April 1997, 17 BLD (1997) (HCD) 395, (1997) 2 CHRLD 312.

[184] Ibid.

compensation is, in the opinion of the Court, recoverable by such person in a civil court.[185]

In civil suits, common law remedies are applicable and it is possible for individuals to bring claims for torts such as trespass against the person and assault.[186] Suits must be filed within a year[187] and may be filed against the individual perpetrator, the State or both. The plaintiff must pay a fee to the court, which varies depending on the amount sought, but may be as much as ten per cent of the value of the claim.[188]

Special Tribunals that apply the special laws on acts of violence against women and children, promulgated in the year 2000 and later, do have the power to direct compensation to the victim and/or family members.[189]

1.6. Conclusion

Torture remains endemic in Bangladesh. Throughout the public sector, there is a lack of basic resources, including a lack of infrastructure, personnel, training and proper investigative equipment, which contributes to the use of torture as an 'effective' and accepted tool for criminal investigation.

In addition, there is a fundamental lack of separation of powers and political interference from the executive has led to politically motivated decisions and lack of accountability for human rights violations, including the lack of disciplinary action against law enforcement personnel alleged to be responsible for torture. Officials benefit from immunities provided for in several laws and there is no functioning, independent system dealing with complaints of torture committed by law enforcement officials. As a result, the prospect of successful prosecutions in relation to allegations of torture or related violations is remote.

In order to stop torture, the Government must enact a law criminalising torture in line with international laws and standards and strengthen complaint and investigative mechanisms. The government must also ensure the effective and proper implementation of existing laws, in order to thoroughly and fairly investigate all allegations of arbitrary arrests and detention, torture and extra-judicial killings and pave the way for the prosecution of those alleged to be responsible, in fair trials. In this regard, it is necessary for the State to remove immunities protecting officials and law enforcement personnel from prosecution. Equally,the

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185 Code of Criminal Procedure, s. 545.

186 REDRESS, *Torture in Bangladesh 1971-2004*.

187 Limitation Act of 1908, and Civil Procedure Code, ss. 79 and 80.

188 Court Fees Act of 1870.

189 See for example, the Prevention of Repression against Women and Children Act 2000 and the Acid Crime Control Act 2002

Governmentmust provide a framework for redress and reparation to victims of torture, ensuring that victims have access to effective and enforceable remedies and reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. It is clear that – given the legacy of torture and other violations – these steps, in order to be effective, require fundamental legal and institutional reforms to ensure respect for the basic rights of persons and break the prevailing culture of impunity.

2. India*

2.1. Practice and patterns of torture

India gained its independence from Britain in 1947 and has maintained a reputation as the world's largest democracy with a population of over one billion people and considerable ethnic and religious diversity. The country's record in terms of the protection of human rights, however, is marked by contradiction, in part, because of the above factors and ongoing armed conflicts in parts of the country. India has the requisite institutional and legal framework for the protection of human rights including, a constitution guaranteeing fundamental rights, an independent judiciary and a vibrant civil society. At the same time, reports by domestic and international human rights organisations consistently show widespread human rights violations committed by the security forces, often with little or no accountability.[190] The Indian National Human Rights Commission (NHRC) has documented 14,231 cases of death in custody from 2001 to 2010[191] alone and the majority of the individuals concerned are said to have died of torture and ill-treatment.[192]

The Indian police reportedly utilise a variety of torture methods to extract confessions and in many cases as a form of punishment or even as an expression of superiority over the victims in the absence of any obvious motivation, due to lack of accountability. The approach taken by the police serves to reinforce a social hierarchy that is tacitly condoned through a widespread and pervading culture of impunity at both national and state levels. Furthermore, access to justice is inhibited by a multitude of factors, including coercion at the hands of state actors such as the police and the Border Security Force (BSF), in addition to numerous socio-economic barriers preventing the effective pursuit of legal

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* Based on initial contribution by Kirity Roy, Secretary of MASUM, India.

[190] See: Human Rights Watch, *Country Summary: India*, January 2012, available at: www.hrw.org/sites/default/files/related_material/india_2012.pdf; US Department of State, *Country Reports on Human Rights Practices for 2011*, 2012, available at: www.State.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper; Amnesty International, *Annual Report 2012*: India, available at: www.amnesty.org/en/region/india/report-2012

[191] National Human Rights Commission, *Annual Report 2008-2009*, pp. 168-169, available at: http://nhrc.nic.in/Documents/AR/Final%20Annual%20Report-2008-2009%20in%20English.pdf.

[192] Asian Centre for Human Rights, *Torture in India 2011*, 21 November 2011, available at: http://www.achrweb.org/reports/india/torture2011.pdf.

remedies. The BSF has been accused of being particularly abusive and acting in contravention of acceptable international standards whilst carrying out its functions.[193] A regional organisation, Banglar Manabadhikar Suraksha Mancha (MASUM), regularly releases reports on incidents of institutionalised abuse and the use of torture, involving both police officers and BSF personnel, which have not resulted in any investigations or prosecutions.[194]

Among the most common forms of torture that have been identified are physical violence – including 'falaka' or beatings on the soles of the feet – stretching, submersion, burning, electrocution and sexual violence.[195] There are also reports of mock executions, live burials, acid injections to genitalia, insertion of pins under the fingernails and sexual violation of individuals using inanimate objects.[196] The police and security forces are particularly infamous for their use of corporal punishment, severe coercion, and the punitive use of electrocution. There is also a noted prevalence of sexual abuse perpetrated by law enforcement personnel.[197] It has been reported that the International Committee of the Red Cross has become increasingly frustrated and disillusioned with the Indian government over its perceived lack of action in tackling forms of torture taking place in detention facilities.[198]

Other methods reportedly utilised by the police and security forces that may amount to cruel, inhuman and degrading treatment have included the use of solitary confinement and detention in poor and unsanitary conditions, both of which are features of overcrowded detention facilities. In addition, detainees are regularly deprived of food and water whilst in the custody of the authorities. Such treatment is also noted to have been meted out to children, who are identified as an especially vulnerable group.[199] Another significant problem for India is the frequency of enforced disappearances, which have a direct impact both

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[193] Human Rights Watch, "Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border, December 2010, available at: http://www.hrw.org/node/94641/section/3.

[194] Reports available at: http://www.masum.org.in/reports1.html.

[195] Subhradipta Sarkar & Archana Sarma, Henri Tiphagne (ed.), *Resource Materials for Lawyers and Criminal Justice Administrators: The National Project for Preventing Torture In India*, People's Watch, October 2006, pp. 12, available at: www.peopleswatch.org/dm-documents/NPPT/Resource%20Material%20Lawyers%20and%20Criminal%20Justice%20Administrators/Lawyers%20and%20Criminal%20Justice%20Administrators.pdf.

[196] South Asia Citizens Web, Joint *Statement: Justice for Soni Sori - Punish officials responsible for custodial torture in Chhattisgarh, India*, 28 November 2011, available at: www.sacw.net/Article2417.html.

[197] Asia Centre for Human Rights, *Torture in India*, p. 37.

[198] Jason Burke, *WikiLeaks cables: India accused of systematic use of torture in Kashmir*, The Guardian, 16 December 2010, available at: www.guardian.co.uk/world/2010/dec/16/wikileaks-cables-indian-torture-kashmi.r

[199] Subhradipta Sarkar & Archana Sarma, Henri Tiphagne (ed.), p. 15.

upon the primary victim and their families as secondary victims. Furthermore, uniformed police have reportedly carried out rape and other forms of sexual violations during enforced evictions, such as during those seen in Prakash Nagar Township, Mumbai, in 1999.[200] There is also a high incidence of extra-judicial killing, with the majority of victims first taken into custody and thereafter killed unlawfully.[201]

Religious minorities such as Muslims, Christians and indigenous peoples, as well as the "lower" societal castes and the country's most economically disadvantaged are reported to be the groups that are most vulnerable to torture and ill-treatment.[202] Similarly, the poor and marginalised members of society are among those who are often detained on suspicion of minor offences such as cattle smuggling and subjected to disproportionate punishments and ill treatment at the hands of security forces.[203]

The social structure that prevails in parts of the country – particularly rural areas – has been a source various forms of ill treatment by non-State actors. Violence and abuses between members of different castes, directed particularly against lower caste members, continue to occur, despite the existence of legal protection.[204] These include beatings, sexual violence and degrading treatment, which have been reported across the country.[205]

In addition, armed groups such as the Maoist rebels in eastern India are reportedly responsible for serious crimes, including extrajudicial killings, torture, abductions, and the use of child

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[200] Lysa John, Violence against Women and Forced Eviction: a study of three communities in India, in *Violence: the impact of forced evictions on women in Palestine, India and Nigeria*, Centre on Housing Rights and Evictions, pp. 35-40, available at: http://www.docstoc.com/docs/48762012/The-impact-of-Forced-Evictions-on-Women.

[201] The UN Special Rapporteur has recently raised concerns over the number of extra-judicial killings. See Press Statement: *Country Mission to India Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions 19 – 30 March 2012, OHCHR, 2012*, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E.

[202] See, Resist Initiative International, *Branded Born-Criminals: Racial Abuses Against Denotified and Nomadic Tribes in India*, Consultation Paper to CERD, February 2007, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/resist.pdf; Subhradipta Sarkar & Archana Sarma, Henri Tiphagne (ed.), pp. 15-16, supra.

[203] Asian Human Rights Commission, *India: BSF bloodies its hands*, Appeal: AHRC-UAC-1072012, 22 June 2012, available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-107-2012 ; Human Rights Watch, *India: Abuses by Border Force Increasing*, 11 June 2012, available at: http://www.hrw.org/news/2012/06/11/india-abuses-border-force-increasing

[204] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, available at: http://www.cwds.org/prevention_of_atrocities_act.pdf.

[205] Asian Centre for Humans Rights, *Torture in India*, p. 66. See also Centre for Enquiry into Health and Allied Themes, *Vulnerable Groups in India*, available at: http://www.cehat.org/humanrights/vulnerable.pdf.

soldiers.[206] There are reports of people tortured and killed during trials before the "people's courts" set up by the Maoist rebels.[207]

2.2. Legal Framework

International law

India acceded to the International Covenant on Civil and Political Rights in 1979[208] but has not ratified the Optional Protocols. It has signed but not ratified the CAT despite a declaration by the Government of India that it was preparing to do so as far back as 2008.[209] India is also a party to the 1949 Geneva Conventions since 1950, but again is yet to ratify the Additional Protocols.[210] The failure to ratify the CAT – despite the Government's stated intention to do so - has been raised during the UN Universal Period Review of human rights in India,[211] with the final report of the working group due this year.

Although the Constitution of India does not specifically refer to the status of international law within the Indian legal system, its Article51(c) provides that "the State [of India] shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another."[212] In addition to the general nature of the clause, the fact that it is positioned under the declaratory segment of the Directive Principles of State Policy in Part IV has given rise to the interpretation that it is a non-justiciable principle, which can only be enforced through an

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[206] See Human Rights Watch, *Dangerous Duty: Children and the Chhattisgarh Conflict*, September 2008, pp. from 21, available at: http://www.hrw.org/sites/default/files/reports/naxalite0908webwcover_0.pdf; *Maoist rebels kill 13 policemen in western India*, CBS News, 27 March 2012, available at: http://www.cbsnews.com/8301-501712_162-57405000/maoist-rebels-kill-13-policemen-in-western-india/; Amnesty International, *India: Maoist armed group should immediately release Chhattisgarh district administrator and Orissa legislator.*

[207] Asian Centre for Human Rights, *Torture in India 2011* p. 50, and *Maoists torture and kill two cops at public court, The Asian Age*, 26 February 2012, available at: http://www.asianage.com/india/maoists-torture-and-kill-two-cops-public-court-704

[208] See UN Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

[209] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: India – Addendum: Response of the Government of India to the recommendations made by delegations during the Universal Periodic Review of India*, Un Doc A/HRC/8/26/Add.1, 25 August 2008, pp. from 2, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/161/58/PDF/G0816158.pdf?OpenElement.

[210] International Committee of the Red Cross, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 10-Jul-2012*, 2012, p. 3, available at: www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf

[211] Human Rights Council, *Summary prepared by the Office of the High Commission for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution of 16/21 – India*, UPR 13th session, UN Doc A/HRC/WG.6/13/IND/3, 12 March 2012), p. 4, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/118/60/PDF/G1211860.pdf?OpenElement

[212] The Constitution of India, as modified on 1 December 2007, available at: http://lawmin.nic.in/coi/coiason29july08.pdf

act of the legislature. Indeed, Indian courts have consistently ruled that international treaties ratified by India can only become part of the law of the land through a subsequent legislative enactment.[213] The Kerala High Court in *Xavier v. Canara Bank Ltd* held that "the remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law *per se* or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken".[214] The Supreme Court similarly found in *Jolly George Verghese v. Bank of Cochin* that, "The positive commitment of the State parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the *corpus juris* of India."[215]

Nevertheless, the Supreme Court of India has held that principles of customary international law are part of the law of the land and are therefore not inconsistent with domestic law.[216] This approach is inspired by the understanding that customary international law principles are part of the common law. This view was endorsed in *Karnataka High Court; Civil Rights Vigilance Committee SLSRC College of Law v. Union of India and others*[217] and again in *People's Union for Civil Liberties v. Union of India*.[218] Significantly, the Supreme Court observed that "it is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law."[219] In *Chairman, Railway Board v Chandrima Das*,[220] the Supreme Court held that the Indian Constitution guaranteed the rights set out in the Universal Declaration of Human Rights. There have been further notable judgments ruling that international norms

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213 *Division Bench of the Rajasthan High Court in Birma v. State* AIR 1951 Raj 127, available at: www.indiankanoon.org/doc/1478362

214 *Xavier v. Canara Bank Ltd*; 1969 Ker L T 927 per Krishna Iyer J, quoted in *Jolly George Verghese v. Bank of Cochin* AIR 1980 SC 470, 1980 SCR (2) 913, pars. 919 - 920, available at: http://indiankanoon.org/doc/1741605.

215 Ibid., *Jolly George Verghes*, par.921. Similarly, in *Maganabhai Ishwarbhai Patel v. Union of India* the Constitution Bench of Supreme Court of India found that, "under the Constitution the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals or others." *Magnabhai Ishwarbhai Patel v. Union of India*, AIR 1969 SC 783, 1969 SCR (3), pars.254 and 257, available at: http://indiankanoon.org/doc/1310955.

216 *Visakha v State of Rajastan* AIR 1997 SC 301, par. 7, available at: http://www.iiap.res.in/files/VisakaVsRajasthan_1997.pdf.: "Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee"; According to Art 141 of the Constitution of India: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

217 *Civil Rights Vigilance Committee SLSRC College of Law v. Union of India and others*.AIR 1983 Kant 85, paras. 12-18, available at: www.indiankanoon.org/doc/950504

218 *People's Union for Civil Liberties v. Union of India* AIR 1997 SC 568, available at: http://www.cscsarchive.org:8081/MediaArchive/medialaw.nsf/(docid)/C4CF5AEF63A1672AE5256AC7002CD040

219 Ibid.

220 AIR 2000 SC 988.

on human rights must be adhered to, on condition that they are compatible with domestic legal provisions.[221] In terms of domestic legislation implementing international human rights standards, the Protection of Human Rights Act 1993 defines human rights in reference to the Constitution as well as the ICCPRand ICESCR.[222]

National legal system

Whilst there is no specific criminal law provision defining and prohibiting torture in India, *de facto* acts of 'torture' are prohibited and punishable under the various provisions of the Indian Penal Code 1860. These include section 330 – voluntarily causing hurt to extort confession or to compel restoration of property – and section 331 – voluntarily causing grievous hurt. There are also relevant Supreme Court rulings regarding torture, enforced disappearances and unacknowledged detentionbased on Article 20 and 21 of the Constitution of India, which prohibit, respectively, compelling someone to testify against himself and arbitrary detention and deprivation of liberty.[223]

Meanwhile, a Prevention of Torture Bill[224] is under consideration by the Indian legislature, but has been criticised for failing to define torture in line with Article 1 of the CAT[225] and for setting out a 2-year statute of limitation about torture investigations.[226]

Non-refoulement

The non-refoulement principle is not recognised as such within the Indian legal system. However, the Indian courts have ruled that refugees are entitled to protection from deportation where such action would endanger their lives[227] and that asylum seekers, including illegal entrants, shall have access to the procedure for the requestof refugee status with United Nations

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[221] See generally SC. *Vosjala & Others v. State of Rajasthan & Others 1997* (6) SCC 241; *Apparel Export Promotion vs. A.K. Chopra* 1999 (1) SCC 759; *Gramophone Co. of India Ltd v Birendra Bahadur Pandey* AIR 1984 SC 667.

[222] Section 2 of the Protection of Human Rights Act, 1993, as amended by the Protection of Human Rights (Amendment) Act, 2006–No. 43 of 2006.

[223] See generally rulings in *Mullin v Union Territory of Delhi* AIR [1981] SC 746, available at: http://indiankanoon.org/doc/78536; see further *Shri D K v State of West Bengal* [1997] S.C.C. (crl) 92, available at: http://www.alrc.net/doc/mainfile.php/cl_india/143 at 10; *Bodhisattwa Gautam v Subhra Chakraborty* [1996] 1 SC 490 at 500, available at: http://indiankanoon.org/doc/642436/.

[224] The Prevention of Torture Bill, 2010, available at: International Commission of Jurists, *The ICJ Legal Opinion on the Revised Prevention of Torture Bill currently before India's Parliament*, November 2011, 23 available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/India-opinion-prevention-torture-legal-submission-2012.pdf

[225] Ibid., pp. 7-10.

[226] Ibid., p. 13.

[227] *Zothansangpuri v State of Manipur* (C.R. No.981 of 1989)

High Commissioner for Refugees (UNHCR).[228] These rulings can be invoked to prevent the return of individuals where there is a real risk that their fundamental rights may be in jeopardy.[229]

Jurisdiction over torture committed abroad

Offences committed outside the territory of India only fall within the ambit of the Penal Code if the perpetrator is a citizen of India and the act, if it were committed in India, would be punishable under the Indian Penal Code.[230] Accordingly, given that the latter does not provide for a specific offence of torture, acts amounting to torture can only be prosecuted under categories offences that are punishable under the Penal Code. On the other hand, there is a scope for universal jurisdiction to be exercised over torture and ill treatment pursuant to the grave breaches provisions under the Geneva Conventions, to the extent that the acts took place in the context of armed conflict. The prohibition of "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons *hors de combat* is provided for under Common Article 3 of the Geneva Conventions.[231] Torture and cruel treatment are also prohibited in the specific provisions of the four Geneva Conventions under various headings.[232] Adopted into domestic law through the Geneva Conventions Act,[233] the Convention is enforced and consequently applies to all persons regardless of their citizenship.

2.3. Safeguards and complaint mechanisms

Limits to and supervision of pre-trial detention

There is a range of constitutional and legal safeguards against

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[228] *U.Myat Kyaw v State of Manipur* (Civil Rule No. 516 of 1991). The Gauhati High Court has in fact extended the application of Art 21 of the Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law except according to procedure established by law".

[229] See generally, O Chaudhary, Turning Back: An Assessment of Non-Refoulement Under Indian Law, *Economic and Political Weeks*, Vol. 39, p. 3527, 17 July 2004, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668124.

[230] See, *Central Bank of India Ltd v Ram Narain* AIR 1955 SC 36, par. 38. The Indian Supreme Court has also recognised applicability of the objective territorial principle where one of the constituent elements of a crime has been committed within its territory and also the protective principle where crimes threaten security, integrity and independence. See, *Mubarak Ali Ahmed v State of Bombay* AIR 1957 SC 957 and *G.B. Singh v Government of India* AIR 1973 SC 2667 respectively.

[231] Common Article 3, Geneva Conventions.

[232] See Art 12 of First and Second Geneva Conventions;Arts 12, 17, 87 and 89 of the Third Geneva Convention, and Art32 of the Fourth Geneva Convention.

[233] Section 3 (1) of the Geneva Conventions Act of 1960 stipulates that: "(1) If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions he shall be punished, a) where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life; and (b) in any other case, with imprisonment for a term which may extend to fourteen years."

violations of fundamental rights. Article 21 of the Constitution prohibits the arbitrary deprivation of life and personal liberty whereas Article 22(1) affirms the rights of arrestees to be promptly informed of the grounds of their arrest and to have access to counsel. Moreover, an arrested person shall be brought before the nearest magistrate within twenty-four hours after arrest.[234] However, the Constitution also makes exceptions to the above with respect to an 'enemy alien'[235] and individuals arrested under laws providing for preventive detention.[236]

The above constitutional guarantees have served as the basis for a number of writ applications that have been decided by the Supreme Court. The Court has delivered notable rulings setting out guidelines aimed at preventing abuses and ill-treatment in relation to arrest and detention of suspects,[237] solitary confinement[238] and unnecessary handcuffing and roping of arrested individuals.[239] The impact of these rulings has, however, been limited by lack of strict implementation. Indeed, there appears to be a pattern of non-compliance by law enforcement officials with procedural rules such as the requirement to register complaints with a First Information Report (FIR).[240] In addition, the police also reportedly fail to conduct proper investigations into allegations or to deliberately obstruct enquiries.[241] Similarly, while the Criminal Procedure Code contains provisions that serve to limit the length of time that someone can be detained without trial in India,[242] these are not always adhered to in practice.[243]

The safeguards and guarantees provided by the Indian constitution and other laws are further undermined considerably when it comes to cases governed by the various special laws that are in force. The latter include the Armed Forces (Special Powers) Act of 1958, which empowers the army, *inter alia*, to arrest anyone without a warrant under section 4 (c) who has committed, is

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234 Constitution of India, Art 22(2).

235 Ibid.,Art 22(3)(a).

236 Ibid.,Art 22(3)(b) .

237 See *D K Basu v State of West Bengal* AIR [1997] SC 610.

238 *Sunil Batra v Delhi Administration* [1978] 4 SCC 409, available at: http://www.manupatrainternational.in/supremecourt/1950-1979/sc1978/s780431.htm.

239 *Prem Shankar Shukla v Delhi Administration* [1980] AIR 1535, alternative citation, SCR (3) 855, available at: http://indiankanoon.org/doc/853252

240 The legal requirement to register an FIR is provided for in s. 154 Criminal Procedure Code 1973, and was re-affirmed in the Supreme Court decision of *Ramesh Kumari v State (NCT of Delhi) and Others* 2006 SCC 677, available at: http://indiankanoon.org/doc/116992/.

241 People's Watch, *Torture and Impunity in India*, November 2008, p. 29, available at: www.indianet.nl/pdf/TortureAndImpunity.pdf.

242 A Judicial Magistrate may order pre-trial detention of up to 90 days to allow for completion an investigation into an offence, under s. 167 of Criminal Procedure Code 1973, available at: http://mha.nic.in/pdfs/ccp1973.pdf.

243 Open Society Institute, *Justice Initiatives: Pretrial Detention*, Spring 2008, pp. 60-61, available at: http://www.unhcr.org/refworld/country,,OSI,,CHL,,4cdced372,0.html.

suspected of having committed or of being about to commit a "cognizable offence" and to use any amount of force "necessary to effect the arrest".[244]

Under the 1967 Unlawful Activities (Prevention) Act, a senior officer can authorise the arrest of an individual without a court order if he suspects that such a person has committed or was about to commit an offence under the Act. The Act requires the arrested person to be brought to the nearest police station "without unnecessary delay" and not before a magistrate, thereby forestalling the application of the 24 hours requirement and judicial supervision envisaged under the Constitution.[245] Moreover, once the arrested person is brought to court, the length of pre-trial detention under the Act can be extended by a court for up to 180 days for the purposes of the completion of investigation.[246]

Similarly, the National Security Act of 1980 grants the Federal or State Governments the ability to issue a preventive detention order against any person, in order to prevent them from committing acts prejudicial to national security.[247] The competent authorities also have the power to determine the place and conditions of detention as well as appropriate punishments for breaches of discipline.[248] What is also problematic is that a person detained under the act can be detained in preventive detention for up to 12 months, which is unduly long.[249] The National Security Act, however, is not the worst legislation in India as far as the length of preventive detention is concerned. Under the Jammu and Kashmir Public Safety Act 1978,[250] the State authorities can place a person in preventive detention for an unacceptably long period of 2 years.[251] There is also limited possibility of judicial supervision since the detainees are kept in places determined by the Government and can bemoved from one place to another.[252] While aspects of the

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[244] By virtue of s. 4 (a), (b), (c) and (d) of the Armed Force Act 1958, the armed forces are empowered to kill, destroy property, arrest and detain. The army has further permission to shoot to kill under the powers of s.4 (a) of the Act on the basis of the commission or suspicion of the commission of breaking the law in "disturbed areas" or carrying weapons.

[245] Unlawful Activities (Prevention) Act 1967, amended 2008, s. 43, available at: http://www.satp.org/satporgtp/countries/india/document/papers/76-c.htm

[246] Ibid., s. 43D (2) (b).

[247] National Security Act 1980, s. 3(b), available at: http://www.satp.org/satporgtp/countries/india/document/actandordinances/NationalSecurityact.htm

[248] Ibid., s. 5(a).

[249] Ibid., s. 13.

[250] Jammu and Kashmir Public Safety Act 1978 (Act No. 6 of 1978, India) 11978, s. 1(2), available at: http://www.unhcr.org/refworld/docid/3ae6b52014.html.

[251] Ibid., s. 8(1)(a)(i). In addition to individuals that authorities consider may act against the security of the State, a 'foreigner' or a person residing in the 'area of the State under occupation of Pakistan' can be subject to such preventive detention with a view to determining the status of the person in the State or making arrangement for his or her expulsion. See s. 8(1)(b)(i)-(ii).

[252] Ibid., see s. 10(a)-(b).

Jammu and Kashmir Public Safety Act were amended in April 2012, the amendments are considered inadequate.[253]

The role of Human Rights Institutions

Human Rights Institutions (HRIs) are able to provide a degree of independent oversight over places of detention. The National Human Rights Commission has been instrumental in documenting and publishing statistics on prison overcrowding, which is attributed in part to the number of cases of pre-trial detention[254] and custodial deaths. According to the Commission's report published in 2011, for example, 35 fatalities in custody had been recorded over the previous three years.[255] The prison authorities claimed that disease was the primary cause of deaths but post-mortem examination reports are unavailable for the overwhelming majority of them.[256] Some regional HRIs within India have also successfully pushed theauthorities to issue guidelines regarding arrests, deaths in police and judicial custody, the condition of prisons and their inmates as well as requirements to film post-mortem examinations in the case of custodial deaths. However, it is difficult to access information on the work of some of those institutions, as they do not regularly publish their annual reports. Visits by NGOs and independent organisations, such as the Commonwealth Human Rights Initiative, in recent years have also led to increased awareness about prison conditions and to greater dialogue with the prison authorities.[257]

The impact of HRIs, however, has been limited since they can only make recommendations. Furthermore, the armed forces are not subject to the jurisdiction of the NHRC under the Human Rights Protection Act.[258]

Access to legal advice and compulsory medical assistance upon arrest

The right of an arrested person to consult and to be defended by a lawyer of his choice is provided for under Article 22 of the

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[253] The Jammu and Kashmir Public Safety (Amendment) Act, 2012. The amendment, for example, reduces the maximum length of detention from two years to an initial period of 6 years while maintaining the possibility for extension up two years in relation to persons acting in "any manner prejudicial to the security of the State". See also Amnesty International, India: Still a 'lawless law': Detentions under the Jammu and Kashmir Public Safety Act, 1978 , October 2012, available at: http://www.amnesty.org/pt-br/library/asset/ASA20/035/2012/en/807ef797-3994-4d2b-9469-f2e2456d91ef/asa200352012en.pdf.

[254] Ministry of Home Affairs, *Prison Statistics India*, National Crime Records Bureau, 2010, (i)-(ii), available at: http://ncrb.nic.in.

[255] Jail Inspection Report, *Central Jail Indore*, NHRC, 9-10 March 2011, pp. 4-5, available at: http://nhrc.nic.in/Reports/PrisonsVisit/indore_Jail_Inspection_Report.pdf, see also: http://nhrc.nic.in/Reports_prison.htm.

[256] Ibid.

[257] Open Society Institute (2008) p. 58.

[258] Protection of Human Rights Act 1993, s. 19.

Constitution. In addition, Article 39A of the Constitution requires the State to provide free legal aid to ensure that access to justice is not denied to citizens who are disadvantaged economically or otherwise. The right to consult a lawyer upon arrest was held by the Supreme Court to be an undeniable right in *Nandini Satpathy vs. Dani (P.L.) and Another*,[259] which went further to include persons that had not been officially apprehended or arrested. Furthermore, Article 303 of the Criminal Procedure Code provides for the right of a person accused of an offence to be defended by a lawyer of his choice before a criminal court. In practice, however, it has been reported that arrestees are regularly denied access to legal counsel, and are often not allowed to have a confidential discussion when they do consult a lawyer.[260]

An arrested person is able to request a medical examination in order to disprove his purported commission of the offence, or "establish the commission by any other person of an offence against his body."[261] The Supreme Court also decided in *D.K. Basu* that an arrestee should be given a medical examination every 48 hours during his or her detention. However, such examinations are often reported to be inadequate and lack the required independence as they are conducted under the direct supervision of the police.[262]

Admissibility of evidence obtained under torture

The Indian Evidence Act provides that the admissibility of a confession is contingent upon it being given freely and voluntarily and excludes confessions made to police officers as a general rule.[263] The courts have expanded on the above to develop a two-stage test of admissibility. In *Shankaria v. State of Rajastan*, the court held that in order for confessional evidence to be admissible it must be established that it was both voluntary and reliable. The court further held that the voluntary nature of the confession is a condition *sine qua non* for admissibility.[264]

As with the other legal safeguards, however, the above exclusionary rule has been ineffective when it comes to cases falling within the ambit of some of India's special laws. This was particularly true with the adoption of the 1987 Terrorist and

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[259] 1978 AIR 1025.

[260] US Department of State, *Country Reports on Human Rights Practices for 2011: India*, p.11.

[261] Criminal Procedure Code, s. 54.

[262] REDRESS, *India*, p. 16, available at: www.redress.org/downloads/country-reports/india.pdf; US Department of State, Country Reports on Human Rights Practices for 2011, pp. 7,12.

[263] See Indian Evidence Act (IEA) 1872, ss. 24, 25 and 26, available at: http://www.vakilno1.com/bareacts/indianevidenceact/indianevidenceact.htm.

[264] *Shankaria v State of Rajastan* [1978] 3 SCC 435, par. 744, available at: http://judis.nic.in/supremecourt/helddis.aspx,.

Disruptive Activities (Prevention) Act (TADA), which has introduced a specific exception to the Evidence Act making confession given to police officers admissible in evidence against an accused.[265] Such an exception is bound to provide an incentive to officers who are keen to secure a conviction resort to acts of torture and reports suggest that there have been widespread cases of torture since the promulgation of the Act. In a 1994 ruling, the Supreme Court has sought to limit the risks of abuse associated the above exception, while upholding the constitutionality of the Act, by holding that a custodial confession should only be admissible if given "in a free atmosphere".[266] The ruling, however, was unlikely to have a significant impact to the extent that onus of challenging the voluntariness of the confession lies with the accused, who would particularly be in a weaker position to do so after the prolonged detention provided for under the Act.[267]

TADA was repealed with the adoption of the Prevention of Terrorism Act (POTA)[268] in 2002, which seems to incorporate the safeguards cited in the above mentioned Supreme Court ruling, stating that confessions shall be "recorded in an atmosphere free from threat or inducement" in order to be admissible.[269] POTA also included additional safeguards in the form of a requirement that the confession had to be recorded using audio or video recording equipment and the detainee had to be produced before a senior judge within 48 hours together with the recording of the original confession for confirmation. In the event of a complaint of torture, the detainee shall be sent for medical examination and subsequently transferred to judicial custody.[270] Despite these provisions, the Act as a whole has been criticised as being a source of serious abuses by the police and the judiciary and was repealed in 2004.[271]

2.4. Accountability

Investigations into allegations of torture may be initiated through various means. A cognizable offence can be reported in writing to "an officer in charge of a police station" under Section 154 of the CPC, who should then register an FIR to begin the

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[265] Terrorist and Disruptive Activities (Prevention) Act (TADA), Act No. 28 of 1987, s. 15, available at: http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm.

[266] The constitutionality *Kartar Singh v. State of Punjab*, 1994 (2) SC 423-564.

[267] Terrorist and Disruptive Activities (Prevention) Act (TADA), See ss. 20(4)(b) and 49(2).

[268] The Prevention of Terrorism Act, 2002, available at: http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm.

[269] Ibid,, s. 32(3)and (1).

[270] Ibid., s. 32(4) and (5).

[271] Anild Kalhan, et al Colonial Continuities: Human Rights, Anti-Terrorism and Security Laws in India, 20 *Columbia J. of Asian Law* 93.

investigation.[272] In addition, Sections 156 (3) and 200 of the CPC can be used to lodge a complaint before the court of Judicial Magistrates against the offending police officer. Complaints can also be made to magistrates under Section 200 of the CPC or by reporting directly to the National Human Rights Commission. While, as noted earlier, India has yet to enact a specific law criminalising torture, acts amounting to torture can be prosecuted under the provisions of the 1860 Penal Code, including sections 330 and 331. The Supreme Court of India has set an important standard of accountability by ruling that, when it comes to allegations of torture in police custody, the onus to disprove such allegations rests with the respective police.[273]

Despite the available mechanisms to bring legal actions against perpetrators, they are often rendered ineffective due to procedural failings, such as the police refusing to register an FIR,[274] undue delays and corruption within the court system as well as financial constraints.[275]

The lack of appropriate mechanisms for victims and witnesses often results in a genuine risk of intimidation and further victimisation for those that pursue complaints or testify in court.[276]

There are also a number of legislative provisions that can significantly impedethe investigation and prosecution of certain authorities whilst on duty. For instance, public servants cannot be prosecuted without prior sanction by the Government in respect of "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty."[277] When acts of torture are successfully investigated and the perpetrators convicted, the punishment of such conduct varies from case to case. Examples of sentences for torture and other abuses have included a 10-year prison sentence for a retired police officer following a custodial death, and a 5-year sentence for a police

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[272] See ss. 156 and 157 of the Civil Procedure Code.

[273] *Smt. Nilabati Behera Alias Lalit Behera v State of Orissa and Ors* 1993 SCR (2) 581, par. 590, available at: http://indiankanoon.org/doc/1628260. The court held that as the petitioner's son was taken into police custody, and died the next day from unnatural injuries without having been formally released from custody, the burden of proof rested with the respondents to explain how the injuries were sustained.

[274] REDRESS, *India*, p. 16, available at: www.redress.org/downloads/country-reports/india.pdf.

[275] See, Article 2, *Judicial delays to criminal trials in Delhi*, Asian Legal Resource Centre, June 2008, , available at: http://www.Article2.org/pdf/v07n02.pdf; see also Commonwealth Human Rights Initiative, *Submission of the Commonwealth Human Rights Initiative for the Universal Periodic Review: India*, November 2007, pp. 2-3, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/CHRI_IND_UPR_S1_2008_CommonwealthHumanRightsInitiative_uprsubmission.pdf

[276] REDRESS, *India*, p. 16; Asian Human Rights Commission, *India: Threatened with violence for reporting torture to police*, Appeal: AHRC-UAU-026-2012, available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-026-2012.

[277] Criminal Procedure Code 1973, s. 197 (1).

officer who severed the private parts of a detainee in custody.[278] The procedure can becompromised, as the prosecution is reliant upon an investigation conducted by members of the institution where the alleged crimes take place.[279] It has been reported that the police are often reluctant to effectively investigate violations, including incidents of torture in which their colleagues may be implicated.[280]

By far the most significant systemic problems in relation to accountability are to be found in the areas where special laws are in force such as Manipur, Jammu and Kashmir. Despite persistent and documented reports of widespread and serious human rights violations committed by security forces in those parts of India overmany years, the authorities have shown little interest in bringing perpetrators to justice.[281] The Border Security Force Act 1968, especially the power granted to a court martial, has also been used to afford a degree of impunity to the BSF. After a trial of any BSF personnel has commenced in the Magistrate Court, BSF officers can ask the magistrate to transfer that case to their own court.[282] Despite claims by the BSF that internal trials are used to prosecute violations of the Border Security Force Act and other crimes, there are no known cases of BSF personnel having been convicted for any violations.[283] There are examples of perceived collusion and acts where the authorities have impeded investigations of alleged violations, such as in the case of Alamgir Seikh's extra-judicial killing at the hands of the BSF[284] and the

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[278] Asian Centre for Human Rights, *Torture in India 2011*, par. 77-79.

[279] Asian Legal Resource Centre, *Statement on 'Custodial deaths and torture in India' received by Commission on Human Rights*, 31 March 2004, available at: http://www.alrc.net/pr/mainfile.php/2004pr/41/.

[280] Amnesty International, *India: Submission to the UN Universal Periodic Review*, AI Index: ASA 20/021/2007, November 2007, p. 2, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/AI_IND_UPR_S1_2008_AmnestyInternational_uprsubmission.pdf.

[281] See Human Rights Watch, "*Everyone Lives in Fear": Patterns of Impunity in Jammu and Kashmir*, September 2006, available at: http://www.hrw.org/reports/2006/india0906/india0906web.pdf and REDRESS, Asian Human Rights Commission and Human Rights Alert, *The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations*, 18 August 2011, available at: http://www.redress.org/downloads/AFA-India-pressrelease-180811.pdf.

[282] Border Security Force Act, ss. 64 and 140.

[283] Human Rights Watch, *"Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border*, pp. 7 - 8, available at: http://www.unhcr.org/refworld/docid/4d00a6ab2.html.

[284] The body of the victim could not be retrieved for four months, and remained in a medical college hospital in Bangladesh. It is alleged that the BSF and police fraternity in India caused unnecessary hazards and delays in retrieving the dead body of the victim. MASUM report, available at: www.masum.org.in/Alamgir%20Update.pdf.

enforced disappearance of Bhikari Paswan.[285] Victims, witnesses and human rights activists have also reportedly been subject to threats and harassment.[286]

2.5. Reparation

No formal reparation scheme exists in India, and there is no specific legislation that provides for an explicit right to reparation for victims of torture. However, section 4 of the draft Prevention of Torture Bill includes provisions on reparation.[287] While the provision does not incorporate all the forms of reparation provided under the Basic Principles and Guidelines,[288] notably, "just satisfaction" and "guarantees against repetition", it would, if enacted, constitute notable progress and contribute to filling an important gap in the legal framework on reparation.[289] One major obstacle to the realisation of the right provided under the Bill, however, is section 7, which requires prior approval to initiate proceedings against public officials.[290]

The right to compensation is a legitimate cause of action pursuant to writ petitions before the Supreme Court and the High Court, respectively under Article 32 of the Constitution based on strict vicarious liability for contraventions of fundamental rights.[291] Persons convicted of a criminal offence can also be ordered to pay compensation to the victim, or any person who has suffered injury or loss caused by the offence, pursuant to section 357 of the CPC.

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[285] The case of Bhikari Paswan involved an alleged instance of enforced disappearance conducted by the police. The victim was a labourer who was taken away and has not been returned. As of yet his whereabouts are unknown. It has not been possible to mount a comprehensive legal challenge against the police in court. See World Organisation Against Torture, *India: delays in prosecution may lead to impunity*, 20 August 2004, available at: www.omct.org/files/2004/08/2490/india_200804_eng.pdf.

[286] See Frontline Defender, *India: Judicial harassment of human rights defender Kirity Roy*, October 2008, available at: http://www.frontlinedefenders.org/node/1581 and FIDH, *Death threats against Mr. Gopen Chandra Sharma*, September 2009, available at: http://www.fidh.org/Death-threats-against-Mr-Gopen.

[287] The Prevention of Torture Bill, s. 4(3) – "Any public servant or other person committing torture or attempting to commit torture shall also be liable to fine which shall be payable to the affected person."; There have been unsuccessful attempts to pass bills on compensation for victims in the past, including a Private Members Bill referred to us Custodial Crimes (Prevention, Protection and Compensation) Bill 2001, introduced by Shri G.M. Banatwalla.

[288] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147, (16 December 2005).

[289] See also The Prevention of Torture Bill, 2010, available at: http://www.prsindia.org/uploads/media/Torture/prevention%20of%20torture%20bill%202010.pdf. See also, International Commission of Jurists, The ICJ Legal Opinion on the Revised Prevention of Torture Bill currently before India's Parliament.

[290] Ibid., p. 14.

[291] The State is vicariously liable for wrongful acts committed by its public officials and employees. See *Uttarakhand Sangharsh Samiti, Mussoorie v State of Uttar Pradesh* (1996) 1 UPLBEC 461.

Although the chances of obtaining compensation are limited for most victims, due to low conviction rates, procedural delays and the limited capacity of many accused persons to pay substantial compensation,[292] the higher courts have awarded interim compensation in custodial death cases.[293] Where a victim is successful in bringing a claim for torture, compensation is usually awarded by the State.[294] In a few cases, however, the court has ordered the perpetrators to compensate the victim's family directly.[295] Victims of torture and other abuses have also received compensation from the State further to recommendations made by the National Human Rights Commission.[296] Furthermore, such recommendations are not subject to the completion of criminal or disciplinary proceedings in relation to the violation concerned.[297]

In terms of medical rehabilitation for torture victims, the benchmark for international standards is set out in CAT Article 14, which requires the State to provide the means for "as full rehabilitation as possible." Having not ratified the convention, the domestic standard followed in India does not mirror this provision. Delays in receiving treatment are commonplace, and the treatment is subject to disruption by the authorities.[298] Yet, there are some examples of judicial intervention to ensure a high standard of care for victims.[299]

The State does not provide for specific psychological counselling for victims of torture, and what little mental healthcare that is

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[292] Murugesan Srinivasan and Jane Eyre Mathew, *Victims and the Criminal Justice System in India: Need for a paradigm shift in the justice system*, Temida Vol. 10.2 Victimology Society of Serbia, 2007, p. 54, available at: http://www.doiserbia.nb.rs/img/doi/1450-6637/2007/1450-66370702051S.pdf.

[293] See The Protection of Human Rights Act 1993, s. 18; for an example of a grant of ex gratia interim payment see *Re, Death of Sawinder Singh Grover* 1995: supp. (4) SCC 450; for discussion of this case see also Dr K Vij et al, Torture and the Law: An Indian Perspective, *Journal of Indian Academy of Forensic Medicine*, 2007, 29 (4) 125-128, pp. 126-127, available at: http://medind.nic.in/jal/t07/i4/jalt07i4p125.pdf.

[294] See, Asian Human Rights Commission, *Torture in India 2011*, pp. 74-76.

[295] For establishment of compensation for injuries received see generally *The 'Bhagalpur Blinding Case' Khatri Vs State of Bihar* AIR 1981 SC 928; on quantum of damages see *People's Union for Democratic Rights Vs State of Bihar* AIR 1987 SC 355 and regarding State payment of compensation, the right of the State to indemnity by the perpetrator see *Arvinder Singh Bagga Vs State of UP* 1994 6 SCC 565; see also Dr K Vij et al, Torture and the Law: An Indian Perspective, pp. 126-127.

[296] For recent examples of recommendations by the National Human Rights Commission leading to the award of compensation, see: http://www.achrweb.org/impact/compensation.html.

[297] See, for example, Case 362/10/6/2010, available at: http://www.achrweb.org/impact/compensations/Prakyath.pdf; Case 26/2/0/2010, available at: http://www.achrweb.org/impact/compensations/Khya_Sonam_Tara.pdf.

[298] Human Rights Watch, *India: Prosecute Security Forces for Torture*, 31 January 2012, available at: www.hrw.org/news/2012/01/30/india-prosecute-security-forces-torture.

[299] 'High Court orders to treat 'torture' victim in private hospital', *Press Trust of India*, 24 April 2012, available at: www.ndtv.com/Article/cities/high-court-orders-to-treat-torture-victim-in-private-hospital-201365.

provided within the prison system is inadequate. Nevertheless, there are localised forms of support in some areas, such as in Delhi, where there is an organisation that provides juveniles and sexually abused women with psychological counselling under the supervision of the police.[300] In relation to psychological treatment for torture victims and their families, assistance is sometimes provided by independent organisations, such as MASUM,[301] the Centre for Organisation Research and Education (CORE),[302] and the Rehabilitation and Research Centre for Torture Victims.[303]

2.6. Conclusion

Incident reports, commentary analysis and relevant statistics provide ample evidence to demonstrate that torture remains a systemic problem in India. The vulnerability of marginalised people to torture and the lack of effective accountability and justice are features common across India, with additional problems experienced in the North-East and Jammu and Kashmir as a result of security laws,which provide the forces with broad powers without any corresponding accountability. With there being no uniform legislation that specifically prohibits torture and protects victims, an atmosphere of relative judicial uncertainty and disjointed precedent has been created. Nevertheless, encouraging signs can be seen in the attempts by the Supreme Court to afford protection and create safeguards against torture. The decision to award significant sums in compensation in several cases further suggests that some progress is being made. The ratification of the CAT and the enactment of the Prevention of Torture Bill would be two important legal steps signaling India's willingness to combat torture but it is equally clear that a series of other legislative reforms, such as on security laws, and deep-seated institutional reforms, including outstanding police reform, need to be carried out in order for the prohibition of torture to become more effective in India.

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[300] Special Police Unit for Women and Children (SPUWAC), reference www.spuwac.com.

[301] An example of such support is described in: *Report of the Medical Camp at Jalangi, Murshidabad on 13th August 2010*, available at: www.masum.org.in/medical%20camp.htm.

[302] CORE, *Annual Narrative Report 2010-2011*, 2011, p. 2, available at: www.coremanipur.org/images/2010-2011.pdf.

[303] See Inger Agger, *Testimonial therapy: a pilot project to improve psychological wellbeing among survivors of torture in India, 2008*, available at: www.rct.org/resources/rct-research-publications/Articles,-book-chapters,-and-monographs/2009/testimonial-therapy-a-pilot-project-among-torture-survivors-in-india.aspx; Inger Agger et al., *Testimony ceremonies in Asia: Integrating spirituality in testimonial therapy for torture survivors in India, Sri Lanka, Cambodia and the Philippines*, Transcultural Psychiatry, May 2012, available at: http://tps.sagepub.com/content/early/2012/05/25/1363461512447138.full.pdf+html.

3. North East India and the Armed Forces (Special Powers) Act*

3.1. Introduction

The Armed Forces (Special Powers) Act ('AFSPA' or 'the Act') was passed on 11 September 1958 by the Indian Parliament in response to unrest and calls for self-determination in the North-Eastern regions of India.[304] The AFSPA has been used to justify the presence and actions of armed forces in places qualified as 'disturbed areas' conferring them with broad powers to use lethal force, destroy property, arrest and detain in the name of "aiding civil power."[305] Serious questions have been raised over the years regarding the Act's compatibility with international standards of human rights, with recurring reports of people being arbitrarily killed, tortured, raped, and forcibly disappeared at the hands of the armed forces acting under the AFSPA.[306]

In response to growing criticism, the Central Government established a committee chaired by a former Supreme Court judge, Justice B P Jeevan Reddy in 2004 to review aspects of the AFSPA.[307] Following extensive consultation with government officials, members of the armed forces, civil society, and other individuals the Jeevan Reddy Committee produced its report in June 2005, recommending that the Government of India

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* Based on initial contribution by Anjuman Ara Begum, Research Scholar, Department of Law, Gauhati University, India.

[304] The Armed Forces (Special Powers) Act 1958,is applicable in the seven North-Eastern states of Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram, and Nagaland. Since 1990, India's northernmost State of Jammu and Kashmir has had a similar Act in force, namely The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

[305] Human Rights Watch, *Getting Away With Murder: 50 Years of the Armed Forces Special Powers Act*, 2008, p. 1, available at: www.unhcr.org/refworld/country,,HRW,,IND,,48a93a402,0.html.

[306] Ibid. See also Joint NGO Report (REDRESS, Asian Human Rights Commission, Human Rights Alert), *The Armed Forces (Special Powers) Act, 1958 in Manipur and other states of the Northeast of India: Sanctioning repression in violation of India's human rights obligations*, 2011, p. 3, available at: www.redress.org/downloads/publications/AFSPA_180811.pdf.

[307] The five member committee, which was created to review the AFSPA via the Ministry of Home Affairs Office Order No.11011/97/2004-NE-III dated 19th November 2004, was headed by Justice Jeevan Reddy. The other members included: Dr. S.B. Nakade, Former Vice Chancellor and Jurist; Shri P.Shrivastav, IAS (Retd), Former Special Secretary, MHA; Lt Gen (Retd) V.R. Raghavan, Former DGMO; and Shri Sanjoy Hazarika, Journalist.

repeal the existing Act.[308] The Committee concluded that the Act "for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness."[309] It added that a procedure "established by law"[310] that claims to be fair, just and reasonable should not have become a symbol of oppression. Despite these strong findings and calls by UN bodies including the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of Discrimination against Women (CEDAW), the Indian government has yet to implement the Committee's recommendations.[311] The following section discusses some of the disturbing features of the AFSPA that led the Jeeva Committee to reach the foregoing conclusion.

3.2. Key provisions of the AFSPA

Section 3 – the definition of a 'disturbed area'

The power to declare an area as 'disturbed' is conferred under Section 3 to any State Governor or Administrator of a Union Territory to which the Act extends, or the Central Government. Such declarations can be made by notification in the Official Gazette, on the basis of "the opinion" of any of the above actors that an area is "in such a disturbed or dangerous condition that the use of armed forces in the aid of civil powers is necessary."

Accordingly, the AFSPA has been applicable in the states of Manipur and Nagaland, which were declared as 'disturbed areas' since its enactment in 1958.[312] The entire State of Assam has been a 'disturbed area' since 27 November 1990owing to the separatist insurgency from the United Liberation Front of Asom (ULFA), and was renewed most recently in late 2011.[313] On 17 September 2001, areas in the states of Arunachal Pradesh, Nagaland and Meghalaya, all falling within a 20km radius of the State of Assam border, were also re-declared 'disturbed areas'. The whole State of Manipur was declared as 'disturbed' in 1980.

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[308] Ministry of Home Affairs, *Report of the Committee to review the Armed Forces (Special Powers) Act, 1958*, (2005), *hereafter 'Jeevan Reddy report'*, available at: http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf, see also Second Administrative Reforms Commission, *Fifth Report: Public Order*, 2007, p. 239, available at: http://arc.gov.in/5th%20REPORT.pdf.

[309] Ibid., p. 75.

[310] Ibid., p. 69.

[311] *Concluding observations of the Committee on the Elimination of Racial Discrimination: India*, UN Doc. CERD/C/IND/CO/19 (2007), para. 12, available at: www2.ohchr.org/english/bodies/cerd/cerds70.htm; *Concluding comments of the Committee on the Elimination of Discrimination against Women: India*, UN Doc. CEDAW/C/IND/CO/3 (2007), para. 9, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/243/98/PDF/N0724398.pdf?OpenElement.

[312] Second Administrative Reforms Commission, p. 236.

[313] Assam gets AFSPA for one more year, *Times of Assam*, 20 December 2011, available at: http://www.timesofassam.com/headlines/assam-gets-afspa-for-one-more-year.

After agitation in July 2004, the declaration was partially lifted from the city of Imphal.[314] Nagaland remains a 'disturbed area' to this day, while 38 police station areas in Tripura and 2 districts in Arunachal Pradesh, Tirap and Changlang, have also been declared 'disturbed.'[315]

Notably, the courts have not been willing to challenge the sweeping authority conferred to the armed forces under such a vague provision. In *Indrajit Barua v. State of Assam and Another*,[316] the Delhi High Court determined that power conferred on the Governor of Assam to declare an area as 'disturbed' is not arbitrary, given the absence of legislative guidelines stating otherwise. The Court further ruled that the term 'disturbed area' was well understood by both the legislatures and the people of India. In *Naga People's Movement of Human Rights (NPMHR) v. Union of India*,[317] the Supreme Court held that the Central Government has no obligation to consult with a State Government before making the declaration. The Court nevertheless decided that a declaration under Section 3 has to be of limited duration, and must be subject to periodic review every six months at least. The Court added that, although a declaration under Section 3 can be made by the Central Government *suo motu* without consulting the State Government concerned, some degree of consultation is desirable. In practice however, the Central Government decides on declaring areas in a State 'disturbed'. In 1988, the Central Government is reported to have declared 'disturbed areas' in Tripura without the consent of the State Government.[318]

Section 4 (a) – the power to use lethal force

Section 4 of the AFSPA grants the security forces special powers to use force,[319] destroy structures,[320] arrest without warrant,[321] and enter and search premises without warrant[322] for the purposes of maintaining law and order. What is more, Section 4 (a) enables any officer, including a non-commissioned officer such as a havildar,[323] to use force to the extent of causing the death of a person, if that person is in the process of or about to

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[314] Armed Forces (Special Powers) Act, *Teresa Rehman*, 6 September 2008, available at: www.tehelka.com/story_main40.asp?filename=cr060908ArmedForces.asp.

[315] Special powers Act in Tripura extended, *iGovernment*, 19 March 2012, available at: www.igovernment.in/site/special-powers-act-tripura-extended.

[316] AIR 1983 Del. 514.

[317] AIR 1998 SC 431, available at: http://indiankanoon.org/doc/1072165.

[318] Asian Centre for Human Rights, *The AFSPA: Lawless Law Enforcement According to the Law?: A Representation to the Committee to Review the Armed Forces Special Powers Act 1958*, 2005, p. 14.

[319] Section 4 (a).

[320] Section 4 (b).

[321] Section 4 (c).

[322] Section 4 (d).

[323] A non-commissioned officer in the Indian Army, of rank equivalent to a Sergeant.

act in contravention of any law. The use of such force is subject to due warnings made at the discretion of the executing officer of the armed forces.

The Supreme Court has held that the power to use lethal force as provided for under Section 4 (a) was in contravention of Article 21 of the Constitution, which states "no person shall be deprived of his life or personal liberty except according to procedure established by law."[324] Notably, the court opined that, when it comes to the derogation to the rights conferred under Article 21, "the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary." The above ruling, however, has not been fully adhered to in subsequent rulings of the Supreme Court and other courts.

The Supreme Court in *NPMHR v. Union of India* took the view that the power conferred under Sections 4 and 5 of the AFSPA on the officers of the armed forces, including non-commissioned officers, "cannot be held to be arbitrary or unreasonable" and are not in violation of the provisions of Articles 14, 19 and 21 of the constitution. The court continued to clarify that while exercising the powers conferred under Section 4 (a) of the AFSPA, the conditions indicated that the officer should use "minimal force."[325] The Supreme Court added that army officers exercising their AFSPA special powers could be punished under the Army Act of 1950 if they violated the army's set of "Dos and Don'ts instructions".[326]

In *Indrajit Barua v State of Assam and Another*,[327] the Delhi High Court held that conferring power to low ranking officials is justified due to their having a certain amount of status and responsibility attached to their position.

Section 4 (c) and Section 5 – the power of arrest

Under Section 4(c), a mere "suspicion" that a person has committed or is about to commit an offence is enough for an officer to effect an arrest, which is open to abuse in the form of arbitrary arrest.[328] Section 5 of the Act requires arrested persons to be handed over to the police but does not provide a specific time limit. It provides for the detainee to be transferred "with the least possible delay, together with a report on the circumstances occasioning the arrest." Consequently, Section 5 taken together with Section 4 (c) is deemed to violate the Constitutional protection guaranteed under Article 22 of the Constitution regarding arrest

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[324] *Maneka Gandhi vs. Union of India* 1978 SCR (2) 621 at [626], available at: http://indiankanoon.org/doc/1766147.

[325] AIR 1998, SC 431, available at: http://indiankanoon.org/doc/1072165.

[326] Ibid.

[327] AIR, 1983 Del 514.

[328] Human Rights Watch, *Getting Away With Murder* (2008), 3.

and detention.[329] However, the Jeevan Reddy Committee was of the opinion that there was no basis to doubt the compatibility of the provision with the Constitution, as the right to be brought before a magistrate within twenty-four hours of arrest is "available whether the arrest is made by an officer of the armed forces or by the police."[330]

While Indian courts have sought to circumscribe the open-ended nature of Section 5, the jurisprudence is not as categorical as the views expressed by the Committee. Concerning what is acceptable within the meaning of "the least possible delay," the Gauhati High Court ruled, in *Nongshitombi Devi v. Rishang Keishing*, that it should be understood to allow for a certain period of delay for reasons that are cogent, genuine and relevant.[331] The Guhaiti Court also held that the armed forces could not conduct criminal investigations and interrogations on a person in their custody. In *Horendi Gogoi v Union of India*,[332] the same Court confirmed the duty of officers to hand over an arrestee with the least possible delay, whereas in *Civil Liberties and Human Rights Organisation v P.L. Kukrety*,[333] it held that the army is liable to pay compensation to the detainee should it fail to do so. However, the armed forces are under no express obligation to communicate the grounds for the arrest, and there is no advisory board to review arrests made under the AFSPA, which appears to be contrary to the Constitution.[334]

Section 6 – protection to persons acting under the AFSPA

Under Section 6 of the AFSPA, officials covered by the Act will not be the subject of any prosecution proceedings as a result of their actions, "except with the previous sanction of the Central Government."[335] While this should not necessarily grant impunity to officials, it has been interpreted as the Executive expressing a "lack of faith in the Judiciary."[336]

A notable ruling on the matter is that of *Sri Krishna Singh v. the Union Territory of Mizoram*,[337] whereby the court held that the

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[329] South Asia Human Rights Documentation Centre (1995). The Constitution requires an arrestee to be presented before a magistrate within twenty-four hours of arrest. See Art 22 (2) Constitution of India, available at: http://lawmin.nic.in/coi/coiason29july08.pdf.

[330] Jeevan Reddy Committee report (2005) 17.

[331] (1982) 1 GLR 756.

[332] *Horendi Gogoi v. Union of India*, (1991) Gau CR 3081.

[333] (1988) 2 GLR 137.

[334] Constitution of India, Art 22 (5).

[335] This protection is also provided under ss. 45, 32, 197 of the Code of Criminal Procedure, ss. 125, 126 of the Army Act 1950, s. 6 of the Armed Forces (Special Powers) Act 1958 and s. 45 of the Unlawful Activities (Prevention) Act 1967. See also s. 7, Armed Forces (Special Powers) Act (Jammu and Kashmir) 1990.

[336] Asian Centre for Human Rights, *An analysis of Armed Forces Special Powers Act, 1958*, 2005, available at: www.pucl.org/Topics/Law/2005/afspa.htm.

[337] (1983) 1 GLR (NOC) 35.

approval of Central Government had not been necessary. The judges found that prior sanction is not required at the initial stage of legal proceedings and that a First Information Report ('FIR') alleging a 'cognizable offence' is enough for police to initiate an investigation and the registration of the FIR. The Gauhati High Court confirmed this position in *Union of India and Others v. State of Manipur and Others*,[338] ruling that prior sanction could be obtained at "the time of filing the charge-sheet or at the time of taking the cognizance by the concerned Court." The Court added that Section 6 only extends this protection in the case of bringing a lawsuit or other legal proceedings.

3.3. The AFSPA in practice and its application by the courts

From the above discussion, it may appear that the power granted to the armed forces is somehow circumscribed and that it cannot be used arbitrarily to carry out extrajudicial execution, disappearances, torture, rape, detention or any other crimes as defined under the Indian Penal Code. However, notable cases reveal a different picture. There have been numerous allegations that portray the Act as facilitating gross human rights violations, effectively granting the armed forces powers to kill in the name of law enforcement "without regard to international human rights law restrictions on the use of lethal force."[339] In 2009, reportedly 260 people were killed due to action taken under the AFSPA in the State of Manipur alone.[340] Furthermore, the Act's implementation is reported to have resulted in violations of the right to be free from torture, the right to liberty and security of person, and the right to a remedy.[341]

A highly publicised incident that demonstrates the potential for abuse regarding the use of lethal force is the killings in Kohima, the State capital of Nagaland, on 5 March 1995. As an army convoy passed through the town, a truck tyre burst and startled the soldiers, who thought they were under attack. They proceeded to "drag people out of their houses and kill them."[342] Seven people died from the attack, and it was confirmed through a Commission of Enquiry that the actions of the soldiers amounted to "cold-

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[338] 2008 Cri.L.J 32, 2007 (4) GLT 581, para.9.

[339] Human Rights Watch, *Getting Away With Murder*, p. 3.

[340] Armed Forces Special Powers Act responsible for many killings' K S Subramanian, retired police officer, interview with Amrith Lal, *Times of India*, 21 December 2009, available at: http://Articles.timesofindia.indiatimes.com/2009-12-21/interviews/28096458_1_afspa-battalions-manipur-rifles.

[341] Ibid; Joint NGO report (REDRESS, Asian Human Rights Commission, Human Rights Alert), pp. 6-8; Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958*, 2005, pp. 9-22, available at: www.amnesty.org/en/library/asset/ASA20/025/2005/en/400bfb4e-d4e1-11dd-8a23-d58a49c0d652/asa200252005en.pdf.

[342] Rakesh Shukla, *Why temperance will not work with AFSPA*, Manipur Online, 6 November 2010, available at: http://manipuronline.com/edop/opinions-commentary/why-temperance-will-not-work-with-afspa/2010/11/06.

blooded murder"[343] in two of the deaths, with "five other innocent civilians ... killed as a result of the firing."[344] The Commission also documented instances of beatings and civilians being forced to lie down or stand up for extended period.[345] Although the incident portrayed the tension in the area and showed the armed forces to be "perpetually under stress,"[346] it can be taken as a clear example of the dangers faced by civilians in a "disturbed area".

There are numerous other cases of torture, raped and murder documented by human rights groups. On 11 July 2004, for example, Thangjam Manorama Devi was reportedly arrested at her home by the Assam Rifles of the Indian Armed Forces for separatist activities. She was found dead three hours later, with her body showing "multiple gun-shot wounds," signs of torture, and with further reports indicating she was also sexually assaulted.[347] No one in the regiment has been prosecuted for the abuse or the killing, and the Central Government has reportedly blocked attempts at an investigation in spite of a Gauhati High Court ruling mandatingthe Manipur State government to investigate.[348] The case of Bhupen Choudhury and Krishnan Sarmah provides another example.The victims were picked up from Assam where they ran village tea stalls, and taken to Khairabari Army Camp where they reportedly died in custody in 1997. In *Adari Choudhury and others v. Union of India and Others*,[349] the Gauhati High Court ruled that Bhupen Choudhury was tortured to death during an interrogation whilst in custody, and admitted a post-mortem examination report, which confirmed that Mr Choudhury had suffered severely bruised soles, multiple contusions on the back and thighs, and fractured ribs. The Court found that this was the clear cause of death, and ordered compensation to the victim's family amounting to three lakh (300,000) rupees.

The problem posed by the requirement of a prior government sanction for an investigation into violations committed by the armed forces is demonstrated in a case involving the

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[343] 'The Justice D. M. Sen Commission of Enquiry into the Firing on 5th March 1995 at Kohima, Nagaland', cited in 'An Illusion of Justice: Supreme Court Judgment on the Armed Forces (Special Powers) Act' People's Union for Democratic Rights (1998) ['Powers of the Army' para.1], available at: www.cscsarchive.org:8081/MediaArchive/liberty.nsf/(docid)/B40648183B600F3865256A470064BE68.

[344] Ibid.

[345] Ibid.

[346] South Asia Human Rights Documentation Centre, *Armed Forces Special Powers Act: A study in National Security tyranny*, (1995).

[347] Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958*, pp. 16-17.

[348] Manorama murder case reaches Supreme Court, *Times of India*, 11 July 2011, available at: http://Articles.timesofindia.indiatimes.com/2011-07-11/guwahati/29760275_1_manorama-devi-c-upendra-singh-thangjam.

[349] (1999) ACJ 1331, available at: http://www.indiankanoon.org/doc/1363952/

disappearance of Mohammed Tayab Ali in 1999.[350] Mr Ali was arrested by plain clothes army officers and detained at an Assam Rifles (AR) camp at Kangla, Imphal. Despite AR authorities assuring his family that he would be handed over to police within 24 hours, he disappeared and has not been seen since. The case was investigated by the National Human Rights Commission, which found the Assam Rifles liable for the disappearance of the victim and thereby ordered the payment of compensation to his family.[351] The Gauhati High Court ordered the Central Bureau of Investigation to look into the matter further. However, as transpired, the process for obtaining prior government sanction for investigation and indictment was so long-winded that no one has so far been prosecuted, even though charges have been filed against several suspects.[352]

The case of *Sebastian M. Hongray v. Union of India & Others*[353] is a landmark decision in which the Supreme Court ordered exemplary compensation for violation of the right to life. This followed the disappearance in 1982 of C. Paul and C. Daniel from the village of Huining, Manipur after being taken into custody by the 21st Sikh Regiment of the Indian Army. Mr Hongray submitted a writ of habeas corpus on behalf of the families of the two men. The court decided that the men must have met an unnatural death, and went further to find that the relevant army authority committed contempt of court through "wilful disobedience to a writ issued by a court."[354] While the case set a precedent for human rights jurisprudence in India concerning enforced disappearance, it has not provided the impetus needed to ensure effective protection on the ground.

3.4. Conclusion: The application of AFSPA in light of NPMHR v. Union of India

A policy of 'minimal use of force' was prescribed by the Supreme Court in *NPMHR v. Union of India*.[355] Similarly, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[356] upholds the principles of proportionality,

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[350] National Human Rights Commission, *Procedure with respect to complaints against Armed Forces: Disappearance of Mohammed Tayab Ali*, (Case No. 32/14/1999-2000), available at: http://nhrc.nic.in/ArmedForcesCases.htm#no8

[351] Ibid.

[352] Civil Society Coalition on Human Rights in Manipur and the UN, *Manipur: A Memorandum on Extrajudicial*, Summary or Arbitrary Executions, Submission to the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 March 2012, available at: http://e-paolive.net/download/education/2012/03/CSCHR_Memorandum_20120328.pdf.

[353] 1984 AIR 1026, 1984 SCR (3) 544, available at http://indiankanoon.org/doc/1046642.

[354] Ibid., para. 548.

[355] *Naga People's Movement of Human Rights (NPMHR) v Union of India*, ICHRL 117 SC 1997, available at: http://judis.nic.in/supremecourt/qrydisp.aspx?filename=13628.

[356] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted 1990, available at: www2.ohchr.org/english/law/firearms.htm.

legality, accountability and necessity ('PLAN'),[357] which should be followed by all security forces deployed in disturbed areas. Force can only be used if it is 'strictly necessary' and must be exercised with restraint, in proportion with the objective and in consideration of the aim of the operation, the danger of the situation and the degree to which the force might risk life.[358]

The presumption of innocence and *audi alterem partem*, which embody the concept that no person should be condemned unheard, are two fundamental principles of criminal justice. These basic principles can only be ensured through a fair trial. The Supreme Court decided that maintenance of public order involves "cognizance of offences," search, seizure and arrest followed by registration of reports on offences [FIRs], investigation, prosecution, trial and, in the event of conviction, execution of sentences.[359]

While questions are rarely raised when security forces "destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made "in exercising powers under Section 4 (b) of AFSPA, the power to shoot where absconders may be hiding is legally untenable. The Supreme Court stated that "even if the appellant's absence is held to be an act of absconding, such conduct by itself is not conclusive either of guilt or of a guilty conscience."[360]

The power to make an arrest without warrant under Section 4(c) of AFSPA on the suspicion that the accused "has committed or is about to commit a "cognizable offence" is highly problematic. Arrests without warrant often lead to torture and other human rights violations, including extrajudicial killings. Similarly, searches without warrant under Section 4(d) of AFPSA have been one of the main reasons behind the anger and disaffection of people in disturbed areas.

Although the Supreme Court gave the AFSPA a vote of confidence in *NPMHR v. Union of India*, the practical application of AFSPA has been brutal and has bred a culture of impunity for the violators of human rights. The cases referred to above are just a few of the thousands that illustrate how the AFSPA has, indeed, become "a symbol of oppression [and] and object of hatred."[361] As noted by the Jeevan Reddy Committees, CEDAW, CERD and the

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[357] Commonwealth Human Rights Initiative, *Stamping Out Rights: The impact of anti-terrorism laws on policing*, 2007, p. 17, available at: www.humanrightsinitiative.org/publications/chogm/chogm_2007/chogm_report_2007.pdf.

[358] Ibid.

[359] *Naga People's Movement of Human Rights NPMHR v Union of India*, 28 October, 1987, available at: http://www.indiankanoon.org/doc/1301465/.

[360] *State Of Orissa v Mohan Mahanto* 2008 I OLR 942, para.13, available at: www.indiankanoon.org/doc/1657158/.

[361] Ministry of Home Affairs, *Jeevan Reddy report*, p. 75.

UN Special Rapporteur against Extra-Judicial killings[362] and the Special Rapporteur on the situation of human rights defenders,[363] only by repealing the Act can such violations be put to an end. Merely amending the Act is not enough.

[362] Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, *Country Mission to India Press Statement*, 19 – 30 March 2012, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E.

[363] Statement of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, as she concludes her visit to India, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10660&LangID=E.

4. Indonesia*

4.1. Practice and patterns of torture

The Republic of Indonesia has emerged from a 32 year dictatorship under Suharto, which lasted until 1998 and was characterised by large scale violations, including mass killings, torture, enforced disappearances and arbitrary detention.[364] Indonesian security forces were also said to be directly responsible for thousands of cases of torture in East Timor during the Indonesian occupation from 1974 to 1999.[365] The fall of Suharto ushered a period referred to as 'reformasi' characterised by high hopes and promises of improvements in the protection of human rights and the rule of law. A five year National Plan of Action on Human Rights (from 1998-2003) was launched by the new government, which was followed by the adoption of a constitutional amendment incorporating a chapter on human rights and the enactment of Law No. 39 of 1999 concerning Human Rights. The government also enacted Law No. 26 of2000, whichprovides forthe establishment of a Human Rights Court with jurisdiction over gross human rights violations, amid strong international pressure to prosecute the perpetrators of crimes committed mainly in East Timor. The above facilitated the establishment of ad hoc human rights courts for East Timor and Tanjung Priok by presidential decrees.[366]

Despite these developments, expectations for greater respect for human rights and accountability remain largely unmet and

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* Based on initial contribution by Chris Biantoro, Investigator, Lawyer, Commission for the Disappeared and Victims of Violence (KontraS), Indonesia.

[364] KontraS, *Crimes Against Humanity under Suharto's New Order Regime (1966-1998)*, available at: http://www.kontras.org/data/Crimes%20against%20Humanity%20under%20Soeharto.pdf.

[365] Joint NGO report, *The Practice of Torture in Aceh and Papua 1998-2007 – with an annex on the situation of human rights in Timor Leste*, November 2007, p. 101, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/ShadowReportIndonesia40.pdf.

[366] Presidential Decrees No. 53/2001 and 96/2001.

widespread abuses continue to be reported.[367] Among the factors that account for the absence of significant progress in human rights protection are the lack of independence and institutional impartiality on the part of the judiciary and the law enforcement agencies as well as rampant corruption.[368] Notably, only one of the four human rights courts envisaged under Law 26 was established[369] and it has only heard one case to date whereas the impact of the ad hoc courts is seriously undermined by their limited geographic and temporal jurisdiction as well as irregularities in the conduct and outcome of the trials.[370] They have therefore largely failed to break the climate of impunity for serious human rights violations, including torture.

Varieties of actors in Indonesia have reportedly been responsible for acts of torture and related violations. The police are known to utilise torture in the process of interrogating and arresting detainees, as well as in other situations.[371] Many of these arrests are undertaken without a warrant, despite this

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[367] See Amnesty International, *Stalled Reforms: 'Impunity, discrimination and security force violations in Indonesia'Submission to the UN Universal Periodic Review, May-June 2012, Index: ASA 21/003/2012*, available at: http://www.amnesty.org/en/library/asset/ASA21/003/2012/en/10658fe3-4d18-4101-9039-374f7c93e635/asa210032012en.pdf; Asian Human Rights Commission, *The State of Human Rights in Indonesia*, AHRC-SPR-012-2008, 2008, available at: http://www.humanrights.asia/resources/hrreport/2008/AHRC-SPR-012-2008-Indonesia_AHRR2008.pdf. See also Alternative NGO Coalition Report on the Situation of Torture in the Republic of Indonesia, FIDH, Imparsial, KontraS, *Shadows and clouds: Human Rights in Indonesia: Shady Legacy, Uncertain Future*, October 2010, available at: http://www.fidh.org/IMG/pdf/Indonesie552ang.pdf.

[368] See: Commission on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy, submitted in accordance with Commission on Human Rights Resolution 2002/43: Report on the mission to Indonesia*, UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, paras.81-86, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/102/08/PDF/G0310208.pdf?OpenElement.

[369] The law envisages the establishment of Human Rights Courts in Makassar, Surabaya, Jakarta, and Medan and only the first one is established as of this writing. See Art 3 of Law No. 26, 2006; International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto*, March 2011, available at: http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf.

[370] The Jurisdiction of the Ad Hoc Human Rights Court for Timor is limited to crimes committed from April to September 1999 in only three of Timor-Leste's 13 districts, whereas the jurisdiction of Tanjung Priok Court is specific to crimes committed by government forces in the context of an attack against protesters in 1984 in Jakarta's port. All the 34 accused tried by the two ad-hoc courts and the single permanent Human rights Court in Kemassa have been acquitted at first instance or on appeal. See: Human Rights Watch, *Country Summary: Indonesia*, January 2009, p. 2, available at: http://www.hrw.org/sites/default/files/related_material/indonesia.pdf and ICTJ, Intended to Fail, The Trials Before the Ad Hoc Human Rights Court in Jakarta, 2003, available at: http://ictj.org/sites/default/files/ICTJ-Indonesia-Rights-Court-2003-English.pdf. See also International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto*.

[371] Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, Manfred Nowak, UN Doc. A/HRC/7/3/Add.7, 10 March 2008, 15, paras. 37-38, available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=47eba2802&skip=0&type=MISSION&advsearch=y&process=y&allwords=&exactphrase=&atleastone=&without=&title=special%20rapporteur%20torture%20&monthfrom=&yearfrom=&monthto=&yearto=&coa=&language=&citation=

being a requirement under the Indonesian Criminal Procedure Code.[372] Pre-trial detainees in police custody are also often held in facilities where there is "limited ventilation, no natural daylight and no possibility to exercise."[373] The practice of torture appears to be most prevalent in urban areas, such as Jakarta and other metropolitan areas around Java, which has been attributed to higher crime rates,[374] but has also been reported in rural areas. Torture reportedly consists of beatings – with fists, wooden sticks, chains, cables, iron bars and hammers – kicking, electrocution and the placing of heavy implements on parts of the victims' body.[375] Furthermore, the police have been accused of being over-zealous and using excessive force whilst monitoring demonstrations.[376]

The Indonesian Armed Forces (TNI[377]) is reportedly responsible for the widespread use of torture, particularly in provinces prone to the activities of separatist groups, such as West Papua, Aceh and the Republic of South Moluccas (RMS). Western Papua is a highly militarised region, where the use of torture has become an institutionalised practice, and is used as a weapon against the "perceived threat" of West Papuan nationalism.[378] A notorious incident that drew heavy criticism was that of the "2007 Flag Unfurling and its violent aftermath,"[379] which took place in the RMS. In a show of defiance towards Susilo Yudhoyono, the President of Indonesia, protesters performed the cakalele[380] and raised the Moluccan flag. In retribution for the public embarrassment of President Yudhoyono, officers from the National Police anti-terrorism unit[381] began arresting and rounding up the activists, some of whom were beaten and subjected to other forms of inhumane treatment.[382]

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372 Criminal Code of Procedure (KUHAP), Art 68.

373 Amnesty International, *Indonesia: Briefing to the UN Committee Against Torture*, AI Index: ASA 21/003/2008, April 2008, p. 26, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AIReportIndonesia40.pdf.

374 Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia* p. 2.

375 Ibid., para. 21.

376 Asian Human Rights Commission, *INDONESIA: Police raided offices of two legal aid organisations and used excessive force towards protesters in Jakarta*, Appeal: AHRC-UAC-0672012, 3 May 2012, available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-067-2012.

377 'Tentara NasionalIndonesia'.

378 Franciscans International, Faith Based Network on West Papua, and Asian Human Rights Commission, *Joint Stakeholders' Submission on: The Human Rights Situation in Papua*, November 2011, p. 2, available at: http://www.humanrights.asia/resources/special-reports/AHRC-SPR-002-2011/view.

379 Human Rights Watch, *Prosecuting Political Aspiration: Indonesia's Political Prisoners*, June 2010, p. 18, available at: http://www.hrw.org/sites/default/files/reports/indonesia0610webwcover_0.pdf.

380 A traditional Moluccan war dance.

381 National Police Detachment 88.

382 Human Rights Watch, *Prosecuting Political Aspiration: Indonesia's Political Prisoners*, pp.19-26.

In several instances, torture has apparently been committed for discriminatory motives, such as in relation to sexual orientation and religion. In 2007, a homosexual couple were arrested and detained by police in Aceh province, and they were allegedly tortured on account of their sexual orientation.[383] The two men were sexually abused and made to strip naked, among other forms of ill-treatment, before eventually being released on condition that one of them signed a statement declaring they would no longer engage in homosexual acts.[384] Although four police officers were arrested, they were reportedly charged with a minor offence and sentenced to three months imprisonment and a small fine after a lengthy investigation.[385] The use of Sharia (Islamic law) in Aceh has been identified as a source of officially sanctioned torture and ill treatment, due to regulations[386] authorising stoning and flogging as forms of punishment.[387] Furthermore, ethnic and religious tensions and conflicts have resulted in ill treatment being committed by non-state actors belonging to different religious groups or sects against members of other sects. The UN Committee against Torture has been particularly concerned at the violence suffered by Ahmadiyah Muslims at the hands of mainstream Muslims, and the "reluctance" of the authorities to provide adequate protection and investigate the rights violations.[388]

There have also been instances where private corporations have allegedly been involved in abuses, including 'torture', in rural areas. Exxon-Mobil reportedly hired security forces, comprised of members of the Indonesian military, who committed serious crimes against villagers in Aceh province between 1999 and 2001. The alleged crimes included villagers being "beaten, burned, shocked with cattle prods, kicked, and subjected to other forms of brutality and cruelty", and resulted in a US federal court affirming

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383 Asian Human Rights Commission, *Indonesia: Alleged brutal torture and sexual abuse by the Banda Raya police*, Appeal: UA-068-2007, 28 February 2007, available at: http://www.humanrights.asia/news/urgent-appeals/UA-068-2007.

384 Amnesty International, *Indonesia: Briefing to the UN Committee Against Torture*, pp. 21-22.

385 Ricky Gunawan, Laws against torture needed, Jakarta Post, 22 November 2008, available at: http://www.thejakartapost.com/news/2008/11/22/laws-against-torture-needed.html.

386 See Qanun No. 14/2003 *Khalwat* regulations, concerning illicit relations between men and women.

387 Human Rights Watch, *Indonesia: New Aceh Law Imposes Torture*, 11 October 2009, available at: http://www.hrw.org/news/2009/10/11/indonesia-new-aceh-law-imposes-torture.

388 Committee Against Torture, *Concluding observations of the Committee against Torture: Indonesia*, UN Doc. CAT/C/IDN/CO/2, 2 July 2008, para. 7-8, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/428/16/PDF/G0842816.pdf?OpenElement; see also Kanaha Sabapathy, Indonesians seek action against religious violence. *Radio Australia*, 25 April 2012, available at: http://www.radioaustralia.net.au/international/radio/program/asia-pacific/indonesians-seek-action-against-religious-violence/933448.

the claimants' right to sue the oil company.[389] The case is currently pending before the DC Circuit Court, which is expected to make a further determination in light of the recent ruling of the US Supreme Court in *Kiobel, et al v. Royal Dutch Petroleum*.[390] The latter ruling limits the use of the US Alien Tort Statute[391] to bring suits against corporations allegedly responsible for human rights violations committed abroad.

4.2. Legal framework

International law

Indonesia ratified the UN Convention against Torture (CAT) on 28 October 1998,[392] with a reservation and declaration in relation to the clause on dispute resolution under Article 30(1)[393] of the Convention and paragraphs 1 to 3 of Article 20, which refer to the remit of the Committee to investigate allegations of systematic torture and the responsibility of states to cooperate.[394] Indonesia has not accepted the Committee's competence to consider individual complaints and is not party to the Optional Protocol to CAT.

Other important international instruments to which Indonesia is a party include the ICCPR,[395] although not the Optional Protocols,[396] the ICESCR,[397] and further UN conventions concerning children's rights,[398] discrimination against women,[399] and racial

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[389] John Doe VIII et al v. Exxon Mobil Corp et al, D.C. Circuit Court of Appeals, No. 09-7125 (D.C. Cir. July 8, 2011); See also: Jonathan Stempel, Indonesia torture case vs Exxon Mobil revived, Reuters,8 July 2011, available at: http://www.reuters.com/Article/2011/07/08/us-exxonmobil-indonesia-idUSTRE7676I120110708 .

[390] *Kiobel, et al v. Royal Dutch Petroleum Co. et al*10–1491 (U.S. Apr. 17, 2013).

[391] Alien Tort Statute, 28 U.S.C. § 1350 (2006).

[392] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention was incorporated into domestic law through Law No. 5 of 1998.

[393] Art 30 provides that in event of dispute between states regarding the interpretation of the Convention, one of the parties can ultimately refer the dispute to the International Court of Justice. The Indonesian government's position is that disputes "may be referred to the International Court of Justice only with the consent of all [involved] parties." See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec.

[394] The Indonesia Government accepted those provisions with the qualification that they shall be "implemented in strict compliance with the principles of the sovereignty and territorial integrity of the states."

[395] International Covenant on Civil and Political Rights. Indonesia acceded to the covenant on 23 February 2006.

[396] Optional Protocol to the International Covenant on Civil and Political Rights and Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

[397] International Covenant on Economic Social and Cultural Rights.Indonesia acceded to the Covenant on 23 February 2006.

[398] Convention on the Rights of the Child. Indonesia ratified on 5 September 1990.

[399] Convention on the Elimination of All Forms of Discrimination against Women. Ratified by Indonesia on 13 September 1984.

discrimination.[400] Indonesia ratified the Geneva Conventions,[401] but has not become a party to the Additional Protocols. It is also not a party to the Rome Statute of the International Criminal Court.

The applicability of international law in the Indonesian legal system is stipulated in Law No. 39 of 1999, which indicatesthat "provisions set forth in international law concerning human rights ratified by the Republic of Indonesia, are recognised…as legally binding".[402] In September 2010, the Indonesian government also signed the Convention on the Protection of All Persons from Enforced Disappearance (CPED) in New York.[403]

While Indonesia is said to have cooperated in the past with international monitoring bodies, such as the Special Rapporteur on Torture[404] and the Committee against Torture,[405] the Special Rapporteur on Torture noted in 2010 that it had failed to implement key recommendations he had made in 2008.[406]

National legal system

The Constitution of Indonesia guarantees the right to be "free from torture or inhumane and degrading treatment" and provides that the said right "cannot be limited under any circumstances".[407] In addition, Indonesia's human rights bill provides a comprehensive definition of torture[408] and affirms the

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[400] International Convention on the Elimination of All Forms of Racial Discrimination. Indonesia acceded to the Convention on 25 June 1999.

[401] The Four Geneva Conventions of 12 August 1949. Ratified by Indonesia on 30 September 1958.

[402] Law No. 39 of 1999, Art 7 (2), available at: http://www.asiapacificforum.net/members/full-members/indonesia/downloads/legal-framework/indonesiaact.pdf.

[403] KontraS, *Report on Torture Practice in Indonesia for International Day of Support for Victims of Torture*, p. 19, available at: http://www.humanrights.asia/countries/indonesia/reports/ngo/KontraSTortureReport2011.pdf.

[404] Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, p. 2.

[405] Committee Against Torture, *Concluding observations of the Committee against Torture: Indonesia*, para.2.

[406] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment, Manfred Nowak – Follow-up to the recommendations made by the Special Rapporteur: Visit to Indonesia*, UN Doc. A/HRC/13/39Add.6, 26 February 2010, paras.32 - 37, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf.

[407] 1945Constitution of Indonesia, as amended by the Fourth Amendment of 2002, Arts 28G (2) and 28I (1), available at: http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf.

[408] "Torture means all deliberate acts that cause deep pain and suffering, both physical or emotional, inflicted on a person to obtain information or knowledge from that person or from a third party, by punishing an individual for an act carried out or suspected to have been carried out by an individual or third party, or by threatening or coercing an individual or third party, or for reasons based on discriminative considerations, should this pain and suffering arise as a result of provocation by, with the approval of, or with the knowledge of any person or public official whatsoever." – Art 1 (4) of Law No. 39 of 1999, Concerning Human Rights.

right of all persons to freedom from torture, and cruel, inhuman or degrading punishment or treatment,[409] and not to be arbitrarily arrested or detained.[410] It also contains a specific provision concerning the right of children "not to be the object of oppression, torture, or inhuman legal punishment".[411]

Acts of torture are punishable as crimes against humanity under Law No. 26 of 2000 "if perpetrated as a part of a broad or systematic direct attack on civilians."[412] There is no specific provision under Indonesian law criminalising acts of torture that do not meet the elements of crimes against humanity as provided for by Law No. 26, 2000. The Penal Code,[413] however, contains provisions on acts against the person that could be used to prosecute conduct falling within the scope of the definition of torture, such as maltreatment and coercion in the course of interrogation.[414] Maltreatment can be punished by up to fifteen years imprisonment, depending on the severity of the act and taking account of any injuries or loss of life suffered by the victim. Any official obtaining a confession or a statement through coercion faces a maximum of four years imprisonment.[415]

These provisions do not provide a sufficient disincentive against the use of torture by law enforcement officials and fail to reflect the gravity of the crime of torture. The draft Penal Code, which has been considered from at least as early as 2003, if enacted is expected to fill this gap in that it contains a provision defining and criminalising torture.[416] However, the draft has not been enacted at the time of writing.[417] The same applies to the revision of the Criminal Procedure Code that has been going on for many years.[418]

In addition to gaps in the legal framework for the prohibition of torture, the infliction of corporal punishment is sanctioned by Sharia law in the Aceh province for vaguely defined "morality

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[409] Law No. 39 of 1999, Art 33 (1). The right not to be tortured "cannot be diminished under any circumstances whatsoever" – Art 4.

[410] Law No. 39 of 1999, Art 34.

[411] Ibid.,Art 66 (1).

[412] Law No. 26 of 2000, Arts 7 and 9.

[413] Penal Code of Indonesia 1982, available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ffc09ae2&skip=0&query=Indonesian%20Penal%20Code

[414] See Penal Code, Arts 351-355 and Art 422.

[415] Ibid.

[416] See, Committee against Torture, *Indonesia: Consideration of reports submitted by State Parties under Article 19 of the convention – Second periodic reports of State parties due in 2003, Addendum*, UN Doc. CAT/C/Add.1, 25 August 2005, p. 6, available at: http://www.unhchr.ch/tbs/doc.nsf/c12563e7005d936d4125611e00445ea9/0579ee640a30ec09c125712a00351d37/$FILE/G0544102.pdf.

[417] Amnesty International, *Briefing to the UN Committee Against Torture*, 2008, AI Index: ASA 21/003/2008.

[418] R.R. Strang, "*More Adversarial but not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code*, Fordham International Law Journal, 2008, p. 192.

offences".[419] Such forms of punishment and the public trials through which the defendant's guilt is established constitute inhumane punishment and/or treatment and violations of international fair trial standards. Although the CAT and other human rights instruments do not contains a specific prohibition on corporal punishment, it has been considered as 'cruel, inhuman or degrading treatment or punishment' in a number of leading cases.[420] In relation to Indonesia, the UN Special Rapporteur on Torture has considered the practice to be incompatible with the CAT,[421] and expressed his concern at the use of punishments introduced under Sharia law in Aceh.[422]

Non-refoulement

Deporting refugees and asylum-seekers to a place where they face a genuine risk of torture is expressly prohibited through the principle of non-refoulement under the CAT.[423] Although Indonesia is not a party to the UN Refugee Convention,[424] it has the obligation under the CAT to protect individuals who face a real risk of torture. While there is limited information on the practice in Indonesia, reports suggest that the Government has not always lived up to its treaty obligation. One example is the extradition of a Yemeni national who was deported, and then tortured in Jordan.[425]

Jurisdiction over torture committed abroad

Law No. 26 of 2000 sets out the authority of the Human Rights Court to rule on cases where torture has been committed abroad but only if the author is an Indonesian citizen.[426] Jurisdiction for acts committed outside Indonesia by non-Indonesian nationals is only provided for certain crimes, such as crimes against the security of the State, money laundering, counterfeiting and piracy.[427] Accordingly, there is no clear provision in Indonesian law empowering its national court to try individuals responsible

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419 Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 17.

420 See for example *Osbourne v. Jamaica*, Communication No. 759/1997, UN Doc, CCPR/C/68/D/759/1997 (2000), para.9.1; *Tyrer v. United Kingdom*, Application No. 5856/72, Judgment from 25April 1978.

421 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, UN Doc. A/HRC/13/39/Add.5, 5 February 2010, para.212-219, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf.

422 Ibid., para.218.

423 Convention against Torture, Art 3.

424 United Nations Convention Relating to the Status of Refugees 1951 – the principle of non-refoulement is set out in Art 33.

425 Amnesty International, *Indonesia: Briefing to the UN Committee Against Torture*, pp. 18 – 19.

426 Law No. 26 of 2000, Art 5

427 See Penal Code, Arts 4 and 104.

for acts of torture committed, where such individuals are found in Indonesian territory. In its 2008 Concluding Observations, the Committee against Torture was critical regarding this issue, and recommended that Indonesia should provide jurisdiction over acts of torture allowing the extradition or prosecution of suspects found in its territory in line with the provisions of the convention.[428]

4.3. Safeguards and complaint mechanisms

Limits to and supervision of pre-trial detention and complaint mechanisms

The law regarding the length of time that someone can be detained without trial is set out in the Criminal Procedure Code (KUHAP).[429] The Criminal Procedure Code currently allows the detention of a suspect for up to 20 days upon a warrant issued by an "investigator", which may be extended by forty days by a prosecutor if the investigation were not completed.[430] A public prosecutor may also issue a warrant for detention of up to twenty days, with a further extension of up to thirty days granted by the head of a district court for the purpose of completing an investigation.[431] The judge is not required to see the detainee to grant the extension, which deprives the detainee of a crucial opportunity to be heard and challenge the legality of detention and/or complain about possible ill-treatment and his condition of detention. The period of pre-trial detention can be extended further by a possible sixty days if the suspect has a medically proven physical or mental disorder, or he or she is being investigated for a crime that carries a sentence of at least nine years imprisonment.[432]

Moreover, emergency laws vest both the police and armed forces with the power to detain suspects without trial. Indonesia's anti-terrorism law of 2002, for example, permits the police and prosecutors to keep a suspect in pre-trial detention for up to six months.[433] Law No. 23 of 1959 allows the armed forces to "arrest and detain a person for a maximum of twenty days".[434] The detainee can eventually be held for a "maximum of fifty days" with the approval of the Central Military Emergency Authority to complete the investigation, without judicial supervision.[435]

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[428] Committee Against Torture, *Concluding observations of the Committee against Torture: Indonesia*, par. 12.

[429] Kitab Undang-Undang Hukum Acara Pidana 1981 (KUHAP).

[430] KUHAP, Arts 20 and 24.

[431] Ibid., Art 25.

[432] Ibid., Art 29.

[433] See Art 25(2), of Law No 15 of 2003 confirming Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism.

[434] Law No. 23 of 1959, Art 32 (1), available at: http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/html/Filetoupload,53220,en.htm.

[435] Law No. 23 of 1959, Art 32 (3).

The lack of adequate safeguards under these provisions provides evident scope for abuse, and reforms under the draft revised procedure code do little to alleviate concerns.[436] The length of time that suspects can be held without trial was an issue highlighted by the Human Rights Committee, which recommended that such periods should be reduced.[437] There are numerous accounts of torture occurring during pre-trial detention, with reports of some victims even committing suicide due to the unbearable conditions.[438] The UN Special Rapporteur on Torture noted "with concern the very long duration of police custody",[439] which renders detainees vulnerable to torture and other abuse and allows the physical signs of such abuse to disappear.[440]

Prison overcrowding, which can partly be attributed to the extensive use of pre-trial detention in Indonesia that was estimated at 36 % as of August 2011,[441] is another cause of concern as it may amount to inhumane treatment.[442] Poor hygiene standards, a lack of living space, and scarcity of food were all features of overcrowded prisons noted by the UN Special Rapporteur, as well as there being facilities where pre-trial detainees and convicts were not separated in violation of international standards.[443]

Victims are able to submit complaints and report allegations of torture to the police or military or the National Police Commission (KOMPOLNAS).[444] However, such avenues are rarely effective for the understandable reason that those are often the same institutions that are implicated in the violations. The internal police investigative body, Propam,[445] has been accused of confining itself to imposing weak disciplinary sanctions in response to torture allegations against the police, "which by no means reflect the gravity of the crime."[446]

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436 Amnesty International, *Indonesia: Briefing to the UN Committee against Torture*, pp. 14-15.

437 Committee against Torture, *Concluding Observations: Indonesia*, UN Doc.A/57/44, 1 November 2002, paras. 36-46, available at: http://indonesia.ahrchk.net/docs/IndonesianCATReport2002.pdf.

438 Asian Legal Resource Centre, *Indonesia: Failure to pass appropriate legislation concerning torture, as required by the Convention against Torture*, ALRC-CWS-07-004-2008, 21 February 2008, available at: http://www.alrc.net/doc/mainfile.php/alrc_st2008/471/.

439 Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 23.

440 Ibid.

441 International Centre for Prison Studies, *World Prison Brief: Indonesia*, available at: http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=95

442 Amnesty International, *Indonesia: Briefing to the UN Committee against Torture*, p. 23.

443 Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 31.

444 Amnesty International, *Indonesia: Briefing to the UN Committee against Torture*, p. 32.

445 Profesi dan Pengamanam (Professionalism and Security).

446 Human Rights Council, Report of the Special Rapporteur on Torture: Mission to Indonesia, para. 52.

The National Human Rights Commission (Komnas HAM),[447] on the other hand, was meant to serve as an independent mechanism. It is mandated to receive complaints and has the sole mandate to inquire into allegations of human rights violations under Law No. 26 of 2000.[448] Indeed, in the early days of the reform, the commission has asserted its independence and competence through the conduct and findings of its investigation into crimes against humanity in Timor Leste, implicating senior officers.[449] However, the Komnas HAM has not been able to maintain such independence[450] and its composition and apparent inability to properly record complaints has been criticised.[451]

Access to legal representation and compulsory medical examination upon arrest

Suspects have the right to obtain legal advice once they have been arrested. Article 54 of the KUHAP is the relevant provision concerning access to legal counsel upon arrest,[452] and the right to legal aid for persons brought before a tribunal is set out in Section 4, Right to Justice in Law No. 39 of 1999.[453] With regard to those who are unable to afford legal representation, Law No. 18 of 2003 requires all lawyers to provide pro bono legal assistance.[454] In spite of these provisions, access to legal counsel is routinely denied or forcibly waived under the influence of the police.[455] Furthermore, there is even a reluctance to seek legal counsel among many detainees "for fear that it would signal to the police that they were wealthy and thereby make them even more vulnerable to bribery, extortion and other abuses."[456]

Article 58 KUHAP guarantees the right of a detainee or suspect to contact a doctor, although it does not provide a right to request

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[447] Komnas HAM was established by Presidential Decree No. 50 of 1993, and its legal foundation and mandate is set out in Art 89, Law No. 39 of 1999.

[448] Law No. 26 of 2000, Art 18.

[449] International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto*.

[450] See both Committee Against Torture, *Concluding Observations: Indonesia*, 2002, par. 4; and Committee Against Torture, *Concluding observations of the Committee against Torture: Indonesia*, 2008, par. 10,.

[451] Asian Legal Resource Centre, *Alternative Report to the Secretary General's Special Rapporteur on Torture on the issue of torture in Indonesia*, ALRC-SPR-001-2007, October 2007, p. 4, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/ALRCReportIndonesia40.pdf.

[452] Commission on Human Rights, *Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January-12 February 1999)*, UN Doc. E/CN.4/2000/4/Add.2, 12 August 1999, para.76, available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/1fb77aecf39c857f802568330052ad30?Opendocument.

[453] Law No. 39 of 1999, Art 18 (4).

[454] Law No. 18 of 2003, Art 22

[455] Amnesty International, *Unfinished Business: Police Accountability in Indonesia*, Index: 21/013/2009, June 2009, p. 36, available at: http://www.amnesty.org/en/library/asset/ASA21/013/2009/en/619e8559-7fed-4923-ad6c-624fbc79b94f/asa210132009en.pdf.

[456] Ibid., p. 35.

that a medical report is drawn up. In practice, however, in situations of detention and interrogation, it was of "major concern" to the UN Special Rapporteur that medical care was lacking for those that were in urgent need of attention.[457]

Admissibility of evidence obtained under torture

The Indonesian Code of Criminal Procedure provides that suspects should be able to provide information freely during the investigation and trial stages and that they should not be pressured "in any form" into giving evidence.[458] The judge during a trial shall ensure that a defendant or witness has been able to give evidence freely and failure to do so can be a ground to quash a verdict.[459] In practice, however, the judiciary has been seen to be unwilling to address allegations of torture, with such evidence often being "admissible during court proceedings."[460] This accounts, in part, for the fact that torture is routinely used to extract confessions and obtain information by the police, which has been the basis of securing convictions.[461]

4.4. Accountability

Indonesia has an unsatisfactory record in respect of accountability for past andongoing human rights violations, including torture. This reality cannot be attributed solely to the absence of an adequate legal framework. Although torture is not defined and punished as a specific offence under the Indonesian Criminal Code, acts of torture could still be prosecuted before civilian or military tribunals under other categories of offences.[462] Moreover, with the passage of Law No. 26, it is possible to prosecute systematic and widespread cases of torture, such as those that have reportedly taken place in Aceh and West Papua. Yet, the fate of Law No. 26 and the initiatives to address gross human rights violations demonstrate the magnitude of resistance to accountability in Indonesia.

Komnas Ham, the National Commission on Violence Against Women (Komnas Prepuan), the Indonesia–Timor-Leste Commission of Truth, Friendship, and a number of other mechanisms have conducted investigations into systematic violations of human rights in conflict zones. Most of the finding

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457 Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para.36.

458 KUHAP, Arts 52, 117 (1) and 66.

459 KUHAP, Art 153.

460 Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 21.

461 Amnesty International, *Open letter on torture and other human rights violations by the police in Indonesia*, Index: ASA 21/014/2012, 4 April 2012, p. 1, available at: http://www.amnesty-polizei.de/d/wp-content/uploads/asa210142012en.pdf.

462 See Penal Code, Arts 351-355 and Art 422.

of these bodies, however, did not lead to criminal investigations and prosecutions.[463] In those cases where such steps were taken, the accused were eventually acquitted, owing mainly to the weaknesses of the cases prepared by the prosecution.[464] For example, all but six of the eighteen accused before the Ad Hoc Human Rights Court for Timor Leste were acquitted by the Trial Court. The six high profiles accused, which included Eurico Guterres – a former East-Timorese militia leader – and Abilio Soares – the former Governor of East Timor – were subsequently acquitted on appeal.[465] The Tanjung Priok Ad hoc Human Rights Court, on the other hand, convicted twelve out of the fourteen defendants who were indicted for serious crimes including extra-judicial killings and torture, committed against civilian protesters in 1984. However, all of them were acquitted on appeal by the Constitutional Court.[466]

As noted above, the permanent Human Rights Court established under Law No. 26/2000 only heard one case so far and acquitted the two police officers who stood trial. The defendants were indicted for their alleged involvement in crimes committed in 2000 during a military operation against students in Papua, which included mass detention, beatingsand torture and resulted in the death of several students.[467] Although the Indonesian government is expected to establish truth commissions and ad hoc human rights courts for Aceh and Papua under the laws granting autonomy to the two provinces, none of these institutions have been set up at the time of writing.[468]

The failure to conduct a genuine process of accountability for past abuses in Indonesia seems to perpetuate the culture

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[463] For a detailed discussion of the different mechanisms, see International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto*, pp. 17-31.

[464] See David Cohen, *Intended to Fail: the Trials Before The Ad Hoc Human Rights Court in Jakarta*, Occasional Paper Series, New York: ICTJ, August 2003, p. v.,; International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto*, pp. 47-50; and Human Rights Watch, *Country Summary: Indonesia*, January 2009, p. 2, available at: http://www.hrw.org/sites/default/files/related_material/indonesia.pdf.

[465] Guterres JudgementNo 04/PID.HAM/AD.HOC/2002/PH.JKT.PST, (HRCI, Nov 25, 2002), available at: http://www.worldcourts.com/hrahc/eng/decisions/2002.11.25_Prosecutor_v_Guterres.htm; Osorio Soares Judgement No 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST, (HRCI, Aug 7, 2002), available at: http://www.worldcourts.com/hrahc/eng/decisions/2002.08.07_Prosecutor_v_Soares.htm.

[466] See International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto*, p. 48.

[467] The two suspects were reportedly promoted later. See Joint NGO report, *The Practice of Torture in Aceh and Papua 1998-2007 – with an annex on the situation of human rights in Timor Leste*, pp. 84-85 and 95; and International Centre for Transitional Justice, Association for the Families of the Disappeared in Indonesia, Coalition for Justice and Truth, *Indonesia's obligations to Provide Reparations for Victims of Gross Human Rights Violations*, December 2011, p. 5, available at: http://ictj.org/sites/default/files/ICTJ-Indonesia-Reparations-Policy-Briefing-2011-English.pdf.

[468] Law No. 11 of 2006 and Law 11/2006,Arts 228-229 and Law No. 21 of 2001, Art 45.

of impunity. This was reflected in a more recent case involving the torture and killing of a Papuan activist, Yawan Wayeni, and the torture of two Papuan farmers that was caught in a graphic video footage. Despite the international condemnation that the image provoked the Indonesian authorities have failed to bring the perpetrators to justice.[469]

Besides lack of political will, there are a range of structural problems that impede genuine investigations and prosecutions of on going cases of torture and ill treatment committed in a wide range of contexts. These include widespread corruption within the law enforcement agencies and the judiciary, and the lack of independent oversight mechanisms and a strong judiciary. According to the Special Rapporteur on Torture, corruption is particularly "deeply ingrained in the criminal justice system," and can even determine the availability of such basic services as sanitation and access to food within detention facilities.[470] Suspects are reportedly asked to pay bribes to the police whilst in custody in order to obtain their release or avoid torture.[471] Inadequate pay and poor working conditions within the police force are further problems that contribute to the prevalence of corruption.[472]

The prevalence of impunity and corruption is bound to erode confidence in the institutions that are supposed to enforce the law among the public and discourage victims and witnesses from coming forward with information.[473] The Witness and Victims Agency (LPSK)[474] established under Law No. 13 of 2006 is reportedly unable to provide adequate protection due to financial and logistical constraints while its independence has also been questioned.[475] Another problem relating to the investigation and prosecution of torture concerns the examination and documentation of injuries inflicted during torture or ill treatment. The fact that autopsies are not mandatory and that forensic examinations are not always carried out following allegations

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[469] Human Rights Watch, *Country Summary: Indonesia*, January 2011, p. 4, available at: http://www.hrw.org/sites/default/files/related_material/indonesia_5.pdf.

[470] Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 37.

[471] Amnesty International, *Unfinished Business: Police Accountability in Indonesia*, p. 40.

[472] Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 38. Although Indonesia has an Anti-Corruption Commission (KPK) mandated to monitor, investigate and prosecute corruption, there are serious doubts as to its effectiveness. See, Adnan Topan Husodo, *Challenges in combating corruption: Lessons from Indonesia*, Article 2, Asian Legal Resource Centre, 29 March 2010, available at: http://www.Article2.org/mainfile.php/0901/368/.

[473] Amnesty International, *Indonesia: Briefing to the UN Committee Against Torture*, pp. 12-13.

[474] Lembaga Perlindungan Saksi dan Korban (LPSK).

[475] Asian Human Rights Commission, *Indonesia: Lack of effective witness and victim protection*, AHRC-STM-029-2010, 18.

results in there being notable gaps when trying to build a case against a suspect.[476]

Applicability of statutes of limitation and amnesty

The 2004 Law on Truth and Reconciliation Commission granted the Commission the power to recommend amnesty in exchange for confessions.[477] The Constitutional Court, however, declared the law unconstitutional[478] and it is reported that the new draft bill supported by civil society does not include an amnesty provision.[479] Law No. 26 of 2000 provides that the crimes set forth in the law are imprescriptible, which also applies to acts of torture that qualify as crimes against humanity.[480] On the other hand, statutes of limitation of varying lengths apply to other relevant offences. The period of limitation for the offences of 'malfeasance' or 'coerced confession' is twelve years.[481]

4.5. Reparation

The right to claim compensation for victims of gross human rights violations, including torture, is affirmed in Article 35 (1) of the Law No. 26 of 2000 and Article 7 of the Law No. 13 of 2006.[482] Government Regulation No. 3 of 2002 on the Compensation, Restitution and Rehabilitation of Victims of Human Rights Abuses adds further detail, stipulating that the State must assume the responsibility for providing compensation where the perpetrator is unable to do so.[483] Reparation can also be obtained through alternative civil[484] and criminal[485] law mechanisms, however none specifically provide reparation for torture.

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[476] Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 22.

[477] Law No. 27 of 2004, Art 29, available at: http://hrli.alrc.net/mainfile.php/indonleg/131/.

[478] Constitutional Court Decision No. 006/PUU-IV/2006 (2006), available at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_Verdict%20No.%20006-PUU-IV-2006.pdf.

[479] International Center for Transitional Justice (ICTJ) and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Suharto.*

[480] Art 46.

[481] Penal Code, Art 78(1).

[482] Law No. 13 of 2006 on Witnesses and Victims Protection, available at: http://www.elsam.or.id/new/index.php?id=338&lang=en&act=view&cat=c/601.

[483] See both: REDRESS, *Indonesia*, May 2003, p. 20, available at: http://www.redress.org/downloads/country-reports/Indonesia.pdf and Papang Hidayat and Usman Hamid, Justice for victims should include right to reparation, *Jakarta Post*, 8 September 2004, available at: http://www.thejakartapost.com/news/2004/09/08/justice-victims-should-include-right-reparation.html.

[484] "A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore." Indonesian Civil Code, Art 1365, available at: http://www.unhcr.org/refworld/pdfid/3ffbd0804.pdf.

[485] See REDRESS, *Indonesia*, p. 19.

In spite of the legal mechanisms available, very few torture victims have actually been able successfully to claim compensation and other forms of reparation.[486] A notable example can be taken from the Tanjung Priok case, in which a human rights court found members of the military guilty and ordered them to pay reparation in relation to an incident where Indonesian soldiers had opened fire on protesters in 1984. The verdict was eventually overturned, and the case highlightssignificant impediments in obtaining court-ordered reparation, such as a lack of clear precedent and political pressure.[487]

The right to medical care and comprehensive rehabilitative support is set out in Laws No. 26 of 2000[488] and 13 of 2006.[489] The UN Special Rapporteur on Torture expressed his concern about lack of access to medical treatment in his 2008 report, [490] and recommended that judges and prosecutors order a medical examination in cases where there was suspicion of ill-treatment.[491] The lack of medical treatment available in prisons has been deemed to be such a problem that failure to control the spread of disease in facilities amounts to inhume treatment.[492] Improvements in the provision of medical treatment and psychological counselling of torture victims have been recommended to the Indonesian government due to the inadequacy of existing standards.[493]

4.6. Conclusion

Indonesia has witnessed significant institutional and legislative reforms in the post-Suharto period. It has ratified or acceded to a number of international instruments, including CAT and CCPR. In addition, the domestic legal framework for the protection of human rights was reinforced through constitutional amendments and legislative reforms. Moreover, the agency for the protection of victims and witnesses was established and the National Commission on Human Rights was provided with a legal basis and a clear mandate. Indonesia also set up accountability mechanisms

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[486] Art 2, *Indonesia 2008: Torture, killings continue despite 10 years of reforms*, Asian Legal Resource Centre, 17 December 2008, available at: http://www.Article2.org/mainfile.php/0704/330/.

[487] International Centre for Transitional Justice, Association for the Families of the Disappeared in Indonesia, Coalition for Justice and Truth, *Indonesia's obligations to Provide Reparations for Victims of Gross Human Rights Violations*, p. 6.

[488] Law No. 26 of 2000, Art 35.

[489] Law No. 13 of 2006, Art 6.

[490] Human Rights Council, *Report of the Special Rapporteur on Torture: Mission to Indonesia*, para. 67.

[491] Ibid., para.80.

[492] Amnesty International, *Indonesia: Briefing to the UN Committee Against Torture*, p. 25.

[493] See both International Centre for Transitional Justice, Association for the Families of the Disappeared in Indonesia, Coalition for Justice and Truth, *Indonesia's obligations to Provide Reparations for Victims of Gross Human Rights Violations*, p. 13; and Committee Against Torture, *Concluding observations of the Committee against Torture: Indonesia*, 2008, para. 20.

for gross human rights violations including cases of systematic and widespread act of torture committed under the prior regime. However, the proposed Truth and Reconciliation Commission has not yet come into existence.

Fourteen years after Suharto, however, the 'reformasi' that has led to the foregoing developments appears to have lost momentum. One example is Indonesia's failure to enact the draft Criminal Code, which contains provisions criminalising torture. Moreover, the Government has failed to bring a single successful case before the various human rights courts set up to deal with massive human rights violations while some of the courts envisaged were never set up. These developments cast doubt as to whether there was sufficient commitment to the accountability process in the first place or whether the process was mainly motivated to ease international pressure.

Although there is some progress in the protection of human rights, there are continued reports of violations by State agents, including the use of torture and ill-treatment, lack of independent and effective oversight. The National Human Rights Commission and the courts have not been able effectively to assert their independence. Widespread corruption within the judiciary and law enforcement agencies impedes genuine investigations and prosecution of cases involving torture under existing law as well as victims' quest for other forms of reparation. Indonesia's failure to ratify the ICCPR Optional Protocol and to accept the competence of the Committee against Torture under Article 22 of the CAT, has denied victims of torture recourse to international complaints procedures.

5. Kazakhstan*

5.1. Practice and patterns of torture

The Republic of Kazakhstan is a transcontinental country in Central Asia and Europe. On 16 December 1991, Kazakhstan became the last Soviet republic to become an independent country. Nursultan Nazarbayev, the nation's communist-era leader, became Kazakhstan's first president, and retains that position today by virtue of an amendment to the constitution that exempts the first president of the nation from the two-term limit.[494]

Despite the prohibition of torture under the Constitution,[495] allegations of torture, excessive force and ill-treatment are commonly levelled against the police and security forces, the prison system, boarding schools, psychiatric hospitals and drug-related correction centres.[496] Allegations of torture within Kazakhstan are usually associated with police interrogations or the transfer of arrestees to detention centres.[497] The system relies more heavily on confessions than other forms of evidence to obtain convictions and police performance is judged by the rate of successful crime investigation, and high conviction rates are implicitly encouraged.[498] This system provides an incentive for police to resort to coercion and leaves suspects vulnerable to torture, beginning during the first hours of police custody and investigation. Indeed, most instances of torture and ill-treatment reportedly occur before the suspect is "formally detained", i.e. registered at the police station.[499]

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* Based on initial contribution Mushegh Yekmalyan, Torture Prevention Project Manager, Penal Reform International, UK.

[494] Constitution of the Republic of Kazakhstan, 1995, as amended by Law of the Republic of Kazakhstan of 21 May 2007 No. 254-111 LRK, Art 42(5), available at http://www.constcouncil.kz/eng/norpb/constrk/#section1.

[495] Constitution, Art 17.

[496] See Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*.

[497] Amnesty International, *Kazakhstan: No effective safeguards against torture*, Index: EUR 57/001/2010, March 2010, p. 6, available at: http://www.amnesty.org/en/library/asset/EUR57/001/2010/en/88639715-0122-4cdd-ab15-9583ec80f30d/eur570012010en.pdf.

[498] Ibid. See also, Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*.

[499] Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 10.

The Special Rapporteur on Torture reported having received multiple credible allegations of beatings and asphyxiation with plastic bags as a means to obtain confessions from suspects.[500] The torture and ill-treatment is typically inflicted in such a way as to avoid leaving visible marks on the body. This includes beatings administered to the soles of the feet and the kidneys using various tools.[501]

The Coalition of Kazakhstan NGOs Against Torture reported having received 411 torture complaints during 2011 and 115 such complaints during the first five months of 2012.[502] The European Court of Human Rights, in Kaboulov v. Ukraine, a case concerning refoulement, observed that any suspect held in custody in Kazakhstan was at serious risk of being subjected to torture, implying that instances of torture in Kazakhstan are not isolated but systemic.[503]

Torture and ill-treatment are also common within the penitentiary system. The Kazakhstani penal system still reflects Soviet-era attitudes and methods.[504] The Special Rapporteur on Torture particularly noted one penal colony (UK-161/3 in Zhitykara) where "difficult" detainees were sent and subjected to beatings and physical and psychological violence in order to break their personality.[505] The Special Rapporteur further states that inter-prisoner violence is common at such facilities, which he said can qualify as torture when the State fails to act to prevent it with due diligence, or actively or implicitly encourages it.[506]

The National Security Service (NSS), as part of its counter-terrorism operations, targets certain marginalised groups that are perceived as a threat to national and regional security and are, therefore, at a heightened risk of torture in Kazakhstan. Those most affected by NSS scrutiny are asylum-seekers and refugees

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[500] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 8.

[501] Ibid.

[502] 'Kazakh citizens report on police torture more, NGOs', *Interfax-Kazakhstan*, 26 June 2012, available at: http://www.interfax.kz/?lang=eng&int_id=expert_opinions&news_id=1091. NGOs within the coalition include organisations such as, Kazakhstan's Bureau of Human Rights, Human Rights Charter, Centre for Legal Studies, and MediaNet.

[503] See, *Kaboulov v. Ukraine*, Application no. 41015/04, Council of Europe: European Court of Human Rights, 19 November 2009, available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/wmain?page=search&docid=4b0bef482&skip=0&query=Kaboulov%20v.%20Ukraine.

[504] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 7.

[505] Ibid.

[506] Ibid, p. 9.

from Uzbekistan, and members or suspected members of Islamic groups or parties.[507]

5.2. Legal framework

International law

Kazakhstan is a party to the primary United Nations human rights treaties that prohibit the use of torture. The State acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 26 August 1998. Kazakhstan ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 22 October 2008. It also recognised, in the same year, the competence of the Committee Against Torture to receive individual complaints. Kazakhstan ratified the International Covenant on Civil and Political Rights and Optional Protocol on 24 January 2006 and 30 June 2009, respectively. It has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (26 August 1998) as well as the Convention on the Elimination of All Forms of Discrimination against Women (26 August 1998).[508] However, Kazakhstan is not party to the Rome Statute of the International Criminal Court.[509]

Article 4 of the Constitution of Kazakhstan provides that international treaties ratified by the Republic "shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law." In addition, Article 8 of theConstitution declaresthat the State "shall respect [the] principles and norms of international law".[510]

In line with its obligations under OPCAT, which provides for unannounced and independent monitoring of all places of detention, Kazakhstan has worked to create a National Preventative Mechanism (NPM), though the Government made a declaration in February 2010 that would allow the State to postpone the establishment of the NPM for up to three years.[511]

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[507] Ibid, pp. 14-15. See also, Amnesty International, *Kazakhstan: Summary of Concerns on Torture and Ill-treatment – Briefing for the United Nations Committee against Torture*, AI Index: EUR 57/001/2008, November 2008, pp. 8-11, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AIKazakhstan41.pdf.

[508] United Nations Treaty Collection, available at: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en

[509] International Criminal Court website, States Parties, available at: http://www.icc-cpi.int/Menus/ASP/states+parties/.

[510] Ibid.

[511] Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 8.

The government has also cooperated with the UN Universal Periodic Review (UPR).[512]

The Special Rapporteur on torture visited Kazakhstan in May 2009 at the invitation of the Government. The Special Rapporteur concluded that Kazakhstan had "made good progress in reforming its legal framework and its institutions" since gaining independence in 1991, but that "considerable gaps" remained between the law and reality.[513]

National legal system

Section II of the Constitution of Kazakhstan enumerates the rights of the individual and citizen. Article 17(1) stipulates that "[a] person's dignity shall be inviolable", and Article 17(2) that "[n]o one must be subject to torture, violence or other treatment and punishment that is cruel or humiliating to human dignity." Article 16 enshrines the right to personal freedom, and caps the legal time limit for detention by police at seventy-two hours before an individual must be released or charged with a crime.

Torture is an offence under the Criminal Code of Kazakhstan, which has recently been amended with a view to bringing the definition of torture in line with Article 1 of the CAT.[514] Prior to the amendment, the prohibition of torture was restricted to acts committed by public officials and did not include other persons acting in a legal capacity or with the instigation, consent or acquiescence of a public official.[515] While the 2011 amendment rectifies the above gap, it maintains the vague and problematic clause, whichstates that the definition does not apply to"physical or mental suffering" arising from 'legitimate' or 'lawful actions

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[512] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kazakhstan*, UN Doc. A/HRC/14/10, pp. 3-6, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/KZ/A_HRC_14_10_Kazakhstan.pdf.

[513] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, in human or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 20.

[514] Law No. 167 of 16 July 1997, The Criminal Code of the Republic of Kazakhstan; Action Against Torture (ACAT) France, *A world of Torture*, 2011, available at: http://unmondetortionnaire.com/IMG/pdf/a_world_of_torture-2012-DEF.pdf.

[515] Criminal Code, as amended on 9th December 2004, Art 347 (1), available at: http://legislationline.org/download/action/download/id/1681/file/ca1cfb8a67f8a1c2ffe8de6554a3.htm/preview. The CAT and the Special Rapporteur had criticised the law and have recommended that the definition of torture be brought into conformity with the convention. See, Committee Against Torture, *Kazakhstan*, 41st Session, 2nd Report, 6-7 November 2008, available at: http://www2.ohchr.org/english/bodies/cat/cats41.htm; and Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 6.

of officials'.[516] Furthermore, in a follow up observation to its previous recommendation, the Special Rapporteur has noted that the penalty provided under the amended provision is still not commensurate with the gravity of the crime and urged the Government to ensure that appropriate penalties are adopted to sanction torture in line with Article 4(2) of the Convention.[517] The punishment provided under the law ranges from monetary sanction to five years imprisonment although a court can impose up to 10 years imprisonment in special aggravated cases.[518]

Article 107 of the criminal code prohibits private actors from causing "physical or mental sufferings by way of systematic beating or by other violent actions", and lists the application of 'torture' as an aggravating factor, punishable by imprisonment for a period of three to seven years.[519] However, it is not clear how the concept of torture as employed under the latter provision can be reconciled with the definition of torture contained under Article 141 (1), which requires a link with the conduct of state actors.

The domestic legislation of Kazakhstan does not contain provisions implementing the principle of non-refoulement expressed under article 3 of the CAT. However, Kazakhstan is a party to the Convention relating to the Status of Refugees, and works closely with the office of the UN High Commissioner for Refugees,[520] with cooperation focussing on bringing domestic refugee law in line with international standards and tackling the issue of stateless persons.[521] Ultimately, however, concerns persist as to the effectiveness of procedures available to asylum-seekers,[522] and there have been reports that Kazakhstan has deported persons to countries where they face a real risk of being tortured on their return.[523] Asylum-seekers from Uzbekistan and ethnic Uyghurs from China tend to be the most at risk of being deported, and subject to ill treatment on their return.

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[516] Criminal Code, as amended on 2 August 2011, s. 141(3). See also Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez – Addendum: Follow-up to the recommendations made by the Special Rapporteur visit to Kazakhstan*, UN Doc. A/HRC/19/61/Add.3, 1 March 2012, para.64, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/111/23/PDF/G1211123.pdf?OpenElement.

[517] Ibid.

[518] See Criminal Code, as amended on 2 August 2011, Art 141(1).

[519] Criminal Code, Art 107 (2) (d).

[520] See Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 13.

[521] UNHCR, *2012 Regional Operations Profile – Central Asia*, available at: http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487146&submit=GO.

[522] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 13.

[523] Human Rights Watch, Kazakhstan: *Forced Returns to Uzbekistan Illegal*, 10 June 2011, available at: http://www.hrw.org/news/2011/06/10/kazakhstan-forced-returns-uzbekistan-illegal.

The principle of universal jurisdiction is not recognised in Kazakhstan and there is nodomestic legislation implementing the principle of non-refoulement,stipulated by Articles 5(2) and 7 of the CAT.[524]

5.3. Safeguards and complaint mechanisms

Limits to and supervision of pre-trial detention and complaint mechanisms

Though safeguards exist for detained persons under the law, including the rights to legal and medical assistance, these safeguards only apply to individuals who have been formally detained and registered at a police station.[525] Article 134 of the Criminal Procedure Code (CPC)[526] dictates that any person detained under suspicion of having committed a crime must be registered "within a period not longer than three hours after the bringing of a detained person to the body of interrogation or to a body of preliminary investigation". Despite this, the Special Rapporteur on Torture found that the registration process is not followed in practice. Police often do not record the time of arrival of a person at the station concerned, making it impossible to establish whether the three hour maximum is respected.[527] During this three-hour period, detainees do not have a right to legal assistance, and officials in the Department for Internal Affairs in Kostanai (DVD) have indicated that individuals held in detention are only informed of their rights once they are transferred to formal detention.[528] Allegations abound that law enforcement officers use torture during that initial, unrecorded period to obtain confessions.[529]

The Prosecutor's office is the primary oversight body in Kazakhstan under Article 83 of the Constitution, and is charged with monitoring conditions in places of detention and conducting inspections of the facilities. All law enforcement bodies can also conduct unannounced inspections of their own facilities.[530] The impact of such visits tends to be minimal as the results of the inspections are not made public.

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524 Ibid.

525 Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 10.

526 Law No. 206, 14 December 1997, Criminal Procedure Code of the Republic of Kazakhstan, as amended 2 August 2011, available (only in Russian) at: http://adilet.minjust.kz/rus/docs/Z970000206

527 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, pp. 18-19.

528 Amnesty International, *No effective safeguards against torture*, p. 11.

529 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, pp. 18-19.

530 Ibid., p. 18.

Kazakhstan also has established a Commissioner for Human Rights (CHR) with a mandate to ensure human rights protection through various functions, including the monitoring of detention facilities.[531] The CHR may enter any facility where individuals are deprived of their liberty, though such monitoring activities by the CHR are infrequent due to limited resources and the CHR's independence has been questioned.[532] Moreover, recent reports, such as that of the Working Group on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is made up of officials from relevant State bodies and meets under the auspices of the Human Rights Commissioner, appear to focus primarily on conditions of facilities and less on conducting torture fact-finding.[533] Public monitoring commissions have also been established in each of the State's fifteen regions and are mandated to visit detention facilities.[534] Again, these bodies are also said to primarily focus on conditions within the facilities and not on torture fact-finding.[535]

Several complaint mechanisms exist under the CPC, including Article 183, which requires any complaint about a crime to be registered. Article 192(4-1) of the CPC stipulates that investigations into criminal cases relating to offences committed under Article 141-1 of the Criminal Code are to be carried out by the internal affairs department of the law enforcement body receiving the complaint. The reasonable grounds to initiate criminal proceedings are set out in Article 177, which includes receiving applications from citizens, and the resolution to commence proceedings is to be recorded pursuant to Article 186.

However, the Special Rapporteur observed that "the overwhelming majority" of police and National Security Committee chiefs and directors of penitentiary facilities told him that they had not received any complaints of torture and ill treatment in the preceding five years, which led him to conclude that there, is no meaningful complaint mechanism within Kazakhstan.[536] One of the reasons for the above is that many victims of torture or ill-treatment are reluctant to lodge a complaint out of a fear of reprisals against themselves or their families.[537]

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[531] Decree of the President of the Republic of Kazakhstan # 947, dated 19 September 2002, Statute on Commissioner for Human Rights, available at: http://www.venice.coe.int/docs/2007/CDL(2007)054-e.pdf, s. 15. See also, CHR website, available at: http://www.ombudsman.kz/en/about/action.php

[532] Ibid.

[533] See Activity Report of the Ombudsman of the Republic of Kazakhstan, 2008, pp. 20-22, available at: http://www.kazakhembus.com/uploads/2008OmbudsmanActivityReport2.pdf.

[534] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*.

[535] Ibid.

[536] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 15.

[537] Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 20.

The CHR may also receive complaints of torture and ill treatment, and can request information for consideration of the complaint from the authority whose officials are alleged to be responsible.[538]

Access to legal advice and compulsory medical assistance upon arrest

The right of access to a lawyer for persons "detained, arrested and accused of committing a crime" is set out under Article 16 of the Constitution. In addition, the CPC provides for the right of a suspect to meet with a lawyer of his or her choice in private prior to the first interrogation,[539] and to meet the lawyer immediately, or at least within 24 hours of being formally detained.[540] However, the right to have a lawyer present during the interrogation is not expressly guaranteed under the CPC.

In practice, procedural failings, such as the inadequate registration of arrest and detention orders,[541] result in many of the above safeguards not being strictly adhered to.[542] Following transfer to temporary isolation facilities (IVSs) or investigation isolation facilities (SIZOs), there are no adequate guarantees for detainees to have access to lawyers, doctors or their families.[543] Those lawyers that are eventually able to gain access to detainees are frequently unable to gather evidence,[544] and are widely believed to be "corrupt, ineffective, 'part of the system', and unwilling to defend their clients' rights."[545]

Admissibility of evidence obtained under torture

Article 77(9) of the Constitution bars the use of "evidence obtained by illegal means", and evidence gathered by way of torture is inadmissible under Article 116(1) (1) of the CPC. Based

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538 Statute on the Commissioner for Human Rights of Kazakhstan, s.15(1).

539 Criminal Procedure Code,Art 68 (2)

540 Ibid., Art 216.

541 The failure to register detention can have serious consequences in respect of investigations into torture and ill-treatment in custody. Denis Polienko alleged that he was tortured whilst in unregistered custody in November 2006. In the ensuing criminal case, the two accused officers accused were cleared as there was no official record that he had been detained. See: Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 12.

542 *Alternative Report of Nongovernmental Organizations of Kazakhstan on the Implementation of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('Alternative NGO Report'), 2008, pp. 11-12, available at: http://www2.ohchr.org/english/bodies/cat/cats41.htm.

543 Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention – Concluding Observations of the Committee Against Torture: Kazakhstan*, UN Doc. CAT/C/KAZ/CO/2, 12 December 2008, para. 9, available at: http://www.unhcr.org/refworld/publisher,CAT,,KAZ,49631f8b2,0.html.

544 Ibid, para. 27.

545 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 16.

on international standards, if allegations of torture or ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove that any confession obtained was not gained by unlawful means.[546] However, in practice, statements alleged to have been obtained through torture are often admitted by the courts.[547] Judges in criminal cases routinely view defendants' allegations of torture as an attempt to obstruct the proceedings, and are therefore dismissive of such complaints, thereby effectively placing the burden of proof on the defendants.[548] According to monitoring conducted by a Kazakh NGO during 2005-2006, 40% of torture complaints by defendants were ignored, with the remainder not being adequately addressed.[549]

5.4. Accountability

Few law enforcement officers have been brought to trial or held accountable for violations of human rights, including torture,[550] which indicates that investigation mechanisms in Kazakhstan appear to be of limited effectiveness. Amnesty International reported that over eighteen months between 2007 and 2009, more than 600 cases of torture were recorded by Kazakhstani NGOs.[551] However, the number of law enforcement officials being prosecuted and convicted under the previous mechanism criminalising torture under the Criminal Code is comparatively low. For instance, in 2009, only one police officer was convicted of torture. It remains to be seen as to whether the revised provisions will be more effective in practice.

Several obstacles hinder the effective investigation of torture cases. There is often a lack of independent medical evidence available to substantiate allegations of torture and ill treatment. Penitentiary medical personnel in Kazakhstan are employed by the Ministry of the Interior, and lack the independence necessary

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[546] United Nations Economic and Social Council, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur on the question of torture*, E/CN.4/2003/68, para.26(k), available at: http://daccess-ods.un.org/TMP/2375995.36776543.html.

[547] Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention – Concluding Observations of the Committee Against Torture: Kazakhstan*, s. 29, available at: http://www.unhcr.org/refworld/publisher,CAT,,KAZ,49631f8b2,0.html.

[548] *Kazakhstan NGOs and Open Society Justice Initiative Joint Submission to the UN Universal Periodic Review of Kazakhstan* ('UPR Joint Submission'), 2009, p. 4, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/KZ/JS2_UPR_KAZ_S07_2010_JointSubmission2.pdf. See also Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, para. 20.

[549] Ibid.

[550] Amnesty International, *Kazakhstan: Amnesty International submission to the UN Universal Periodic Review*, AI Index: EUR 57/001/2009, September 2009, p. 4, available at: http://www.amnesty.org/en/library/asset/EUR57/001/2009/en/89ce2754-9fc8-40cc-9757-e0c00127cd8f/eur570012009eng.pdf.

[551] Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 24.

to take action against colleagues. External medical examinations are also not a practical means of obtaining evidence to support or refute allegations of torture, as all outside medical exams must be approved by a supervising authority. Such authorisation allows penitentiary officials to delay medical examinations until injuries deriving from torture have healed.[552] Without medical evidence to substantiate allegations of torture, investigations are usually closed.[553] As a result of these factors, allegations that confessions were coerced using torture that are brought before Kazakhstani courts, if they are even acknowledged by the courts,[554] are rarely substantiated.

The UN Special Rapporteur on Torture has also noted the problem that arises from the role of the prosecutor's office. The office must endorse indictments prepared by police after a criminal investigation, but is also meant to monitor compliance of law enforcement officials with the law. Consequently, if allegations of torture or ill-treatment are raised by an accused after an indictment has been brought, those allegations must be investigated by the prosecutor's office. Given the potential conflict of interest that such a situation presents, prosecutors tend to ignore allegations of serious violations.[555]

The inadequacy of complaint and investigation mechanisms is illustrated by the case of Alexander Gerasimov, who was reportedly tortured by the police in order to extort a confession for murder.[556] When Mr Gerasimov subsequently filed a complaint to the authorities, his case was referred to the same police unit implicated in the violation, which subsequently decided against pursuing the investigation. The decision of the police was later upheld by the court. The Committee against Torture found that Kazakhstan had failed to effectively investigate Mr Gerasimov's allegations, and confirmed that he had been intimidated and offered bribes in order to make him drop the case.[557]

In instances where investigations into allegations of torture result in prosecutions, the punishments do not appear to match the severity of the crimes. For example, in 2005, three officers in Pavlodar were found guilty of torturing an individual who eventually died. One officer was sentenced to four years in

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[552] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 15.

[553] Amnesty International, *Kazakhstan: No effective safeguards against torture*, p. 22.

[554] Ibid., p. 26.

[555] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, pp. 15-16.

[556] Committee against Torture , *Gerasimov v. Republic of Kazakhstan*, Communication No. 433/2010, available at: http://www.soros.org/sites/default/files/gerasimov-cat-decision-20120726.pdf

[557] Ibid., paras. 12.3-14.

prison, and a second was given a three-year conditional term.[558] In another case, in 2007, a police inspector was found guilty of inflicting injuries on a suspect in order to obtain a confession. The inspector was sentenced to eighteen months imprisonment.[559] The Special Rapporteur deduced that the use of torture within Kazakhstan "certainly goes beyond isolated instances", and that the inaction of prosecutors, judges, the Ministry of Justice, doctors and lawyers, in combination with an ineffective complaint mechanism, exacerbate the problem.[560]

5.5. Reparation

Although Article 40 of the CPC provides for compensation for harm caused as a result of unlawful acts committed by an investigative body, the list of unlawful acts does not explicitly include torture or ill-treatment.[561] A Supreme Court resolution[562] provides guidelines to judges regarding persons entitled to compensation as victims of unlawful actions in the criminal justice process. The relevant unlawful actions include the "use of violence, cruel and degrading treatment". "[A]rrested, accused, and convicted persons" are eligible for compensation.[563]

The Civil Code also limits the possibility for reparation. Article 923 sets out the grounds under which victims may claim compensation, but does not explicitly include acts of torture or ill treatment.[564] Furthermore, compensation under the Civil Code only becomes accessible once criminal proceedings have been brought against the perpetrator.[565] An apt example of problems encountered whilst claiming reparation under the Civil Code can be seen in the case of Amantaj Usenov who was awarded compensation in 2008 after being incapacitated and handicapped due to torture at the hands of the police. However, the Ministry of Finance appealed against the award, arguing that torture is not an unlawful action within the remit of Article 923 of the Civil Code.[566]

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[558] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 17.

[559] Ibid.

[560] Ibid., p. 20.

[561] Criminal Procedure Code.

[562] Resolution of the Supreme Court of the Republic of Kazakhstan of July 9, 1999, No.7, "On Practical Application of the Legislation on the Compensation for Harm Caused by Unlawful Actions of the Bodies in Charge of the Criminal Process".

[563] See: Alternative NGO Report, p. 29.

[564] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, pp. 17-18; Alternative NGO Report, pp. 29-30.

[565] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 18.

[566] Alternative NGO Report, p. 30.

In his investigation, the Special Rapporteur on Torture did not identify a single case where victims of torture had received compensation or rehabilitation, even if a finding of torture had been reached by a criminal court.[567] This echoes the finding of the Committee against Torture, which raised concerns about the lack of examples in which compensation for ill treatment had been awarded, and medical and psychological rehabilitation provided.[568]

5.6. Conclusion

While the Government of Kazakhstan has taken some steps to integrate international standards into its national legal framework, such as the criminalisation of torture, gaps between the law and practice remain. The quota system used to evaluate police officers encourages the use of torture during interrogations in order to obtain confessions, regardless of the suspect's guilt or innocence. Additionally, there is no effective complaint and oversight mechanism that could contribute to mitigating the risk of torture. Nor do the courts appear to be interested in monitoring instances of torture as they have repeatedly permitted the use of evidence obtained through torture in criminal cases. Investigations into allegations of torture and ill treatment are often insufficient, and lack the requisite standard of independence to effectively hold perpetrators to account. Even in the few cases where an investigation has led to a conviction for torture or ill treatment, the punishments have not reflected the gravity of the offence. Opportunities to receive reparation and rehabilitation for torture victims are virtually non-existent, which can be attributed to a lack of convictions, and acts of torture and ill treatment not being included within the remit of provisions on compensation. Increased police oversight and additional police training are necessary to tackle the practice of torture in Kazakhstan. Independent, external oversight of police agencies and detention facilities could also play an important role in the prevention of torture In addition, substantial legislative and institutional reforms are required to ensure the availability of effective complaints mechanisms and effective avenues for victims claiming reparation for torture.

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[567] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan*, p. 18.

[568] Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention – Concluding Observations of the Committee Against Torture: Kazakhstan*, para.28.

6. Nepal*

6.1. Practice and patterns of torture

Ensuring political stability remains a challenge in Nepal. In 2006, a Comprehensive Peace Agreement (CPA) signed between a Seven Parties Alliance and Maoist rebels ended a decade long conflict that resulted in at least 17,265 deaths and 1,327 enforced disappearances.[569] Under the terms of the temporary constitution, Maoist leaders entered parliament and in 2007 parliament voted to end the monarchy and establish a republic. The Maoists won the largest number of seats during elections in 2008, though not enough for an outright majority. For the next four years, a coalition governed Nepal; however, disagreements saw its composition change.[570] Despite a number of extensions of the deadline envisaged in the CPA to agree a new Constitution, the parliament failed to reach agreement by the final deadline set by the Supreme Court of Nepal, and was dissolved in May 2012. The country is currently ruled by a caretaker government, until agreement can be reached on holding new elections and resuming the constitution drafting process.

Local and international organisations have documented the prevalence of torture, extra-judicial killings and enforced disappearances by government forces and some non-state actors since the signing of the CPA.[571] Following an apparent steep decline in reported custodial torture after 2006, reports indicate that it is again on the rise. Nepal-based NGO Advocacy Forum carries out regular monitoring of places of detention in 20 of the

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* Based on initial contributions by Tika Ram Pokhrel, Advocate, Centre for Victims of Torture, and Diraj Pokhrel, Advocacy Forum, Nepal.

569 See report by 'Nepal Monitor' available at: http://www.nepalmonitor.com/2011/07/recording_nepal_conf.html; a translation of the 2006 Comprehensive Peace Agreement is available at: http://reliefweb.int/node/219161.

570 For an overview, see BBC News, *Nepal Profile*, last updated 29 May 2012, available at: http://www.bbc.co.uk/news/world-south-asia-12499391.

571 See UN Office of the High Commissioner for Human Rights in Nepal, *Investigating Allegations of Extra-Judicial Killings in the Terai – OHCHR-Nepal Summary of Concerns*, July 2010, available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/Investigating%20Allegations%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf/; Advocacy Forum, *Recent Trends and Patterns of Torture in Nepal*, July to December 2010, (hereafter "Advocacy Forum report of July to December 2010"), available at: http://www.advocacyforum.org/downloads/pdf/publications/Briefing-July-to-Dec-2010-final.pdf; U.S. Department of State, 2010 Human Rights Report: Nepal, 8 April 2011, available at: http://www.State.gov/j/drl/rls/hrrpt/2010/sca/154484.htm

country's 75 districts. Between January and June 2010, 15.8 percent of those interviewed told of being subjected to torture in custody. In the next six months this figure rose to 22.5%, and in the first six months of 2011, reports of torture increased to 25 percent.[572] The figure has stayed relatively stable since.[573] Police reportedly practise torture in the various stages of the criminal justice process, including during interrogations at police stations, in transit to places of detention and at penal detention facilities.[574] Besides the police, officials allegedly responsible for acts of torture and ill-treatment include forest officers (who have the authority for arrest and investigation of certain offences in national parks),[575] Chief District Officers[576] and prison officers. In addition, members of the Armed Police Force[577] are reportedly responsible for torture and other serious human rights violations committed in the volatile Terai region.[578] There is also evidence that non-state armed groups, especially members of the Young Communist League (YCL) and armed groups in Terai, have committed torture in their respective areas of operation.[579]

Notwithstanding a regulation on Juvenile Justice adopted in 2006 to afford protection to young detainees, such detainees are among the groups that are most vulnerable to torture.[580] A 2010 report by Advocacy Forum and REDRESS described the rapid increase in the number of juvenile torture cases reported in the

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[572] Advocacy Forum report of July to December 2010 and Advocacy Forum, *Torture Briefing – Prevention of Torture in Nepal* (hereafter "Advocacy Forum report of January to June 2011"). January-June 2011, available at: http://www.advocacyforum.org/downloads/pdf/publications/briefing-jan-to-june-2011.pdf. 2,015 detainees were interviewed, 2, 183 were surveyed from July-December 2010 and 2,268 were interviewed from January-June 2011.

[573] Advocacy Forum, *Torture Briefing – Prevention of Torture in Nepal, January to June 2012*, available at: http://www.advocacyforum.org/downloads/pdf/publications/torture/torture-briefing-january-to-june-2012.pdf.

[574] Advocacy Forum, Criminalise Torture, 26 July 2009 (hereafter 'Advocacy-Forum report of July 2009'), pp. 7-9, available at: http://www.advocacyforum.org/downloads/publications/criminalize-torture-june26-report-english-final.pdf.

[575] According to the Forest Act 1993 and the National Park and Wildlife Conservation Act 1973, the officers in Forest Office and National Park and Wildlife Conservation Office have a right to arrest, investigate, prosecute and adjudicate any person in relation to any violation of these Acts. They have their own separate detention centre without any monitoring system, which results in suspicion that a high risk of torture and consequent custodial death prevails in this process.

[576] The Chief District Officer is the representative of the Government of Nepal in charge of the administration of the district. See s.5 of the Local Administration Act, 2028 (1971).

[577] The Armed Police Force is a paramilitary force tasked with the maintenance of law and order and "containing insurgency or terrorist activities". See s.6 of Armed Police Force Act, 2058 (2001).

[578] Advocacy Forum report of July 2009, p. 7 and Advocacy Forum, *Torture of Juveniles in Nepal: A Serious Challenge to Justice System*, June 2010, p. 10, available at: http://www.advocacyforum.org/downloads/pdf/publications/Torture-of-juveniles-in-Nepal_26_June_2010.pdf

[579] Advocacy Forum report of July 2009, p. 9.

[580] Juvenile Justice (Procedure) Regulations 2006 concern the jurisdiction of s. 58 of Child Right Act 2048.

Terai region as particularly alarming.[581] The Supreme Court has ruled that children should not be detained in police custody where they are at greater risk of ill-treatment. However, overcrowding in correction homes means that they are often transferred to police custody and detained with adults.[582] Detainees from the Terai ethnic groups and Dalit community are reportedly more frequently subjected to torture than other detainees.[583] Other vulnerable groups include female detainees who are often sexually harassed, stripped naked, beaten and threatened with rape during investigations.[584]

Acts of torture are mainly used to extract confessions, intimidate or coerce a suspect or a detainee, and as a form of punishment. They are also employed to force victims into silence and to conceal corrupt practices on the part of the authorities. The most frequent methods of torture include beatings with rifle butts or bamboo sticks, kicking, forcing stress positions for a considerable time and sexual assault.[585] Death threats, blindfolding, threatening to rape family members or loved ones, physical and verbal humiliation and incommunicado detention are also reported.[586]

6.2. Legal framework

International law

Nepal is a party to the International Covenant on Civil and Political Rights (ICCPR) and the first Optional Protocol to the

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[581] According to data collected by Advocacy Forum, eight of the nine districts with higher record of torture than the average are either in the Terai region or in bordering districts (Bardiya, Dhanusha, Jhapa, Kapilvastu, Morang, Rupandehi, Surkhet and Udayapur). See Advocacy Forum and REDRESS, *Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005*, September 2010, pp. 3-4 (hereafter "Advocacy-Forum and REDRESS report of 2010").

[582] Advocacy Forum report of July 2009, pp. 8-9.

[583] Advocacy Forum and REDRESS report of 2010, p. 4.

[584] Advocacy Forum and REDRESS, *Held to Account : Making the Law Work to Fight Impunity in Nepal*, December 2011, p. 50, (hereafter "Advocacy Forum and REDRESS report of December 2011"), available at: http://www.redress.org/downloads/Nepal%20Impunity%20Report%20-%20English.pdf.

[585] Advocacy Forum report of July 2009, pp. 9-10; The Centre for Victims of Torture Nepal (CVICT) has found that 70 different methods of torture are used in detention facilities.

[586] See e.g. Advocacy Forum *Recent Trends and Patterns of Torture in Nepal, Briefing, July to December 2010, Torture Briefing – Prevention of Torture in Nepal, January to June 2011, Torture of Women in Detention – Nepal's Failure to Prevent and Protect*, 26 June 2011, available at: http://www.advocacyforum.org/downloads/pdf/publications/torture-of-women-in-detention-english-26-june-2011.pdf and *Torture Briefing – Prevention of Torture in Nepal, July to December 2011*.

Covenant.[587] It ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in May 1991, but has not yet ratified the Optional Protocol to the CAT. Nepal is also a party to all four Geneva Conventions of 1949,[588] but has not ratified the Rome Statute of the International Criminal Court.

According to the Treaty Act of 1990, if any domestic law is inconsistent with a treaty to which Nepal is a party, the treaty shall prevail.[589] However, the Supreme Court of Nepal has held that treaties that are ratified by Nepal are below the Constitution in terms of hierarchy of laws.[590]

The Nepalese government has taken some measures, in part as a result of its engagements at the international level. In an attempt to demonstrate its compliance with the CAT, the Government enacted the Compensation Relating to Torture Act (CRT) in 1996,[591] which provides victims of torture a mechanism to claim minimal compensation.[592] The government also established a National Human Right Commission (NHRC) in 2001.[593] However, it has not adopted any legislation that criminalises torture as such, notwithstanding recommendations by the Committee against Torture and the Special Rapporteur on Torture.[594]

National legal system

Article 26(1) of the Interim Constitution 2007, provides that "No person who is detained during investigation, or for trial or for any other reason, shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner." Article

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[587] Nepal ratified both the ICCPR and its Optional Protocol I on 14 May 1991. There have been three communications related to torture considered by the Human Rights Committee including *Yasoda Sharma v. Nepal*, Communication No. 1469/2006, 28 October 2008, *Charles Gurmurkh Sobhraj v. Nepal*, Communication No. 1870/2009, 27 July 2010, *Yubraj Giri v. Nepal*, Communication No. 1761 / 2008, 24 March 2011.

[588] Nepal ratified the Geneva Conventions of 1949 on 7 February 1964 and signed Additional Protocol III on 14 March 2006. Additional Protocols I and II have not been signed by Nepal.

[589] Nepal Treaty Act, 2047 (1990)., s. 9.

[590] See *Reena Bajracharya v HMG*, Writ No. 2812 of 1999, Supreme Court of Nepal.

[591] Compensation Relating to Torture Act (CRT), 2053 (1996).

[592] Preamble of the CRT. Note that this Act has been strongly criticised by human rights organisations, see further below.

[593] Human Rights Commission Act, 2053 (1997); Advocacy Forum, *Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act-1996*, June 2008, p. 21, available at: http://www.advocacyforum.org/downloads/pdf/publications/june26-report-english-2008.pdf.

[594] Consideration of Reports Submitted by States Parties under Article 19 of the Convention – *Conclusions and recommendations of the Committee against torture: Nepal*, UN Doc. CAT/C/NPL/CO/2, 13 April 2007, para.12; Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Mission to Nepal (hereafter Special Rapporteur on torture report (2006)), UN Doc. E/CN.4/2006/6/Add.5, 9 January 2006, para.33(b).

26(2) further states that "Any such an act pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner determined by law." The prohibition of torture is absolute and cannot be suspended or derogated from under the Interim Constitution.[595] The prohibition of torture is also laid down in the CRT, which stipulates that "no person who is in detention in the course of inquiry, investigation or hearing, or for any other reason, shall be tortured."[596] The Children Act 1992 also prohibits the infliction of torture and cruel treatment.[597]

The CRT defines torture as "physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her".[598] This definition, however, does not conform to Article 1 of the CAT in several respects. Firstly, it uses the term torture, which is the term to be defined, instead of "severe pain and suffering" as provided for under the CAT. Secondly, it fails to account for torture committed outside detention facilities. Thirdly, the phrase "for any other reason" is not accompanied by a reference to "discrimination" and lastly, there is no reference to the official status of the person inflicting pain and suffering. It is worth noting, however, that the Supreme Court has held that the above does not mean that torture committed outside detention facilities is considered legal although there is currently no applicable law and no definition has subsequently been provided by the Court.

Although the Nepalese government has recognised its duty to ensure that "all acts of torture are to be made punishable by appropriate penalties,"[599] it has so far failed to enact a law criminalising torture as required under the Constitution. In this connection, the Supreme Court of Nepal has admonished the Government, stating that "the Government of Nepal has to

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595 Interim Constitution 2007, Art 143(7).

596 CRT, s. 3(1).

597 The Act sets out the obligations of parents, guardians, welfare homes, orphanages, centres for mentally retarded children and juvenile rehabilitation homes. Section 7 of the Children Act 2048 (1992) provides that "No child shall be subjected to torture or cruel treatment. Provided that, the act of scolding an minor beating by his father, mother, member of family, guardian or teacher for the interest of the child shall not be deemed to violate the provisions of this section." Section 15 also states that: "Notwithstanding anything contained in the exist in g laws, no Child shall be subjected to handcuffs and fetters, solitary confinement or be committed to live to ether in prison with prisoners having attained the age of majority in case a Child is convicted for any offence."

598 CRT, Art 2(a).

599 Paragraph 1 of Initial reports of States Parties due in 1992: Nepal, UN Doc. CAT/C/16/Add.3, 16 December 1993.

criminalise torture and make provisions to punish the perpetrators of torture as demanded by the petitioners."[600]

In 2010, the Government produced a Draft Criminal Code incorporating the crime of torture and a Draft Criminal Procedure Code;however, these were not enacted into law before parliament was dissolved.[601] The Draft Criminal Code, however, was defective in that it fails to provide a definition of torture, it imposed a six-month limitation period for the prosecution of torture and it sets the maximum penalty at five years imprisonment.[602] The Draft Criminal Procedure Code also contained a problematic provision requiring a "written approval of the Government of Nepal or the Departmental Chief" for the prosecution of a government employee, which can potentially be used as a bar to prosecutions for torture and other crimes committed by public servants.[603] In April 2012, a separate and more comprehensive anti-torture bill was tabled, but this was not passed before the parliament was dissolved in May 2012.[604]

Despite this gap in the law, acts constituting torture could, in principle, be punished under various provisions of the Muluki Ain (lit. Country Code: a consolidated code of substantive and procedural laws).[605] These provisions relate to offences such as illegal detention (which includes detention without any food and water);[606] battery (defined as any act causing bloodshed, wound, injury, grievous hurt, or any pain or harm to the body of another person);[607] and rape (which is defined as sexual intercourse with a women without her consent or sexual intercourse with a girl below the age of sixteen years with or without her consent).[608] Punishment ranges for these crimes vary. For example, the act of causing grievous bodily harm (battery) entails a maximum sentence of eight years imprisonment and a fine of 10,000 Rupees. It is clear that neither the definition of "battery" nor the maximum

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[600] *Rajendra Ghimire & Dahal v. Council of Ministers et al.*, Supreme Court of Nepal, 17 December, 2007, cited in Advocacy Forum and REDRESS report of December 2011, p. 52. For a similar ruling in respect of enforced disappearance see *Dhakal v. Nepal Government, Home Minister and Others*, Writ no.3575, registration dated 21 January 1999, Supreme Court of Nepal: For an unofficial translation of the judgment see: http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/5eab6202e55a6ff3c125753f003a5722/$FILE/Decision%20of%20the%20Supreme%20Court%20on%20Disappearance%20Case.PDF.

[601] The Proposed Draft Criminal Code, 2066 BS (2010) and Draft Criminal Procedure Code 2066 BS (2010), based on an unofficial translation from Nepali, available on file.

[602] Draft Criminal Code, ss. 166 and 164(2); see also Advocacy Forum and REDRESS report of 2010p. 6.

[603] Criminal Procedure Code, s. 50.

[604] For further information see Advocacy Forum, *Torture of Women: Nepal's Duplicity Continues*, June 2012, pp. 52-60, available at: http://www.advocacyforum.org/_downloads/torture-of-women-report-june-26-2012-english.pdf (hereinafter "Torture of Women").

[605] The Muluki Ain (General Code), 1964.

[606] Ibid., Part 4 - Chapter 8.

[607] Ibid., Par t4- Chapter 9 (1-3).

[608] Ibid., Part 4- Chapter14(1).

penalty provided for the offence account for the distinct nature and psychological impact of torture.

In addition, there is currently no legislation or practice prohibiting refoulement, contrary to the obligation under Article 3 of the CAT, which means that individuals can be expelled, extradited, deported and removed from the country regardless of the risk of torture that they might face in the country of destination. Furthermore, there are no mechanisms for bringing criminal and/or civil actions against persons suspected of torture committed outside Nepal under Nepalese Law and practice. There is, however, a provision on universal jurisdiction in the proposed *Bill Providing for the Act of Disappearing of a Person for the establishment of the Commission of Inquiry on Disappearances*.[609]

6.3. Safeguards and complaint mechanism

Limits to and supervision of pre-trial detention

Article 12(2) of the Interim Constitution guarantees that, "No person shall be deprived of his/her personal liberty unless in accordance with law."[610] The 1992 Government Cases Act requires the police to bring every suspect before a judicial body within 24 hours of his or her arrest.[611] The Act also provides that following the initial hearing, a judge may order the suspect's continued detention for up to 25 days.[612] However, the duration of pre-trial detention can be longer for people detained under various special laws. For example, the Narcotic Drugs (Control) Act 1976 allows an extended period of detention for up to three months,[613] whereas the period extends for up to 21 months and one year, respectively under the Public Security Act.[614] The Public Offences and Penalties Act 1970, which covers crimes such as disturbing the peace, vandalism, rioting and fighting, has been interpreted so that a person may be held for investigation for up to 35 days (with approval of the Chief District Officer).[615]

The Government Cases Act also stipulates that all Statements made by a suspect should be in the presence of an official from the Attorney General's Office.[616] However, according to a survey

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609 Bill Providing for the Act of Disappearing a Person, s. 1(2).

610 Interim Constitution, Art 224(3).

611 Government Cases Act 2049 (1992), s.15(1).

612 Ibid., at s. 15(4).

613 Narcotic Drugs (Control) Act, 2033 (1976), s. 22(c).

614 Public Security Act 2046 (1989), ss. 3(1) and 5.

615 Public Offences (and Punishment) Act 2027 (1970), s. 4. Although the Courts have clarified that a Chief District Officer may not detain a person for more than seven days before filing the charge-sheet without "reasonable grounds": See *Government of Nepal v Shanmbu Yadav*, referred to in International Legal Foundation – Nepal, 'Case Notes – Fall 2010', p. 1, available at: http://theilf.org/wp-content/uploads/2011/07/ILF-Nepal-Case-Notes-Fall-2010.pdf.

616 Government Cases Act, 2049 (1992), s. 9(1).

conducted in 2003 by the Centre for Legal Research and Resource Development, 50% of suspects had their depositions recorded in the absence of such an official.[617] A subsequent report published by Advocacy Forum puts the figure for 2007 at 44%.[618] This indicates the ineffectiveness of one of the key safeguards available in order to minimise the risks of torture in pre-trial detention, which is of particular concern because neither audio nor video recordings of interrogations are required under existing Nepalese laws.

The Government Cases Act does not, however, contain any provisions relating to release on bail, which means a court may remand a defendant in custody for as long as it deems it necessary for further investigation.[619] Under the *Muluki Ain*, bail is available before the start of judicial proceedings only under limited circumstances,[620] whereas the possibility of release on bail is excluded by law with respect to certain offences, such as human trafficking.[621] In *Kamlesh Dwibedi v. Ministry of Law and Parliamentary Affairs*, the Nepalese Supreme Court ruled that a provision of the Human Trafficking Act[622] imposing statutorily mandated pre-trial detention for suspected violators of that Act was contrary to Article 24 of the Interim Constitution, which provides certain protections for individuals detained in custody.[623]

In relation to the monitoring of detention facilities, the Prison Act 1963 provides that Appellate Court judges shall visit prisons once a year.[624] Other official organs, such as the NHRC, have failed to function effectively nationwide due to restrictive budgets and a shortage of expertise. Moreover, attempts by the Government to influence the appointment of commissioners and intervene in its activities seem to have politicised and weakened the

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617 Centre for Legal Research and Resource Development (CeLRRd), *Baseline Survey on Criminal Justice System of Nepal*, 2003, p. xvii, available at: http://celrrd.org/publications/21-Baseline%20Survey%20CJS%202002.pdf

618 Kamal Pathak, *Criminal justice in Nepal, Article 2*, Asian Legal Resource Centre 01 March 2008, available at: http://www.Article2.org/mainfile.php/0701/310/.

619 Section15 (4) of the Government Cases Act provides that "If the permission of remand is sought pursuant to Sub-Section (2) by reviewing the documents, considering whether the investigation is being conducted in a satisfactory manner, and if it is found to have been carried out in satisfactory manner, the court may grant a remand of maximum twenty five days at once or time and again".

620 For instance, Muluki Ain, ss. 3 and 118.

621 Human Trafficking and Transportation Control Act, 2064 (2007), s. 8.

622 Ibid.

623 Supreme Court of Nepal (25 June 2009) Presiding justices: CJ Min Bahadur Rayamajhi, Anup Raj Sharma and Justice Sushila Karki (not yet reported), cited in Advocacy Forum and REDRESS Report of December 2011, p. 38. Article 24 of the Interim Constitution provides, *inter alia*, that no person who is arrested shall be detained in custody without being informed of the ground for such arrest, they must have access to a legal practitioner and they must be brought before a judicial authority within 24 hours.

624 Prisons Act, 2019 (1963), s. 18 (4), available at: http://www.ncf.org.np/upload/files/187_en_prisons-act-2019-1963-english.pdf.

independence of the NHRC since the aftermath of the conflict.[625] Non-governmental organisations or human rights defenders can sometimes inspect pre-trial detention facilities with permission from the police. Such oversight, while important where possible, is of limited effectiveness in the overall prevention of torture since access is granted arbitrarily and may be revoked at any point.[626]

Access to legal advice and compulsory medical assistance upon arrest

The Interim Constitution guarantees the right to prompt legal assistance. Article 24(2) provides that a person who is arrested has the "the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner."[627] In practice, however, suspects are not always granted access to legal counsel, particularly during the initial stages of interrogation and detention.[628] Authorities create obstacles, such as requiring lawyers to obtain permission from senior police officers. There have also been reports of lawyers being assaulted or harassed.[629]

Concerning medical check-ups, the CRT provides that detainee shall be examined by a physician upon arrest and release "as far as possible."[630] Moreover, under the CRT, where any adult member of the family of a detainee, or his lawyer, believes that the detainee has been subjected to torture, they may file a petition and the District Court "may issue an order for the examination of the physical or mental condition of the detainee within three days."[631] The CRT also provides that, if deemed necessary, adequate

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625 International Commission of Jurists, *Nepal: Open Letter to the King of Nepal Regarding the National Human Rights Commission*, 21 June 2005, available at http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23335; Asian Human Rights Commission, *Nepal: Nepal must respect its commitment to a strong and independent National Human Rights Commission*, 7 July 2011, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-093-2011.

626 See for example, Asian Human Rights Commission, *NEPAL: Legal aid NGO is denied access to detainees for filing an application for medical check-up on behalf of a torture victims*, 6 June 2007, available at: http://www.humanrights.asia/news/urgent-appeals/UA-181-2007 and Advocacy Forum, *Mid-Term Evaluation of Advocacy Forum's Prevention of Torture Project*, February 2010, p. 15, available at: http://www.advocacyforum.org/downloads/pdf/Mid-Term-Evaluation-of-Advocacy-Forums-Prevention-of-Torture-Project_Final-2.pdf

627 Interim Constitution, Art 24(2)

628 See, United States Department of State, *Country Reports on Human Rights Practices for 2011*, available at: http://www.State.gov/documents/organization/186683.pdf.

629 Ibid.

630 Section3(2) of the CRT provides that "While placing in detention or releasing any person, his physical condition shall be examined by a physical under government service as far as possible and by the concerned official himself in circumstances in which no such physician is available."

631 CRT, s. 5(3)

treatment shall be given at the expense of the Government.[632] This provision, however, is not thoroughly observed in practice. According to a survey by Advocacy Forum, health check-ups are treated as a formality by the police who routinely take detainees in groups to see a doctor, who merely asks the detainees their health condition, but fail to physically examine them.[633]

Admissibility of evidence obtained under torture

Evidence obtained under coercion is inadmissible under Nepalese law. Under Article 24 of the Interim Constitution, "no person accused of any offence shall be compelled to be a witness against oneself."[634] Moreover, Section 9 of the Evidence Act 1974 provides that a confession made through the use of torture is inadmissible as evidence.[635] In practice, however, judges are reluctant to consider allegations of torture during trials and seldom ask defendants whether their statements were given voluntarily.[636]

6.4. Accountability

Criminal investigations and prosecution of serious human rights violations are generally not carried out in an effective and systematic manner. The major obstacle in relation to torture is the absence of an adequate legal framework, and the lack of an independent and impartial investigative body for reviewing complaints filed by victims.[637] Although the Interim Constitution provides that the judiciary of Nepal shall be committed to "the concept, norms and values of the independent judiciary" and "the aspiration of the people's movement and democracy", such independence is not guaranteed in practice and corruption is widespread. Judges are hesitant to decide against suspects, particularly where the police, army and sometimes members of rebel groups are involved. Despite this, on a number of occasions

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[632] Ibid.

[633] See Advocacy Forum, *Torture Briefing: Prevention of Torture in Nepal – July to December 2011*, p. 12.

[634] Interim Constitution, Art 24(7).

[635] Section 9 of the Evidence Act 1974 stipulates that "Statements made by any accused in any criminal suit, in respect to the charges against him, at any place other than a court may be accepted by the court as evidence, provided it is satisfied that the accused had not been forced to make such Statements, or that such Statements had not been extorted by torturing or threatening to place him in a situation in which he was compelled to do so against his will".

[636] See Advocacy-Forum and REDRESS report of 2010, p. 8.

[637] The independence of the Attorney General's Office, for example, has been put to test in relation to its failure to open an investigation in to a murder case involving three police officers. Sahidullah Dewan was killed by three policemen on 26 October 2009 in Rupandehi District. The petition filed by the family to open an investigation had not been duly considered, allegedly due to collusion between the Attorney General's Office and the police, and as of late May 2012, the decision was still pending. Advocacy Forum, *Evading Accountability by Hook or By Crook: The issue of amnesties in post-conflict Nepal*, Occasional Brief, Year 2 Vol.1, June 2011, pp.9-10 (hereafter "Advocacy Forum report – June 2011").

the higher courts in particular have taken a strong stand and directed police and prosecution authorities to investigate and prosecute crimes amounting to serious human rights violations, but these directives have not been followed or investigations have faced obstruction.[638] In addition, there is the problem of lack of awareness about human rights norms and standards among justice sector officials. All of these issues contribute to the prevalence of impunity and a climate in which victims of torture refrain from filing complaints for fear of re-victimisation.

In principle, the NHRC may carry out investigations into torture upon receipt of a complaint from a victim or any person acting on behalf of a victim and make a non-binding recommendation to the authorities concerned.[639] In practice, however, the Government has been indifferent to the NHRC's recommendations and has rarely implemented them.

Applicability of statutes of limitation, amnesties and immunities

A complaint of inhuman detention, battery, and rape shall be filed within 35 days after the commission of the offence.[640] The time limit extends to three months from the date of the incident in the event of serious bodily harm caused by battery.[641] As noted above, the draft Criminal Code is not much of an improvement in those respects in that it provides for a six-month limitation period for torture,[642] and the Torture Bill tabled in parliament in April 2012 retained the even shorter limitation period of 35 days.[643]

One of the major obstacles to the prosecution of allegations relating to serious human rights violations has been a pattern of withdrawal of pending court cases by the Government based on the State Cases Act and the 1998 directive entitled Procedures and Norms to be Adopted While Withdrawing Government Cases. The State Cases Act provides that cases can be withdrawn in the event of reconciliation between the parties and if a court approves the Government's request,[644] while the 1998 standards classify

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[638] See, e.g. *Sushil Pyakurel, et al. v Right Hon'ble Prime Minister Jhala Nath Khanal et al.*, Writ No. 1904 of 2068 B.S., Supreme Court decision dated 21 June 2011 (2068/03/7); *Kedar Chaulagain v District Police Office Kavrepalanchok 1*, Writ No. 064-WO-0339, Supreme Court decision dated 14 December 2009.

[639] Human Rights Commission Act, 2053 (1997), s. 9(2)(a).

[640] See Muluki Ain, Part 4-Chapter8 (7), 9(27) and 14(11), respectively.

[641] Muluki Ain, Part 4- Chapter 9(27).

[642] Draft Criminal Code, ss. 166 and 164(2); see also Advocacy-Forum and REDRESS report of 2010, p. 6.

[643] See Advocacy Forum, *Torture of Women*, pp. 53-54.

[644] State Cases Act, s. 29; for more details on the withdrawal of cases, see Advocacy Forum report –June 2011.

criminal cases into two broad groups: cases of a political nature and general cases.[645]

Nepal has to date, under substantial local and international pressure, refrained from enacting a specific amnesty law in relation to acts of torture and other international crimes committed during and after the armed conflict. However, a significant number of pending cases filed both during the period of civil war and after the conclusion of the CPA were withdrawn by the Maoist-led government and the Madhav Kumar Nepal-led government under Clause 5.2.7 of the CPA.[646] The clause was initially designed to facilitate the release of political prisoners and those illegally detained under the Terrorist and Disruptive Activities Act.[647] However, the post-2008 withdrawals included cases concerning serious human rights violations such as torture, rape or other ill-treatment. While the exact number of cases withdrawn from 2008 to 2009 remains unknown,[648] the practice has effectively barred accountability for serious human rights violations.[649]

Laws such as the Nepal Army Act,[650] the Nepal Police Act[651] and the Armed Police Force Act[652] allow the alleged crimes committed by members of the security forces "acting in good faith" to go unpunished even in the case of serious human rights violations. According to Advocacy Forum, there were no cases against national security forces that had reached a trial stage by 2011.[653] Other laws such as the Essential Goods Protection Act[654] and the National Parks and Wildlife Act[655] provide for specific immunities attached to the use of "necessary force", which could be used to shield human rights violators from prosecution.

Nepalese law also allows for executive pardons. Article 151 of the Interim Constitution, provides that "the President may, upon the recommendations of the Council of Ministers, grant pardons, and suspend, commute or remit any sentence passed

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645 Ibid., p. 2.

646 Clause 5.2.7 of the CPA states that "Both parties guarantee that they will withdraw accusations, claims, complaints and under-consideration cases levelled against various individuals due to political reasons and immediately release those who are in detention by immediately making their status public".

647 Advocacy Forum report -June 2011, p. 6.

648 Ibid, p. 5.

649 For instance, *Government of Nepal v Anita Ghimire, et al*, Writ 913/2067, Supreme Court, 18 January 2011, cited in Advocacy Forum report -June 2011, p. 9; see also, Human Rights Watch and Advocacy Forum, *Adding Insult to Injury: Continued Impunity for Wartime Abuses*, December 2011, p.25, available at: http://www.hrw.org/sites/default/files/reports/nepal1211Upload_0.pdf

650 Army Act, 2063 (2006), s.22.

651 Police Act, 2012 (1995), s. 37.

652 Armed Police Force Act, 2058 (2001), s. 26.

653 Advocacy Forum report –June 2011, p. 4.

654 Essential Good Protection Act, 2012 (1955), s. 6.

655 National Parks and Wildlife Act, 2029 (1973), s. 24(2).

by any court, special court, and military court or by any other judicial or quasi-judicial, or administrative authority or body".[656] The Supreme Court has held that "the power to pardon can only be exercised in the rarest of rare cases."[657] However, there were significant moves to use this power in the sole case in which a government official has been convicted for a crime committed during the conflict, and litigation in relation to that case is still pending in the Supreme Court.[658]

Protection of victims and witnesses

In response to calls by national and international actors[659] and a Supreme Court ruling in November 2009 requesting the enactment of legislation to provide victim and witness protection,[660] the National Law Commission drafted 'A Bill Produced to Manage the Protection of Witnesses' in June 2011. However, the bill includes an unduly narrow definition of 'witness,' a lack of an appeal or review mechanism for protection-related orders and a failure to extend protection for victims (who do not appear as witnesses).[661] As with a number of other Bills, there have been no developments in relation to the above Bill, and it is currently stalled because of the lack of a parliament.

The absence of an adequate victim and witness protection mechanism means that victims of torture and their families are forced to remain silent and consequently without any redress in many cases.[662] In addition, witnesses are reportedly bribed by the perpetrators in exchange for favorable testimony.[663]

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656 Interim Constitution, Art 151.

657 *Mukeshwor Das kathwania*, Supreme Court of Nepal, 16 November 2010, quoted in Advocacy Forum report –June 2011, p. 8.

658 Concerning the case of UCPN-Maoist Constituent Assembly member Bal Krishna Dhungel; see further Advocacy Forum and REDRESS report of December 2011, n.1.

659 See Consideration of Reports Submitted by States Parties under Article 19 of the Convention – Conclusions and recommendations of the Committee against torture: Nepal, CAT/C/NPL/CO/2, 13 April 2007, para.28(b); Advocacy Forum and International Centre for Transitional Justice, *Across the Lines – the impact of Nepali's conflict on women*, December 2010, p. 102, available at: http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AdvocacyForum_NepalCEDAW49.pdf; Asian Human Rights Commission, *Effective Witness Protection Lacking in Indonesia and Nepal*, 23 August 2010, available at: http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc15/ALRC-CWS-15-01-2010.

660 *Mira Dhungana v. Nepal Government et al.*, writ no. 0043/2065 (4 November 2009), cited in International Commission of Jurists, *Witness Protection in Nepal: Recommendations from International Best Practices*, August 2011, p. 9.

661 Ibid, pp.11-12.

662 The Hom Bahadur Bagale case demonstrates the kind of risks victims who file complaints may be exposed to. In November 2002, Hon Bahadur Bagale, a sub-inspector was arrested after refusing to accept gold in the form of a bribe for his superior and was falsely accused of stealing and tortured while being held incommunicado by the police. Upon his release, he filed claims for compensation and protective orders, which led to further arrest and torture at the hands of the police. For further information see: Asian Human Rights Commission, *NEPAL: Trial of Hom Bahadur Bagale's torture case must put an end to a nine-year long denial of justice*, 11 May 2011, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-060-2011.

663 Advocacy-Forum report of July 2009, pp. 34-35.

6.5. Reparation

The Interim Constitution and the CRT provide that the Government shall pay compensation to victims of torture for which the State is liable.[664] According to the CRT, a victim of torture or any adult member of the family or his/her lawyer may file a complaint demanding compensation not exceeding 100,000 Nepalese Rupees ($1,272) with the District Court within 35 days of having been subjected to torture or of release from detention.[665] Given the nature and consequence of torture-related acts, this 35-day limitation places a significant hurdle on many victims and is incompatible with the right to an effective remedy. The cap on the amount of compensation fails to meet the "fair and adequate standards" provided for under Article 14(1) of the CAT.[666]

The CRT provides that a range of factors need to be taken into account in determining the amount of compensation. They include, *inter alia*, the physical or mental pain or hardship caused to the victim and their gravity, decline in income-earning capacity of the victim resulting from physical or mental suffering, the age of the victim and his family responsibilities in case he has suffered physical or mental damage that cannot be treated.[667] These factors, however, appear to be frequently overlooked without thorough examination in practice. According to a 2010 report by Advocacy Forum and REDRESS, for example, only 1 in 16 compensation awards involves the maximum amount provided under the CRT and many of them were awaiting actual payment long after the award was made.[668]

The CRT seems to have led to the perception that the payment of compensation by the Government could absolve it from its other responsibilities including criminal prosecution and other forms of reparation.[669] These gaps in Nepalese law and practice have been identified by the Special Rapporteur on Torture, who expressed serious concern regarding "the prevailing culture of impunity for torture in Nepal, especially the use of compensation for acts of torture as an alternative to criminal sanctions against the perpetrator."[670]

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[664] Interim Constitution, Art 26, and CRT, Art 6(1).

[665] CRT, s. 5.

[666] See e.g. Advocacy Forum, *Hopeand Frustration: Assessing the Impact of Nepal's Torture Compensation Act -1996*, pp. 27-31.

[667] CRT, s. 8.

[668] CRT, s. 9(2), and s. 9(1) which provides that payments should be made within 35 days following the award; Advocacy Forum and REDRESS report of 2010, p.1.

[669] There is a case where an Appeal Court upheld a finding of torture under the CRT Act, and the award of compensation, but overturned an order for departmental action against the perpetrators on the grounds that to do so would 'hamper the work of police': Judgment of the Appellate Court, Biratnagar, 2 June 2011, on appeal from the order of the District Court, Morang, 29 March 2010. See: Advocacy Forum and REDRESS report of December 2011, p.52.

[670] Special Rapporteur report on torture (2006).

In addition to claims under the CRT, torture victims can, in principle, resort to constitutional remedies since the Interim Constitution provides that any citizen whose constitutional rights have been violated can file a writ petition before the Supreme Court.[671] In practice, however, it appears that the most that the Supreme Court does in such cases is to direct the Government to make legislative enactments; it does not award compensation to victims. Furthermore, there is a possibility for such victims to file a claim for compensation with the Appellate Court if the rights guaranteed under the Civil Rights Act, such as the right to life, liberty and freedom from arbitrary arrest, have been violated.[672]

There are no government sponsored rehabilitation programmes for victims of torture, such as psychological counselling and medical treatment. Such support is being provided to some extent by non-governmental organisations such as Centre for Victims of Torture (CIVICT).

6.6. Conclusion

Nepal has made concrete commitments against torture by ratifying international instruments and putting in place constitutional guarantees. However, it needs to reinforce these by ratifying the Optional Protocol to the CAT and, most importantly, by translating the relevant commitments and guarantees into practice. The enactment of a law criminalising torture will be an important first step. The definition of torture under such law must conform to the definition provided under Article 1 of the CAT and the CRT also needs to be amended along the same lines. The draft Bill on the Protection of Witnesses and Victims is another piece of legislation that needs to be modified and enacted without delay. The requirement of prior approval by government officials to initiate proceedings against public servants is an impediment to prompt and effective investigation into human rights abuses and should not be maintained in the Criminal Procedure Code. Similarly, the laws effectively exempting members of the security forces from criminal responsibility, such as the Nepalese Army and Police Acts, need to be revised. It is hoped that Nepal will soon have a functioning parliament that would help realise the legislative reforms such as those referred to above but also guarantee greater political stability.

It is also crucial for the Government of Nepal to guarantee the independence of the judiciary and the NHRC in order to ensure the impartial application of the law and effective investigations into allegations of torture and other human rights violations. An important opportunity for pursuing accountability for serious human rights violations and enhancing the credibility of the

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671 Interim Constitution, Art 107.

672 Civil Rights Act, 2012 (1955), ss. 12 and 15.

judiciary was lost as a result of the political decision to withdraw numerous pending cases involving such violations in 2008 and 2009. Another important problem to be addressed in the Nepalese context is the multiplicity of actors with powers to carry out arrests and interrogations. Arrest, detention and interrogations need to be limited to trained officers and clearly regulated in line with the due process guarantees in order to minimise the risk of violations. The requirements of an effective medical check-up upon arrest and release under the CRT should also be systematically observed and not be treated as a formality, as it reportedly is at present. It is also important for the Government, civil society and the international community to provide human rights training to justice sector personnel and improve awareness of the standards on the treatment of prisoners, including the Istanbul Protocol.

7. Pakistan*

7.1. Practice and patterns of torture

Pakistan was created following the partition of India in 1947 and has a population of over 180 million.[673] It has faced numerous political upheavals since its inception, with the military playing a dominant role in politics or exercising direct political power for much of the Country's history. While Pakistan's Constitution guarantees fundamental rights and freedoms, the record of successive governments in terms of the effective enforcement of those guarantees is marred by reports of serious violations of human rights committed by the police and the security forces.

Torture and other forms of ill treatment are reportedly routinely used to extract confessions or obtain information, and extort money in the process of arrest and interrogation.[674] The most common methods used include beatings with a baton and cane-stick, whipping with a leather slipper or a belt dipped in mustard oil,[675] water boarding, electrocution, prolonged isolation, tight stress positions, and sexual abuse.[676] A local NGO, the Society for Human Rights and Prisoners' Aid (SHARP), documented over 8,000 cases of torture by the police in 2011, which had nearly doubled compared to the previous year.[677] The police are also accused of torturing detainees in "private torture cells" in order

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* Based on initial contribution by Sayed Rizvi, Secretary, Karachi Bar Association, Pakistan.

673 'Country profile: Pakistan', *BBC*, last updated 19 June 2012, available at: http://www.bbc.co.uk/news/world-south-asia-12965779 and 'Population and Demographic Profile', Indexmundi, available at: http://www.indexmundi.com/pakistan/demographics_profile.html.

674 See: Asian Human Rights Commission, *Pakistan: State widespread use of torture must be brought to an end*, AS-154-2006, 23 June 2006, available at: http://www.humanrights.asia/news/ahrc-news/AS-154-2006/?searchterm=Pakistan%20torture.

675 A method known as 'Chitthar' – see Taha Siddiqui, *The torture cells of Lahore*, The Express Tribune, 11 December 2011, available at: http://tribune.com.pk/story/304911/the-torture-cells-of-lahore/.

676 US Department of State, *Country Reports on Human Rights Practices for 2011: Pakistan*, 2012, p. 6, available at: http://www.State.gov/documents/organization/186685.pdf; Malik Abid, Medieval methodologies: Hidden police torture cell discovered by raiding team, *The Express Tribune*, 8 August 2011, available at: http://tribune.com.pk/story/226198/medieval-methodologies-hidden-police-torture-cell-discovered-by-raiding-team/.

677 As cited in: US Department of State, *Country Reports on Human Rights Practices for 2011*: Pakistan, p. 6.

to avoid detection and accountability.[678] Forms of torture carried out by the police, such as using outdated methods in the course of interrogation, also stem from a lack of adequate knowledge and training.[679]

The military and other agencies, which include Military Intelligence (MI), the Inter Service Intelligence (ISI), the Federal Intelligence Agency (FIA), the Pakistan Rangers and the Frontier Constabulary (FC), reportedly often resort to keeping arrested suspects incommunicado and torturing people suspected of involvement in "anti-state" activities including terrorism and separatist movements.[680] Violations carried out at the hands of the Pakistani Armed Forces have been especially prevalent in the more volatile areas of Pakistan, such as the North-Western frontier and the Balochistan regions,[681] with reports of arbitrary arrests, enforced disappearances, and "endemic torture in unauthorised cells."[682]

The issue of terrorism and militant insurgency is one of the significant challenges facing Pakistan. In this context, both the campaigns of the fundamentalist groups involved, and the counter-insurgency efforts to stop them have been characterised by frequent recourse to torture and ill-treatment. 'Private torture' cells are being run by different "terrorist" (or 'sectarian') organisations backed by various religious factions, and others, which are reported to have even been nurtured by the Pakistani administration in the past.[683] As part of the 'War on Terror', the authorities have reportedly used torture and ill-treatment when interrogating individuals suspected of being members of these organisations. According to the Asian Human Rights Commission, there are at least 52 illegal detention centres that are operated by

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678 Ayesha Shahid, Torture: a 'standard operating procedure' for the police, *Dawn*, 2 May 2012, available at: http://dawn.com/2012/05/02/torture-a-standard-operating-procedure-for-police-2/.

679 Asian Human Rights Commission, *Pakistan: 10421 Cases of police Torture reported during the last ten [years]*, AHRC-FST-053-2009, 30 June 2009, available at: http://www.humanrights.asia/news/forwarded-news/AHRC-FST-053-2009.

680 Amnesty International, "*As if hell fell on me": The human rights crisis in Northwest Pakistan*, Index: ASA 33/004/2010, June 2010, p. 63, available at: http://www.amnesty.org/en/library/asset/ASA33/004/2010/en/1ea0b9e0-c79d-4f0f-a43d-98f7739ea92e/asa330042010en.pdf.

681 Human Rights Watch, "*We Can Torture, Kill, or Keep You for Years": Enforced Disappearances by Pakistan Security Forces in Balochistan*, July 2011, p. 25, available at: http://www.hrw.org/sites/default/files/reports/pakistan0711WebInside.pdf.

682 Human Rights Commission of Pakistan, *Pushed to the wall – Report of the HRCP fact-finding mission to Balochistan*, October 2009, p. 5, available at: http://www.hrcp-web.org/pdf/Pushed%20to%20the%20wall.pdf.

683 Ashley J Tellis, *Pakistan and the War on Terror: Conflicted Goals, Compromised Performance*, Carnegie Endowment for International Peace, 2008, pp. 4-6: Sectarian groups have been engaged in "violent bouts of bloodletting," including Sipah-e-Sahaba and Tehrik-e-Jafria Pakistan (p. 4), in addition to groups previously backed by the armed forces, such as Jaish-a-Muhammad and Harkat-ul-Mujahadeen (p. 5).

military forces as torture cells around the country.[684] It should be noted, however, that allegations are not only directed at the Pakistani military and intelligence agencies. There are also recurring allegations relating to British and American complicity in the use of torture.[685]

Additional concerns have been raised in respect of outdated prison practices. The Prison Act of 1894 and the Prison Rules of Pakistan permit the use of various fetters and chains to punish "prison offences" and prisoners can be subjected to such a treatment for more than three months on the discretion of the superintendent.[686] Such practice, according to the UN Special Rapporteur on Torture, amounts to "a clear violation of the Standard Minimum Rules [for the Treatment of Prisoners]" and constitutes "a form of inhuman and degrading treatment".[687] Despite some High Courts ruling that the use of fetters is in breach of Article 14 of the Constitution,[688] it is still available with prior approval of the Inspector General of prisons.[689] Overcrowding has become a serious problem in Pakistani prisons,[690] which has resulted in "abysmal" living conditions amounting to inhumane treatment.[691] The Human Rights Commission of Pakistan, a well-known NGO, reported that as of 2011 most prisons were overcrowded, with some facilities holding more than three times the maximum capacity.[692]

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[684] Asian Human Rights Commission, *Pakistan: 52 illegal torture and detention centres identified*, AHRC-STM-158-2008, 5 June 2008, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-158-2008.

[685] Human Rights Watch, *Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan*, November 2009, pp. 17-35, available at: http://www.hrw.org/sites/default/files/reports/uk1109web_0.pdf.

[686] The Prison Act of 1894, ss. 46 (7) and 57(1) and (2).

[687] Commission on Human Rights, *Report of the Special Rapporteur, Mr Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 – Addendum – Visit by the Special Rapporteur to Pakistan*, UN Doc. E/CN.4/1997/7/Add.2, 15 October 1996, para. 57, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/141/51/PDF/G9614151.pdf?OpenElement.

[688] See: Decisions of Sindh High Court dated 30 December 1993 concerning Cr. Misc. No. 245 of 1989 and C.P. No.D-901 of 1989, cited in U.N. Commission on Human Rights, *Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan*, U.N. Doc. E/CN.4/1997/7/Add.2 (1996) (Nigel Rodley, Special Rapporteur) para. 59, available at: http://www1.umn.edu/humanrts/commission/thematic53/97TORPAK.htm; Art 14 of the Constitution renders the dignity of a man inviolable, subject to law, and prohibits torture for the purpose of extracting evidence.

[689] Mohammad Kamran, 'SC restricts use of fetters on prisoners', *Daily Times*, 12 October 2006, available at: http://www.dailytimes.com.pk/default.asp?page=2006%5C10%5C12%5Cstory_12-10-2006_pg7_3.

[690] International Crisis Group, *Reforming Pakistan's Prison System*, Asia Report No. 212 , October 2011, p. 1, available at: http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/212%20-%20Reforming%20Pakistans%20Prison%20System.pdf.

[691] Ibid.

[692] Human Rights Commission of Pakistan, *State of Human Rights in 2011*, pp. 61 – 62.

Due to their status in sections of Pakistani society, women are often victims of domestic physical and psychological abuse[693]– either at the hands of their spouse or of his family – for perceived illicit behaviour, or dowry[694] and khula[695] arrangements. The Human Rights Commission of Pakistan's media monitoring programme identified 98 instances of women being "tortured" in the context of domestic violence in 2011, in addition to further incidents, such as amputation of body parts and public humiliation.[696]

Another concern is the prevalence of corporal punishment in Pakistan, which is handed down in various circumstances, such as prisons, schools and in the sentencing for offences under Sharia law.[697] Corporal punishment is legal in Pakistan as a criminal sanction and as punishment for prison offences.[698] Similarly, extreme interpretations of Islamic law by groups, such as the Taleban, often result in young adults, and women in particular, suffering punishments that include flogging, being forcibly stripped naked and stoning – sometimes to death[699]– which are often carried out in public. Such practice amounts to inhumane and degrading treatment under international law, and has been heavily criticised both by the international community and within Pakistan.[700] There has been an attempt to outlaw corporal punishment[701] in part due to numerous publicised cases of children sustaining injuries, and even dying, from such

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693 Ibid, from p. 155.

694 Parveen Azam Ali & Maria Irma Bustamente Gavino, *Violence against Women in Pakistan: A Framework for Analysis*, p. 201.

695 Khula is the process by which women can initiate a divorce; however it requires the consent of the husband. See: Kakakhel Law Associates, *The Law of Divorce in Pakistan*, 23 August 2008, available at: http://www.hg.org/Article.asp?id=5439.

696 Human Rights Commission of Pakistan, *State of Human Rights in 2011*, p. 166. Although whipping is outlawed as a sentence for criminal offences in 1996, the law is riddled with many exceptions and does not apply to the jurisdiction of the Federally Administered Tribal Areas, where whipping is practiced including against children. The Abolition of the Punishment of Whipping Act (1996), See also Global Initiative to End all Corporal Punishment Against Children, *Pakistan Country Report*, January 2012, available at: http://www.endcorporalpunishment.org/pages/pdfs/states-reports/Pakistan.pdf.

697 Human Rights Commission of Pakistan, *State of Human Rights in 2011*, p. 182.

698 Although whipping is outlawed as a sentence for criminal offences in 1996, the law makes an exception with regard to offences under Sharia law. See Art 3 of the Abolition of the Punishment of Whipping Act (1996). Art 46(12) of the Prisons Act (1894) provides for whipping for prison offences committed by male prisoners. Qisa is another form of corporal punishment, which involves causing "a similar hurt" at the same part of the body of the convict as the one caused to the victim. See the Qisa and Diyat Ordinance of 1991 and Criminal Law Amendment Act of 1997.

699 Michael Georgy, Video shows Taliban allegedly stoning Pakistan woman, *Reuters*, 27 September 2010, available at: http://www.reuters.com/Article/2010/09/27/us-pakistan-stoning-idUSTRE68Q2TA20100927.

700 Pakistan to probe girl's flogging, BBC, 3 April 2009, available at: http://news.bbc.co.uk/1/hi/7980899.stm.

701 The Prohibition of Corporal Punishment Act, 2010 (Draft), available at: http://www.na.gov.pk/uploads/documents/1302222875_732.pdf.

practice.[702] While the bill in question was ultimately unsuccessful, another bill to criminalise corporal punishment is currently under consideration in the province of Sindh.[703]

There have also been reports of students, including young children, being subjected to abuse at some religious schools, known as 'madrassas'. In December 2011, over fifty students were rescued during a raid at a madrassa in Karachi, where they were "kept in chains by clerics, beaten, and barely fed."[704] The motives for such treatment have been put down to methods of punishing general indiscipline and drug addiction,[705] and there has been speculation that a number of the schools have links to militant Islamic fundamentalism.[706] Religious motives for abuse have also been reported, an example of which was the torture of an Ahmadi schoolteacher by police earlier this year.[707]

7.2. Legal framework

International law

Pakistan is party to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights, but not to the optional protocols.[708] It has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), on 23 June 2010, though with several reservations.[709] However, it has not accepted the Committee's competence to consider individual complaints and is not party to the Optional Protocol to CAT. It has ratified the Geneva Conventions, but not the Additional Protocols[710] and the Convention on the Rights of the Child.[711]

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[702] Human Rights Commission of Pakistan, *State of Human Rights in 2011*, p. 182.

[703] Expediting legislation on anti-corporal punishment bill urged, *Pakistan Today*, 13 May 2012, available at: http://www.pakistantoday.com.pk/2012/05/13/city/karachi/expediting-legislation-on-anti-corporal-punishment-bill-urged.

[704] Pakistani police rescue 54 students chained up in madrasa basement, *The Guardian*, 13 December 2011, available at: http://www.guardian.co.uk/world/2011/dec/13/pakistani-students-chained-madrasa-basement.

[705] Boy dies of alleged torture by Quran teacher in Pakistan, *Al Arabiya News*, 23 April 2012, available at: http://www.alarabiya.net/Articles/2012/04/23/209706.html.

[706] Oliver Poole, Religious school pupils chained up and tortured, *London Evening Standard*, 13 December 2011, available at: http://www.thisislondon.co.uk/news/religious-school-pupils-chained-up-and-tortured-6378119.html.

[707] Asian Human Rights Commission, *Pakistan: In a hate campaign against the Ahmadis the police torture to death an innocent schoolteacher*, Appeal: AHRC-UAC-057-2012, 3 April 2012, available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-057-2012.

[708] Pakistan ratified the two Covenants on 23 June 2010 and 17 April 2008, respectively.

[709] Pakistan has made reservations to Art 8 (2) (which provides for States Parties to consider the Covenant a legal basis for extradition with respect to torture), Art 20 (relating to the competence of the Committee Against Torture to inquire into systematic cases of torture and the obligation of states to cooperate) and Art 30 (dispute solution).

[710] Pakistan ratified the four Geneva Conventions with reservations concerning Art 44 and 68 (2) on 12 June 1951.

[711] Ratified on12 November 1990.

Pakistan is not party to the Rome Statute of the International Criminal Court.

Domestic implementing legislation is required in order for international treaties to be applicable in the Pakistani legal system. However, the Supreme Court of Pakistan has affirmed that although the international conventions are not directly applicable without national legislation, they can be used as a guiding principle that should be upheld by the courts.[712]

National legal system

Article 14(2) of the Constitution of the Islamic Republic of Pakistan 1973[713] stipulates that "no person shall be subjected to torture for the purpose of extracting evidence," which has been re-affirmed by the Supreme Court.[714] Although the prohibition of torture under this provision may appear to cover only the extracting of evidence, it could be broadly construed since the preceding paragraph guarantees that the dignity of man shall be "inviolable" in accordance with the law.[715]

Torture has not been recognised as a specific crime under domestic legislation.[716] Acts of torture are, therefore, only punishable under related offences proscribed in the Penal Code such as "causing hurt to extort confession or to compel restoration of property,"[717] "wrongful confinement to extort confession or compel restoration of property,"[718] or the provisions governing "criminal force and assault."[719] However, these crimes do not fully cover the components of torture in line with international standards. The term "hurt" under Article 337 (k) of the Penal Code is legally ambiguous, and it is uncertain as to whether it encompasses physical or mental forms of "severe pain or suffering." Moreover, neither the element of official capacity as a torturer nor the act of torture by way of the instigation of, or

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712 *Al-Jehad Trust v Federation of Pakistan* 1999 SCMR 1379, 1395, available at: http://cmsdata.iucn.org/downloads/al_jehad_trust_v_federation_of_pakistan_1999_scmr_1379.pdf.

713 Constitution of the Islamic Republic of Pakistan 1973.

714 *Muhammad Pervez and others v State* (2007 SCMR 670). The Supreme Court found that the complainants had been tortured into confessing to a crime, and duly set aside their convictions. See brief summary of decision at: Amjad Hussain Panwar, *Pakistan Constitution and Prohibition of Torture*, footnote [30], available at: http://www.pakistanlaw.net/law-Articles/legal/pakistan-constitution-and-prohibition-of-torture.

715 Art 14 (1) of the Constitution provides that "the dignity of man and, subject to law, the privacy of home, shall be inviolable".

716 Committee on the Rights of the Child, *Consideration of reports submitted by States Parties under Article44 of the Convention – Concluding observations: Pakistan*, UN Doc. CRC/C/PAK/CO/3-4, 15 October 2009, para.46(b), available at: http://www.unhcr.org/refworld/country,,CRC,,PAK,,4d6f68602,0.html.

717 Pakistan Penal Code (Act XLV of 1860), Art 337 (k), available at: http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,PAK,4562d8cf2,485231942,0.html.

718 Ibid., Art 348

719 Ibid., Arts 349- 358

with the consent or acquiescence of, a person acting in an official capacity is specified under these provisions.

Pakistan is host to "one of the largest and most protracted refugee situations in the world", with approximately 1.7 million people seeking refuge in the country – the majority from Afghanistan.[720] However, it is not party to the UN Convention relating to the Status of Refugees and does not always respect the principle of non-refoulement in line with Article 3 of the CAT. There have been reports of mass deportations by the Pakistani authorities, without serious regard to the welfare of the refugees on their return, as part of the counter-insurgency measures against the Taliban.[721]

There is also no statutory provision on universal jurisdiction. However, in the case of *Shahbazuddin Chaudhry v SHO & Ors*[722] the High Court of Lahore convicted an individual who claimed to be a Saudi Arabian national for fraudulent exchange of money committed in Saudi Arabia, and acknowledged that all countries had an obligation to try all persons charged with committing serious crimes. Citing *R v Bartle & Ors ex parte Pinochet*,[723] the court further held that the principle of universal jurisdiction was in line with the development of international human rights principles.[724]

7.3. Safeguards and complaint mechanisms

Arrest and pre-trial detention

Article 10(2) of the Constitution provides that "Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest… and no such person shall be detained in custody beyond the said period without the authority of a Magistrate". The above protection is also reinforced through Article 61 of the Code of Criminal Procedure.[725] However, the scope of its application does

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720 UNHCR, *2012 UNHCR country operations profile – Pakistan*, available at: http://www.unhcr.org/pages/49e487016.html

721 'Pakistan to deport Afghan refugees', *Al Jazeera*, 7 October 2008, available at: http://www.aljazeera.com/news/asia/2008/10/20081074225388877.html.

722 Shahbazuddin Chaudhry v SHO & Ors; S M Iqtidar Haider v Shahbazuddin Chaudhry, High Court, Lahore, case date 21/12/1998, Judges Tassaduq Hussain Jilani J. A summary is available at: http://www.interights.org/commonwealth-and-international-law-document/2011/index.html.

723 (1998) 5 BHRC 209 UKHL.

724 Although the nationality of the accused was a contentious issue, the court ruled that he could not claim immunity from prosecution in Pakistan irrespective of his nationality. Writ Petition No.17726/1997; Writ Petition No. 22213/98, unreported. A summary is available at: http://www.interights.org/commonwealth-and-international-law-document/2011/index.html.

725 Code of Criminal Procedure 1898 (CCP), available at: http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,PAK,4562d8cf2,48511ea62,0.html.

not extend to individuals arrested or detained under any law providing for preventive detention.[726] Furthermore, Article 10(4) of the Constitution provides that those individuals "acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services" can be placed in preventive detention for 3 months in the first instance. With the authorisation from a Review Board, the period of detention can be continued for up to 12 months.[727]

In practice, the Police frequently fail to observe this safeguard by carrying out arbitrary arrests with false charges or by attempting to extort money for the release or holding of suspects in police custody, until the detention is challenged.[728] The Magistrate, upon receiving a request of remand, can extend the detention for up to 15 days if further investigation is deemed necessary,[729] which is common practice. In some cases where there is insufficient evidence, police and magistrates have contrived to extend detention further by issuing a new First Information Report.[730] Such practice, given a lack of independent mechanisms for monitoring police custody,[731] gives rise to lengthy periods of detention during which there is a high risk of torture or other ill-treatment.

Detainees could file writs of habeas corpus to the high courts, and, in certain cases, to the Supreme Court for the enforcement of their fundamental rights.[732] Yet the remedy is curtailed by exceptions provided in a number of special laws.

Constitutional protections are curtailed in the Federally Administered Tribal Areas (FATA) and the Khyber Pakhtunkhwa's

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[726] Art 10(3) of the Constitution states that "[n]othing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention."

[727] Arts 10(4) and (7) of the Constitution: A Review Board is composed of a chairman and two additional members appointed by the Chief Justice of Pakistan or the High Court, each of whom is or has been a judge of the Supreme Court or a High Court. See Art 10(4) (i) and (ii) of the Constitution.

[728] US Department of State, *Country Reports on Human Rights Practices for 2011: Pakistan*, p. 19; U.N. Commission on Human Rights, *Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan*, para.19: "According to Ijaz Ahmed, it is common practice that when the suspect is arrested in the morning, the police do not hand over his or her to the magistrate on the same day and rather keep his or her in police custody for the night." See Ijaz Ahmer, *Pakistan criminal law needs amendments: A proposal*, available at: http://www.humanrights.asia/resources/journals-magazines/Article2/0105/pakistan-criminal-law-needs-amendments-a-proposal/.

[729] CCP, Art 167(2).

[730] US Department of State, *Country Reports on Human Rights Practices for 2011: Pakistan*, p. 19.

[731] Ibid.: However, the Islamabad Capital Police recently introduced a system whereby Human Rights Officers are able to inspect places of detention as well as to interview the detainees.

[732] Constitution, Arts 199 (1)(b)(i) and 184 (3).

(formerly the Northwest Frontier Provision, NWFP) Provincially Administered Tribal Areas (PATA), where parallel legal systems operate. Article 247 of the Constitution provides for its application, stating that "neither the Supreme Court nor a High Court shall exercise any jurisdiction … in relation to a Tribal Area," thereby limiting enforceability of constitutional provisions. The Frontier Crimes Regulations (FCR) of 1901[733] in the FATA and Sharia law under the Nizam-e-Adl (2009) in the PATA govern the respective criminal justice systems of the two areas.[734] Despite theoretical improvements strengthening the rights of criminal suspects[735] in the FATA as a result of amendments to regulations, a lack of implementation means that there has been little change in actual practice.[736]

Oppressive military operations have also increased the practice of prolonged detention in the FATA and PATA regions.[737] According to the International Crisis Group, the adoption of the Actions (in Aid of Civil Power) Regulation 2011 for FATA and PATA, which applies with retroactive effect from 1 February 2008 and was brought in to legitimise the actions of the military, allows persons who "may obstruct actions in aid of civil power in any manner whatsoever" to be detained without a time limit.[738]

The Anti-Terrorism Act (ATA)[739] permits preventive detention for any person involved in the activities of a prescribed organisation listed in Section 11E of the ordinance for up to 1 year.[740] Following a further amendment in 2009, any person who has allegedly been involved in any offence under this Act[741] can be placed in detention for 90 days for interrogation without any possibility of

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733 As amended by the Frontier Crimes (Amendment) Regulation, 2011.

734 International Crisis Group report, *Reforming Pakistan's Prison System*, pp. 2-5; Asian Human rights Commission, *Pakistan: Frontier Crimes Regulation – Infringing Human and Child Rights*, AHRC-FAT-047-2010, 6 September 2010, available at: http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-047-2010.

735 For example, under s. 11 of Frontier Crimes (Amendment) Regulation 2011, the accused is to be "produced before the Assistant Political Agent concerned within twenty four hours of the arrest", and has the right to bail under s. 11A.

736 FATA Research Centre, *FATA Seminar Series – FCR amendments: A way forward or hurdle for Peace and Development in FATA. March Seminar Report*, 15 April 2012, p. 12, available at: http://design.hostnex.net/frc/wp-content/uploads/2012/06/20March_Seminar.pdf; Tribesmen want amended FCR enforced now, Dawn, 11 April 2012

737 International Crisis Group report, *Reforming Pakistan's Prison System*, p. 4.

738 Waseem Ahmad Shah, New regulations give legal cover to detentions in tribal areas, Dawn, 13 July 2011, available at: http://www.dawn.com/2011/07/13/new-regulations-give-legal-cover-to-detentions-in-tribal-areas.html.

739 The Anti-Terrorism Act 1997, Act No. XXVII of 1997, as amended up to the Anti-Terrorism (Amendment) Ordinance of 2002, available at: http://www.ppra.org.pk/doc/anti-t-act.pdf.

740 Section 11E(3) of the Anti-Terrorism (Amendment) Ordinance 2002, available at: http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinences/anti_terrorism_ordin_2002.htm

741 A range of offences are included under the Anti-Terrorism Act, including actions within the meaning of 'terrorism' under s. 6, actions that are likely or is intended to stir up sectarian hatred under s. 8, and actions in relation to terrorism under ss. 11 and 21.

habeas corpus.[742] The duration of remand can also be extended, allowing the period of "not less than thirty days" in the first place and its extension for another 90 days where the court is satisfied that "further evidence may be available" and that "no bodily harm has been or will be caused to the accused".[743]

Access to legal advice and compulsory medical assistance upon arrest

Article 10(1) of the Constitution stipulates that "[n]o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice." Nevertheless, detainees are often held incommunicado on arrest without access to legal advice.[744] There is no provision concerning medical examination upon arrest under Pakistani laws. This was a subject of concern for the Special Rapporteur on Torture following his visit, stating that he had received "reliable reports that medical care is frequently denied to detainees who have been seriously injured or are seriously ill," including during arrests.[745]

Complaint procedure and independent oversight

The Police Order 2002 introduced new mechanisms for dealing with complaints against police at the district, provincial, and national levels, including the District Public Safety and Police Complaints Commission, the Provincial Public Safety and Police Complaints Commission and the National Public Safety Commission.[746] With a few exceptions, this system has been ineffective, primarily owning to inadequate resources, a lack of incentives, and limited competency of the bodies involved.[747]

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[742] Anti-terrorism (Amendment) Ordinance, 2009, s. 9(1).

[743] Ibid., s. 15.

[744] U.N. Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan, para.19; see also Asian Human Rights Commission, Pakistan: Prominent lawyer tortured, poisoned in detention; two others held incommunicado, Appeal: UA-331-2007, 26 November 2007, available at: http://www.humanrights.asia/news/urgent-appeals/UA-331-2007.

[745] U.N. Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan, para.49.

[746] Police Order 2002, ss. 44, 80 and 93; see also U.N. Commission on Human Rights. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: addendum: follow-up to the recommendations made by the Special Rapporteur visits to Pakistan, para.525, available at: http://www.unhcr.org/refworld/country,,UNHRC,,CHL,,47cbbf262,0.html.

[747] Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, Police Organisations in Pakistan, 2010, pp. 30-31, available at: http://www.hrcp-web.org/pdf/Police_Organisations_in_Pakistan[1].pdf.

One of the principal obstacles to the effective investigation of torture and ill-treatment is the system of recording complaints. Section 154 of the CCP requires the police to register a First Information Report after a crime has been committed or reported. However, the system is prone to abuse and inefficiency. The police will often register an FIR without substantial evidence – leading to the abuse of arrestees – or demand a bribe from complainants in order to register an FIR.[748] According to data taken from the Annual Reports of the Lahore High Court, the non-registration of an FIR made up the overwhelming majority of complaints regarding police inefficiency since 2003.[749] Furthermore, it has been reported that the police have failed to register an FIR in respect of torture allegations pertaining to military activities as a result of political pressure.[750]

There are a number of independent human rights organisations in Pakistan, all of which provide oversight and promote human rights where they can, such as the Human Rights Commission of Pakistan and the Society for Human Rights and Prisoner's Aid. However, activists have been subject to abuse, including torture.[751]

Calls for an independent national institution with the official mandate to monitor the status of human rights have resulted in the passage of the National Commission for Human Rights Act, passed by the National Assembly on 4 May 2012. The Act,[752] which creates the Commission, received presidential assent on 30 May 2012 and is now in force.[753] The law has been criticised, however, due to its limited scope to deal with

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[748] US Department of State, *Country Reports on Human Rights Practices for 2011: Pakistan*, p. 19.

[749] Cited in Humans Rights Commission of Pakistan, *Revisiting Police Laws*, 2011, p. 3, Table 2.

[750] See: Asian Human Rights Commission, *Pakistan: Absence of rule of law provides impunity to military officials*, 29 August 2011, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-113-2011/; Human Rights Watch also points out the disinclination of the police to investigate the matters relating to the military in the context of enforced disappearances in Bolochistan, stating that "[P]olice often explicitly told that they had no powers to investigate disappearances allegedly committed by the intelligence agencies or Frontier Corps personnel". See Human Rights Watch, "*We Can Torture, Kill, or Keep You for Years": Enforced Disappearances by Pakistan Security Forces in Balochistan*, p. 5.

[751] Asian Human Rights Commission, *Pakistan: Human rights defenders were tortured during jail custody in Gilgit-Baltistan*, Appeal: AHRC-UAC-070-2012, 10 May 2012, available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-070-2012.

[752] National Commission for Human Rights Act, 2012, available at: http://www.na.gov.pk/uploads/documents/1342437418_845.pdf; see also, Pakistan Institute of Legislative Development and Transparency (PILDAT) brief for an overview and critique on the bill, available at: http://www.pildat.org/publications/publication/LB/TheNationalCommissionforHumanRightsBill2008-April2011.pdf.

[753] See, President signs National Commission for Human Rights Bill into law, *The Nation*, 30 May 2012, available at: http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/30-May-2012/president-signs-national-commission-for-human-rights-bill-into-laws/; Human Rights Watch, *Pakistan: Revise National Human Rights Commission Law*, 1 May 2012, available at: http://www.hrw.org/news/2012/05/17/pakistan-revise-national-human-rights-commission-law.

violations committed by intelligence agencies and the armed forces.[754] Under Section 14 concerning complaints made against the armed forces, the Commission may only "seek a report from the Federal Government" on the allegation, and, after receipt of the report, make recommendations to the Government on what action to take. There is no express obligation on the Government to comply. Concerning complaints against intelligence agencies under Section 15, the Commission cannot make inquiries and "shall refer the complaint to the competent authority concerned."

Corruption is rife in the public institutions of Pakistan, especially the police and the judiciary,[755] which contributes to a lack of impartiality and restricts the effective investigation of crime. Inadequate financial incentives have resulted in the police looking for alternative forms of income, by taking bribes to either drop cases or file false charges.[756] Strains on the judiciary, resulting in a backlog of cases, provides an opportunity for judges to "seek bribes to fix an early hearing."[757] Furthermore, political pressure exerted by both the federal and respective provincial governments hinders the effective operation of the judiciary, and ultimately curtails its independence. The tempestuous relationship between the executive and the judiciary culminated in the dismissal of Pakistan's Chief Justice in 2007, which ultimately led to a period of martial law and the removal of over fifty high-court judges.[758]

Admissibility of evidence obtained under torture

Evidence obtained under duress is inadmissible under Pakistani law. Article 163 of the CCP provides that "[n]o police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as was mentioned in the Evidence Act, 1872, Section 24." Sections 37-39 of the Qanoon-e-Shahadat Order of 1984, which replaces the Evidence Act 1982, prescribe that confessions obtained through inducement, threat or promise, or confessions made in police custody without the presence of a Magistrate are not admissible in criminal proceedings.[759] Under the ATA, Section 21-H stipulates

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[754] Ibid.

[755] U4, *Overview of corruption in Pakistan*, Anti-Corruption Resource Centre, 2008, p. 5, available at: http://www.u4.no/publications/overview-of-corruption-in-pakistan/.

[756] International Crisis Group, *Reforming Pakistan's Police*, Asia Report No.157, July 2008, p. 13, available at: http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/157_reforming_pakistan_s_police.ashx.

[757] International Crisis Group, *Reforming the Judiciary in Pakistan*, October 2008, p. 16, available at: http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/160_reforming_the_judiciary_in_pakistan.pdf.

[758] Ibid., pp. 4-5; see also Kersi B. Shroff with the assistance of Krishan S. Nehra, *Suspension and ReinStatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial Independence?* Library of Congress, 10 August 2007, available at: http://www.loc.gov/law/help/pakistan-justice.php.

[759] Qanoon-e-Shahadat Order (X of 1984), s. 37, copy of legislation available at: http://www.mpil.de/shared/data/pdf/qanun-e-shahadat_order.pdf.

that the confession of an accused can be admissible if it was made "without being compelled". Furthermore, the voluntary confession has to be made before a police officer "not below the rank of a District Superintendent", who is under the obligation to explain to the accused that he is not bound to make a confession.

Nevertheless, this principle is substantially disregarded in practice chiefly due to the police and prosecutors heavily relying upon confessions obtained through torture-related acts. This can be partly attributed to the absence of qualified investigating officers and the use of primitive methods of collecting evidence.[760]

7.4. Accountability

Notwithstanding persistent allegations of widespread torture and ill treatment in Pakistan, there is a lack of effective mechanisms to investigate such incidents and prosecute those responsible.

Even where a complaint is successfully recorded, it is often the case that allegations of torture are investigated by the same police officers who have been implicated in the violation.[761] Many other factors, including poor management of evidence, insufficient financial and human resources, and inadequate training have aggravated the inadequacy of investigations, and ultimately resulted in strengthening the culture of impunity.[762]

The rudimentary nature of the public prosecution system, despite having been revamped following the Police Order Act, also appears to have a corrosive effect on prosecutions.[763] Prosecutors are reported to have an alarming lack of comprehensive knowledge of the system, which ultimately leads to abuse by the police going unchecked.[764]

The justice system is characterised by prolonged court proceedings and a significant backlog of pending cases, primarily owing to the scarcity of qualified judges and legal professionals and

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[760] International Crisis Group, *Reforming Pakistan's Criminal Justice System*, Asia Report No.196, December 2010, p. 12, available at: http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/196%20Reforming%20Pakistans%20Criminal%20Justice%20System.pdf. According to this report, confessions obtained under duress are often used as evidence in serious crimes, including murder and acts of terrorism.

[761] Asian Human Rights Commission, *The State of Human Rights in Ten Asian Nations – 2011: Pakistan*, 2012, p. 323.

[762] International Crisis Group, *Reforming Pakistan's Criminal Justice System*, pp. 1, 13-14, available at: http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/196%20Reforming%20Pakistans%20Criminal%20Justice%20System.pdf.

[763] All four provinces (Punjab, Sindh, Balochistan, and North-West Frontier Province) approved a Criminal Prosecution Service Act to set up "an independent, effective and efficient service for prosecution of criminal cases, to ensure prosecutorial independence, for better coordination in the criminal justice system of the Province". See e.g. Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006.

[764] International Crisis Group, *Reforming Pakistan's Criminal Justice System*, pp. 17-19.

inadequate case management or court administration systems.[765] More importantly, the judiciary has not been willing to take the initiative to handle these matters due to a fear of retaliation by the military.[766] There have been few cases where police officers in particular have been charged with torture and ill-treatment and even convicted by a court for their actions.[767] However, punishments are rarely enforced and the Special Rapporteur noted that disciplinary measures, such as demotion or dismissal, were often viewed as sufficient punishment for officials who had abused their authority.[768]

Law enforcement personnel appear to enjoy immunity from any liability under national laws. Section 132 of the Code of Criminal Procedure provides that no members of law enforcement agencies acting in "good faith" for the purposes of Chapter IX – unlawful assemblies and maintenance of public peace and security – shall be prosecuted without the sanction of the Government. Likewise, any law enforcement personnel acting in good faith or acting with intention to fulfil the obligations provided are not accountable under the ATA.[769]

Any act or conduct for "the maintenance of public order by law enforcement personnel, including members of the Armed Forces, or of the police or any other related agencies" is not subject to fundamental rights challenges, such as relating to the prohibition of torture.[770] This understanding has been adduced by the jurisprudence of the Supreme Court. For instance, in the case of *Mrs. Shahida Zahir Abbasi v. President of Pakistan* it was stated that "[the Army Act, 1952 is one of these pieces of legislation which is protected under Article 8(3) (a) of the Constitution from being challenged on the ground of its inconsistency with the provisions contained in Chapter I of Part II of the Constitution".[771]

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[765] US Aid, *Pakistan Rule of Law Assessment – Final Report*, November 2008, pp. 16-17 and 22-23, available at: http://www1.usaid.gov/pk/downloads/dg/Pakistan_ROL_11-26-08.pdf.

[766] Asian Human Rights Commission, *Pakistan: Higher courts complicit in the torture and killings in military detention centres*, AHRC-STM-019-2012, 27 January 2012, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-019-2012.

[767] Human Rights Commission of Pakistan, *State of Human Rights in 2006*, January 2006, pp. 112-113, available at: http://www.hrcp-web.org/pdf/Archives%20Reports/AR2006.pdf.

[768] U.N. Commission on Human Rights, *Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan*, para. 22.

[769] Anti-terrorism Act, s. 39.

[770] Art 8 (3) (a) of the Constitution prescribes that "[t]he provisions of this Article shall not apply to (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them".

[771] *Mrs. Shahida Zahir Abbasi v. President of Pakistan*, PLD 1996, Supreme Court 632, cited in Ahsan Yousaf Chaudhary, *Toward a Torture Free Pakistan: Implementing CAT-Challenges and Prospects*, p. 31.

The courts are actively discouraged to intervene in matters relating to the military, and in the cases where the court is granted such a right, any resulting order is simply ignored.[772]

Victims of torture and related violations experience multiple obstacles in pursuing complaints. If a complaint does not result in a prosecution, a victim may be liable to pay compensation if their complaint is deemed "false and either frivolous or vexatious".[773] Such situations may arise through a lack of evidence, and could cause further discouragement to victims in seeking to bring perpetrators to account. In addition, there is no system of effective victim and witness protection. Consequently, it is common for victims and witnesses to be threatened, subject to intimidation or even murdered.[774] There is, however, an element of double standards in the law in that protection can be conferred to witnesses and other persons concerned with court proceedings relating to the Anti-TerrorismAct, subject to the availability of resources.[775]

7.5. Reparation

There is no specific right for victims to seek reparation in Pakistan although they could seek compensation through a fundamental rights petition under the Constitution.[776] Under Section 337-K of the Penal Code, those who cause hurt to extort a confession may be required to pay some form of compensation to the victim, in addition to a term of imprisonment, as punishment for the crime.[777] However, these provisions do not impose an obligation on the State to provide reparation for violations committed by its agents. Moreover, fear of retaliation on the part of the victims and the weaknesses of the judiciary referred to above serve to undermine the possibility of seeking and obtaining reparation through the court system.

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[772] Tariq Hassan, *Supreme Court of Pakistan: The Case of Missing Persons*, Criterion Vol. 4, No. 3, 2011, p. 9, PDF available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1861044.

[773] CCP, Art 250.

[774] Asian Human Rights Commission, *Torture in Pakistan: Legal framework regarding torture*, available at: http://www.humanrights.asia/countries/pakistan/torture-in-pakistan; see also Asad Kharal, *First the sorrow, now the fear, Daily Times*, 22 April 2010, available at: http://www.dailytimes.com.pk/default.asp?page=2010%5C04%5C22%5Cstory_22-4-2010_pg1_6.

[775] Anti-Terrorism Act 1997, ss. 21 (1) and (3)

[776] See for example, *Mazharuddin v The State of Pakistan*, High Court of Sindh, Karachi D-135 of 1997, 17 February 1998 – where the court held that victims of unlawful detention are entitled to compensation. A summary of the decision is available at: http://www.interights.org/commonwealth-and-international-law-document/2070/index.html.

[777] The two forms of compensation are listed as 'arsh' (compensation to be paid to the victim or his heirs as specified in the Penal Code, depending the injury suffered by the victim – see Art 299, and from Art 337-Q) or 'daman' ("compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh" – Art 299).

In the absence of adequate government funded rehabilitation schemes, torture victims are often supported by NGOs, the main one being Sach-Struggle for Change, whichprovides physical and psychological healthcare to victims.[778]

7.6. Conclusion

Torture remains a significant problem in Pakistan, and is perpetrated by law enforcement personnel primarily when interrogating arrestees and detainees. The problem is especially prevalent in the context of counter-terrorism efforts. The threat of terrorism and fundamentalist insurgency in certain regions, primarily the Northwest frontier, has led to widespread violations, including torture, of which an international element is also apparent, given the complicity of western intelligence services.

There have also been prominent examples of ill treatment being committed by non-state actors. Extremist groups have been documented to have publically humiliated and abused victims for their actions, perceived to have been contrary to extreme interpretations of Islam. Furthermore, abuse often takes place within families, and especially in the context of marriage, with women being the most frequent victims.

Despite the ratification of key international instruments and the obligations they entail, such as the ICCPR and the Convention against Torture, legal protection against torture and other forms of ill treatment is inadequate. The fact that torture has not been criminalised under the Penal Code contributes to a culture of impunity, which is exacerbated by a lack of effective safeguards. Constitutional provisions that serve to limit pre-trial detention, and set out the right to consult a lawyer upon arrest are undermined by counter-terrorism and security measures, or are simply disregarded in practice by officials.

The opportunity for torture victims to obtain redress and receive reparation is limited, given the inadequacy of complaint and investigation mechanisms. The system of recording FIRs is not strictly adhered to by the police, and even when complaints are recorded, investigations are often hampered by a lack of resources, special or immunity laws and the inefficiency of law enforcement officials. Institutional corruption and judicial delays are further obstacles to accountability. Despite its perceived flaws, it remains to be seen whether the National Human Rights Commission Act can bring about any notable improvement.

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[778] Reena Saeed Khan & Ilse Frech, *Pakistan: Becoming confident over the years', in Rebuilding Lives*, OHCHR, 2006, p. 135, a summary available at: http://www.ohchr.org/Documents/Publications/rebuildinglivesen.pdf; see also http://cvt.hutman.net/files/pg26/Sach%20Profile--5-05%20web.pdf.

In terms of reparation, although victims can receive compensation under the CCP or through judicial precedent for certain forms of abuses, such as unlawful police detention, there is no specific mechanism available for torture victims. The likelihood of receiving compensation for injuries sustained for torture and ill-treatment is further hindered by the ineffective mechanisms with which to hold perpetrators to account. This, in addition to the lack of State-run initiatives for rehabilitation, leads to the conclusion that Pakistan has failed in its obligation to adequately protect its people against torture and ill treatment.

8. The Philippines*

8.1. Practice and patterns of torture

The Philippines was a Spanish colony for almost three centuries before it was taken over by the United States of America in 1898. It became self-governing in 1935 and gained official independence in 1946. In 1972, the then President Ferdinand E. Marcos declared martial law, allegedly to suppress violence and disorder caused by communist insurgents. Martial law officially ended in 1981, though wide powers of arrest and detention and corruption remained. Successive governments have been plagued by ineffectiveness and corruption, and despite promises to put an end to abuses, the legacy of torture associated with the Marcos regime has persisted.

The first reported cases of torture, including the use of the "water cure" (waterboarding), occurred during the Philippine-American War.[779] Torture was also common during the Japanese Occupation of the Philippines from 1941-1945.[780] However, torture was not employed systematically, by Filipinos against Filipinos, in peacetime, until Ferdinand Marcos declared martial law in 1972 and established a dictatorship.[781]

While the post-Marcos governments have consistently taken a stand against torture, their rhetoric has never been translated into action. Cases of torture by elements of the Philippine military

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* Based on initial contribution by Jose Manuel Diokono, Advocate and Dean of De La Salle University College of Law, the Philippines.

[779] See "Testimony of William Howard Taft, head of the Philippine Commission, before the Committee on the Philippines of the United States Senate", in 1902, as quoted in Paul Kramer, *Annals of American History: The Water Cure*, published in the New Yorker Magazine on 26 February 2008, available at: http://www.newyorker.com/reporting/2008/02/25/080225fa_fact_kramer?currentPage=1.

[780] For an account of the atrocities committed by the Japanese forces, see Jose Ma. Bonifacio M. Escoda, *Warsaw of Asia: The Rape of Manila*, Rev. Ed., Giraffe Books: Quezon City, 2001.

[781] It has been estimated that at least 30,000 Filipinos were arbitrarily arrested during the Marcos regime. Some accounts place the figure at closer to 70,000. Of those who were arrested and detained, many were subjected to physical or psychological torture. See REDRESS, *Philippines*, p. 2, available at: http://www.redress.org/downloads/country-reports/Philippines.pdf; See also *Joint Civil Society report on torture and other cruel, inhuman or degrading treatment or punishment in the Philippines – Presented to the Un Committee Against Torture (CAT) prior to the Philippines' second periodic report at the CAT 42nd session, from 27 April to 15 May 2009*, March 2009, p. 3, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/JCS_Philippines42.pdf.

and police have been reported regularly over the last 30 years. Recently, torture has been the focus of attention by the Philippine media and general public due to several incidents caught on video and shown on television and the internet.[782]

In August 2010, the Philippine police relieved the commander and officers of a police precinct of their posts after a television station aired footage of what appeared to be a police officer torturing a naked detainee in the presence of a uniformed officer. The precinct commander and principal instigator, Senior Inspector Joselito Binayug, was later dismissed from the service, but has yet to be prosecuted for the abuse.[783] In March 2011, a video surfaced on the internet purportedly showing the torture of military recruits by the Armed Forces of the Philippines.[784] In August 2011, Agence France-Presse reported that twenty police officers had been arrested after a video surfaced allegedly showing new police recruits being force-fed and rubbed with red-hot chilli pepper while naked and blindfolded.[785]

Torture by state agents in the Philippines takes varied forms. Physical torture methods include systematic beating, water cure, electric shock, food deprivation or being made to eat rotten food, cigarette burning, rape and sexual abuse.[786] Psychological torture methods include blindfolding, incommunicado or solitary detention in secret detention places, sleep deprivation, being threatened with bodily harm, being forced to watch another person being tortured, and being shot at with a gun loaded with blanks.[787]

Most of the documented torture cases involve victims perceived by the military or police to be insurgents or their supporters, whom they call "enemies of the State." Members of non-governmental and

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[782] In June 2010, three brothers, Eric, Raymond, and Rosmel Miraflores were apparently abducted, tortured and killed, reportedly by policemen from the Zambales police. See http://www.Article2.org/pdf/v10n01.pdf.

[783] Amnesty International – public Statement, *Philippines: Torturers evade justice on Aquino's watch*, Index: ASA 35/004/2012, 26 June 2012, available at: http://www.amnesty.org/en/library/asset/ASA35/004/2012/en/86f695be-136f-4478-8af2-a3c7d927c786/asa350042012en.pdf.

[784] Agence France-Presse, Philippine military rocked by new "torture" video, *ABS-CBN News*, 20 March 2011, available at: http://www.abs-cbnnews.com/nation/03/20/11/philippine-military-rocked-new-torture-video.

[785] Agence France-Presse, Philippines holds 14 cops for torture video, *Intellasia*, 6 August 2011, available at: http://www.intellasia.net/philippines-holds-14-cops-for-chilli-torture-video-166612.

[786] See: Asian Human Rights Commission, *Torturers and torture chambers in the Philippines*, ALRC, 29 March 2011, available at: http://www.Article2.org/mainfile.php/1001/394/?print=yes.

[787] See for example, Max M. De Mesa, *The Manolo Brothers: From Victims to Defenders*, Philippine Human Rights Information Center, available at: http://philrights.org/wp-content/uploads/2010/10/The-Manalo-brothers.pdf; and *Eleven Recent Cases of Torture in the Philippines, inSpecial Report: Torture in the Philippines and the Unfulfilled Promise of the 1987 Constitution*, Asian Legal Resource Centre, March 2011, pp. 31-55, available at: http://www.Article2.org/pdf/v10n01.pdf.

people's organisations, especially those perceived to be "leftist,"[788] and those involved in human rights advocacy, fall in this category. Members of Islamic groups perceived by the military and police as "terrorists" or as supporters of terrorist organisations have also been targeted.[789]

In addition, torture has been routinely used on those suspected of having committed common crimes, often in retaliation or as a form of deterrence or punishment. The torture video implicating Inspector Joselito Binayug in August 2010, shows Darius Evangelista, apparently accused of petty theft, naked and being yanked by a cord attached to his genitals and whipped with a rope. He has not been seen since and there are no records of his arrest.[790]

Serious cases of 'torture' and extrajudicial killings have also been committed by 'private armies' run by politicians or wealthy landowners, which have, under different regimes, received varying levels of support and protection.[791] As well as receiving arms and political support from the State, they have largely acted with impunity. The massacre of 58 people in Maguindanao in 2009 has finally led to the trial of several senior members of the Ampatuan family, who have controlled the island of Mindanao for roughly two decades and carried out killings and other serious abuses.[792]

8.2. Legal framework

International law

The Philippines ratified the International Covenant on Civil and Political Rights (ICCPR)[793] on 23 October 1986, and acceded to the Convention against Torture and Other Cruel, Inhuman or

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[788] On 3 August 2010 at 9:30 p.m., Lenin Salas, Jerry Simbulan, Daniel Joseph Navarro and Rodwin Tala were, by their accounts, tortured by elements of the San Fernando City Police over their alleged involvement with the Marxist Leninist Party of the Philippines. See, *Eleven Recent Cases of Torture in the Philippines*, Ibid.,p. 31.

[789] On 23 June 2011, Asraf Jamiri Musa,a 17 year old college student in Basilan, Mindanao, was reportedly arrested and tortured by the military into admitting that he was part of the Abu Sayyaf group. See Asian Human Rights Commission, *Philippines: Tortured boy temporarily released to his parent's custody*.

[790] Amnesty International, *Annual Report 2011: Philippines*, available at: http://amnesty.org/en/region/philippines/report-2011.

[791] See for example, Human Rights Watch, *They Own the People: The Ampatuans, State-Backed Militias, and Killings in the Southern Philippines*, 16 November 2010, available at: http://www.hrw.org/reports/2010/11/16/they-own-people-0.

[792] Ibid.

[793] The Philippines has also ratified the first Optional Protocol to the ICCPR, but has only signed the second Optional Protocol.

Degrading Treatment or Punishment (CAT) on 18 June 1986.[794] The Philippines also ratified the Geneva Conventions and its Additional Protocols. In addition, the Philippines has signed and ratified a number of other international instruments relevant to human rights, including the ICESCR,[795] ICERD,[796] CRC,[797] CEDAW,[798] and the Rome Statute of the International Criminal Court.

The Philippine Constitution recognises "the generally accepted principles of international law as part of the law of the land…"[799] However, the extent to which the Philippine judiciary applies international standards is not consistent. The Supreme Court has applied relevant international standards in some of the decided amparo cases. In the case of Engineer Morced Tagitis, a victim of enforced disappearance, the Court cited and applied decisions of the Inter-American Court of Human Rights in resolving the case.[800] However, in other enforced disappearance cases, the Court did not mention, much less apply, suchprinciples of international law.

In recent years, the United Nations Human Rights Committee has rendered several decisions against the Philippine Government. These decisions include two controversial cases, one involving the death of Philippine Navy ensign Philip Pestano, and the other involving the conviction of Paco Larranaga for murder.[801] While the Human Rights Committee in these cases (and several others) found that the Philippine Government had violated international

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[794] The Philippines has also ratified the Optional Protocol to the CAT, but with a reservation, which reads in part: "*the Republic of the Philippines hereby declares the postponement of the implementation of its obligations under Part III of the Optional Protocol, specifically Article 11 (1)(a) on the visitations by the Subcommittee on Prevention to places referred to in Article 4 and for them to make recommendations to States Parties concerning the protection of persons deprived of their liberty*".

[795] International Covenant on Economic, Social and Cultural Rights.

[796] International Convention on the Elimination of All Forms of Racial Discrimination.

[797] The Convention on the Rights of the Child.

[798] The Convention on the Elimination of All Forms of Discrimination Against Women.

[799] Constitution of the Republic of The Philippines 1987, Art .II, s.2, available at: http://www.gov.ph/the-philippine-constitutions/the-1987-constitution-of-the-republic-of-the-philippines. In *United States of America v. Guinto*, G.R. No. 76607, 26 February 1990, the Philippine Supreme Court explained that this provision "*is…intended to manifest our resolve to abide by the rules of the international community.*"

[800] *Razon, Jr. v. Tagitis*, G.R. No. 182498, 16, February 2010. The Court cited the cases of *Velasquez Rodriguez v. Honduras*, I/A Court H.R. Velasquez Rodriguez Case, Judgment of July 29, 1988, Series C No. 4, and *Timurtas v. Turkey*, (23531/94) [2000] ECHR 221 (13 June 2000) with approval.

[801] See, e.g. *Francisco Juan Larrañaga v. PH*, Communication No. 1421/2005, 'U.N.'Doc.'CCPR/C/87/D/1421/2005'(2006) (death sentence following unfair trial), available at: http://www1.umn.edu/humanrts/undocs/1421-2005.html; *Phillip Andrew Pestaño v. PH*, Communication No. 1619/2007, U.N.'Doc.'CCPR/C/98/D/1619/2007'(2010) (arbitrary deprivation of life), available at: http://www.worldcourts.com/hrc/eng/decisions/2010.03.23_Pestano_v_Philippines.pdf.

human rights law, the latter has not done anything concrete to implement the decisions and address these violations.[802]

National legal system

The Philippines is a constitutional republic. Its Constitution provides for a tripartite system of government with separate executive and legislative departments and an independent judiciary. It empowers the Supreme Court, the highest judicial tribunal, to decide the constitutionality of any law, treaty, international or executive agreement, rule or regulation.[803] It also contains a Bill of Rights that guarantees the people's individual and collective rights.[804]

The Bill of Rights expressly prohibits torture, force, violence or other means that vitiates free will; cruel, degrading or inhuman punishment; secret places of detention, solitary or incommunicado confinement, or other similar forms of detention; and any methods that violate a person's right to remain silent, to be presumed innocent, and to incriminate themselves.[805]

In 2009, the Philippine Congress enacted Republic Act No. 9745, the Anti-Torture Act,[806] making torture a separate and distinct crime. The law defines torture[807] in line with Article 1 of the Convention against Torture, and penalises other forms of cruel, inhuman and degrading treatment or punishment.[808] The Act also created an oversight body to periodically review its implementation.[809]

Section 6 of the Anti-Torture Act makes freedom from torture an absolute right. A state of war or a threat of war, internal political instability, or any other public emergency, or a document or

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802 See REDRESS, *Submission to the Human Rights Committee on Implementation of its Views in the Philippines*, December 2011, available at: http://www.redress.org/downloads/publications/Submission%20LOI%20Philippines.pdf.

803 Constitution, Art VIII, s. 4(2).

804 The Bill of Rights is found in Art III of the Constitution.

805 Constitution, Art III, s. 12.

806 Republic Act No. 9745 "Anti-Torture Act 2009", s. 3(a), available at: http://www.lawphil.net/statutes/repacts/ra2009/ra_9745_2009.html.

807 Ibid., s.3(a) – "*An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her 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 person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*."

808 Ibid., s.3(b) – "*A deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act* [acts of torture], *inflicted by a person in authority or agent of a person in authority against a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter*."

809 Anti-Torture Act, s. 20.

any determination comprising an "order of battle" shall not and can never be invoked as a justification for torture or other cruel, inhuman and degrading treatment or punishment.

The Anti-Torture Act also provides that no person shall be expelled, returned or extradited to another State where there are substantial grounds to believe that such person shall be in danger of being subjected to torture.[810]

8.3. Safeguards and complaint mechanisms

Arrest and pre-trial detention

The main legal safeguards against torture are the Bill of Rights, statutes prohibiting arbitrary detention, secret detention and torture, as well as guaranteeing the right to counsel and other rights of persons under custodial investigation. These laws include Article 125 of the Revised Penal Code (penalising arbitrary detention), Republic Act 7438 (the Code of Custodial Investigation), and Republic Act 9745 (the Anti-Torture Act of 2009).

In line with the Philippine Constitution, the Anti-Torture Act prohibits "secret detention places, solitary confinement, incommunicado or other similar forms of detention, where torture may be carried out with impunity."[811] The law also requires the military and police to publicly disclose lists of all detention facilities and the names of the detainees, the dates they were arrested, and the charges against them, in addition to submitting such lists to the Commission on Human Rights and ensure they are updated.[812]

Under Article 125 of the Philippines' Revised Penal Code,[813] a public officer or employee who detains a person but fails to deliver that person to the proper judicial authorities (by the filing of charges in court) within a certain time period, is liable for the crime of arbitrary detention. The punishment for the failure to deliver a detainee to the judicial authorities range from "light penalties, or their equivalent" for delays of delivery within a period of 12 hours, to "correctional penalties" for delays within a period of 18 hours, and "afflictive or capital penalties" for delays within a period of 36 hours.[814]

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[810] Ibid.,s. 17.

[811] Ibid., s. 7.

[812] Ibid.

[813] Act No. 3815, 'The Revised Penal Code', 8 December 1930, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf.

[814] Ibid.,Art 125.

Article 125 of the Revised Penal Code also requires, in every case, that the detainee "shall be informed of the cause of his detention and shall be allowed upon his request to communicate and confer at any time with his attorney or counsel."[815] Waivers of Article 125 must be in writing and signed by the detainee in the presence of his counsel, or they will have no effect.

The Supreme Court has further promulgated several rules incorporating basic principles of international human rights law: the rule on the writ of amparo,[816] the rule on the writ of habeas data,[817] and the rules of procedure for environmental cases.[818] It may be too early to tell how well these rules are working in practice, as they are relatively new. The Court's rule on amparo, which has been in place since 2007, has received mixed reviews because the relief granted has been quite limited and has not helped to locate the victims of enforced disappearances on whose behalf the cases were filed.[819]

Access to legal advice and compulsory medical assistance upon arrest

The Republic Act 7438, the Code of Custodial Investigation, expands the right of access to detainees. Under section 2(f) of the law, visits to detainees by certain persons cannot be prevented or denied, including visits by medical doctors, legal counsel and family members.[820]

Section 12 of the Anti-Torture Act recognises the right of detainees to physical and medical examinations by independent and competent doctors of their own choice, both before and after interrogations. If the detainee is unable to afford a doctor, the State is under an obligation to provide one, and preferably of the same sex if the detainee is a female. Furthermore, the State is required to "endeavour to provide the victim with psychological evaluation if available under the circumstances".[821] The Implementing Rules and Regulations of the Anti-Torture Act further set out the specific procedure and information to be documented in relation to the medical examination.[822]

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[815] Ibid.,Art 125, as amended by E.O. 59 dated 7 November 1986 and E.O. 272 dated 25 July 1987.

[816] A.M. No. 07-9-12-SC. The *Amparo* rule took effect on 24 October 2007.

[817] A.M. No. 08-1-16-SC. The *habeas data* rule took effect on 2 February 2008.

[818] A.M. No. 09-6-8-SC. The rules for environmental cases took effect on 29 April 2010.

[819] See GMA News, *Writ of amparo not enough—Hong Kong rights group*, 28 September 2007, available at: http://www.gmanetwork.com/news/story/62409/news/nation/writ-of-amparo-not-enough-hong-kong-rights-group.

[820] Other persons able to visit detainees within the remit of s. 2(f) are: priests or religious ministers chosen by the detainee, members of any NGO accredited by the Commission on Human Rights, and members of any international NGO accredited by the Office of the President.

[821] Anti-Torture Act, s. 12.

[822] Implementing Rules and Regulations of the Anti-Torture Act 2009, s.24.

Complaint procedure and independent oversight

The Constitution created an independent body,[823] the Commission on Human Rights (CHR), to investigate human rights violations concerning civil and political rights, provide appropriate legal measures for the protection of human rights, and monitor the Philippines' compliance with international human rights treaty obligations. In addition, the Commission was given powers to visit jails and detention facilities.

The CHR has been regrettably ineffective. It has reportedly been characterised by a failure to investigate complaints promptly, a lack of competence and misunderstanding of officials' roles, inadequate forensic analysis and medical reporting, and lack of protection for victims.[824] The CHR's power is also limited to submitting its findings to the Department of Justice and the Office of the Ombudsman, who must approve the filing of criminal charges against armed forces or law enforcement personnel.[825] Despite the ban on secret detention places and the CHR's power to visit detention facilities, the Philippine Government has not been able to stop the use of safe houses or secret jails, where most acts of torture take place. This is perhaps best illustrated bythe case of the Manalo brothers who were abducted and kept in secret detention facilities by the military for 18 months between 2006 and 2007.[826] They were moved around several times during this period; all the while, the military denied having the brothers in their custody. While the Manalo brothers prevailed in the very first writ of *amparo* case decided by the Supreme Court,[827] not a single military officer – including those identified by name and unit – have been disciplined or otherwise held accountable for their actions.

The National Police Commission (NAPOLCOM) has the power to receive complaints and investigate misconduct. It can demote, force resignation or immediately dismiss any police officer found guilty of gross misconduct.[828] Under NAPOLCOM, there are two other complaint mechanisms, the Internal Affairs Service, which is national and regional in its scope, and the People's Law Enforcement Board, which covers city and municipal police. They also have the power to dismiss officers, subject to appeal to

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823 See the Constitution, Art XIII, ss. 17-19.

824 "The limitations of the Philippines' Anti-Torture Act" March 2011, *Article 2 Special Report: Torture in the Philippines and the Unfulfilled Promise of the 1987 Constitution*, vol. 10 (1) pp. 8-18, available at: http://www.Article2.org/pdf/v10n01.pdf.

825 Ibid.

826 For further information, see: Max M. De Mesa, *The Manalo Brothers: From Victims to Defenders*, Philippine Human Rights Information Center, available at: http://philrights.org/wp-content/uploads/2010/10/The-Manalo-brothers.pdf.

827 *Secretary of Defense v. Manalo*, G.R. No. 180906, 7 October 2008

828 Republic Act No. 8551, 1998, *Providing for the reform and reorganization of the Philippine National Police*.

the appellate board of NAPOLCOM.[829] These mechanisms have, however, been criticised. For example, an officer who attempted to prevent victims from submitting statements alleging torture was punished only with a verbal reprimand.[830]

Admissibility of evidence obtained under torture

The Bill of Rights within the Constitution has a self-executing exclusionary rule that makes inadmissible all admissions, confessions, and other evidence obtained unconstitutionally.[831] The Anti-Torture Act carries its own exclusionary rule, which provides that any statement, admission or confession obtained from torture is inadmissible in any proceeding, except as evidence against the persons accused of committing the torture.[832]

The Code of Custodial Investigation imposes additional requirements for the admissibility of extra-judicial confessions and admissions and strengthens the right of access to detainees by counsel and relatives. Under Section 2(d) of the law, in addition to what is constitutionally required, confessions must be in writing and signed in the presence of relatives, the municipal judge, district school supervisor, priest or minister as chosen by the detainee. Otherwise, they are inadmissible as evidence in any proceeding.

While many of these safeguards have been in place for a number of years, they have not deterred or prevented the practice of torture.

8.4. Accountability

Impunity for torture prevails with no one having been held criminally and civilly liable for torture, and there is only one known case where a police officer was dismissed from the service for torturing a suspect.[833]

The Anti-Torture Act provides for the right of the victim to a "prompt and impartial investigation" by the Commission on Human Rights and the relevant government agencies into allegations of torture or ill-treatment.[834] However, in practice,

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829 Ibid., ss. 49, 52, and 53.

830 "The limitations of the Philippines' Anti-Torture Act", *Article 2 Special Report: Torture in the Philippines and the Unfulfilled Promise of the 1987 Constitution*, vol. 10 (1), pp. 8-18, available at: http://www.Article2.org/pdf/v10n01.pdf.

831 Art III, s. 3(2) of the Constitution provides that evidence obtained in violation of the rights against unreasonable searches and seizures and privacy of communication and correspondence are inadmissible "for any purpose in any proceeding." Section 12 of the same Article provides that confessions or admissions obtained unconstitutionally are inadmissible in evidence.

832 Anti-Torture Act , s. 8.

833 Ibid.

834 Ibid., s. 9.

several obstacles frequently impede the effective investigation of torture and other human rights violations in the Philippines. The willingness of law enforcement agencies and prosecutors to follow up allegations of abuse has been called into question, and is attributed to suspicions concerning the motive of a complaint alleging torture or ill treatment[835] and a reluctance to investigate allegations directed at state agents,[836] among other factors. Even when complaints are acted upon, the litigation process in the Philippines is notorious for lengthy delays[837] and a lack of independence and deep-rooted corruption within the judiciary undermines proceedings.

The witness protection scheme, as set out under the Witness Protection, Security and Benefit Act,[838] has also been criticised for its limited scope of protection, the weakness of the protection offered, and its uneven application.[839] It extends only to witnesses who have "testified or [are] testifying or about to testify before any judicial or quasi-judicial body."[840] Furthermore, public prosecutors are vulnerable to threats, influence and intimidation. Despite the number of victims, witnesses, lawyers, human rights defenders and even judges who have been killed because of their involvement in human rights cases, the Philippine Government

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[835] A common mentality within the police concerning complaints of torture and ill treatment is that the arrestee is trying to deflect attention from the charges against him. See Asian Human Rights Commission, *Torture in the Philippines*, available at: http://www.humanrights.asia/countries/philippines/torture-in-philippines.

[836] Asian Legal Resource Centre, *Alternative report to the United Nations Committee Against Torture: The situation of torture in the Philippines – For the Committee's consideration of the report of the Government of the Philippines during its 42nd session (April 27 to May 15, 2009*, (hereafter ALRC Alternative Report), p. 22, available at: http://www.alrc.net/PDF/ALRC-TBR-001-2009-Philippines.pdf.

[837] The case of the 'Abadilla Five' illustrates the problem of delays in the Philippine justice system. Five suspects were jailed for the murder of Col Rolando Abadilla, of the now defunct Philippine Constabulary, in 1996. The five have since argued that their confessions were induced through torture, and that their convictions resulted from numerous procedural and evidential failings. In 2011, after 14 years, the Office of the Ombudsman for the Military and Other Law Enforcement Offices concluded that there was sufficient evidence to suggest the suspects had been subject to human rights violations. Although their convictions were upheld by the Supreme Court, a recommendation was issued by the Board of Pardons and Parole to commute the sentences to 16 years (which have been served), which is yet to be approved. See "The limitations of the Philippines' Anti-Torture Act", *Article 2 Special Report: Torture in the Philippines and the Unfulfilled Promise of the 1987 Constitution*, pp. 29-30 and 88-99; ALRC Alternative Report, Ibid., p. 5; and TJ Burgonio, Abadilla 5 call on Aquino to sign release papers, Philippine Daily Inquirer, 29 April 2012, available at: http://newsinfo.inquirer.net/184259/abadilla-5-call-on-aquino-to-sign-release-papers.

[838] Republic Act No. 6981 of April 24, 1991, "Witness Protection, Security and Benefit Act", available at: http://www.lawphil.net/statutes/repacts/ra1991/ra_6981_1991.html.

[839] See *Special Report: Torture in the Philippines and the Unfulfilled Promise of the 1987 Constitution*, Article 2, pp. 100-103.

[840] Witness Protection, Security and Benefit Act, s. 3.

has not taken any real, concrete measures to protect them from harm.[841]

Since the 1970s, the Philippines has had to contend with the activities of communist insurgents in the countryside and armed secessionists in Mindanao. Acts of torture committed by State agents in connection with the counter-insurgency campaign have not been vigorously investigated and prosecuted by the Government, and no one has been convicted or otherwise held accountable for these abuses.

Recent cases highlight the ineffectiveness and unwillingness of the State toproperly investigate and prosecute suspects of torture. Human Rights Watch reports that in the past decade, there have only been seven successful prosecutions for extrajudicial killings, however none of them involved active duty military personnel.[842] The allegations of torture and enforced disappearances of Jonas Burgos and Manuel Merino, and University of the Philippines students Karen Empeno and Sherlyn Cadapan, have also been in the public eye recently, due to decisions of the Supreme Court granting the privilege of the writ of amparo in their cases, and ordering the military to produce the three victims.[843] While charges were eventually filed against one of the accused, former military general Jovito Palparan, continues to evade arrest[844] and has reportedly been helped to remain in hiding by serving military personnel.[845]

The Anti-Torture Act provides that persons who have committed any act of torture shall not benefit from any special amnesty law or similar measures that will have the effect of exempting them from any criminal proceedings and sanctions.[846] This is an important affirmation of the principle of criminal accountability for torture

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[841] FIACAT-ACAT, *Alternative Report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 February 2009, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/FIACAT_ACAT_Philippines42.pdf; see also *Sixth Philippine massacre witness killed*, BBC, 28 June 2012, available at: http://www.bbc.co.uk/news/world-asia-18621705.

[842] Human Rights Watch, *World Report 2012: Philippines*, available at: http://www.hrw.org/world-report-2012/world-report-2012-philippines.

[843] See What Went Before: Abduction of UP students Karen Empeño and Sherlyn Cadapan, *Philippines Daily Inquirer*, 17 December 2011, available at: http://newsinfo.inquirer.net/112599/what-went-before-abduction-of-up-students-karen-empeno-and-sherlyn-cadapan; Edu Punay, SC orders AFP to release 3 UP students, *PhilStar Online*, 21 June 2011, available at: http://www.philstar.com/Article.aspx?ArticleId=698347&publicationSubCategoryId.

[844] Willard Cheng, Gov't focused on finding Palparan, Reyes – Palace, ABS-CBN News, 19 July 2012, available at: http://www.abs-cbnnews.com/nation/07/19/12/govt-focused-finding-palparan-reyes-palace.

[845] Human Rights Watch, *Letter to Lt Gen. Jessie D. Dellosa, Chief of Staff of the Armed Forces of the Philippines*, 2 April 2012, available at: http://www.hrw.org/news/2012/04/01/letter-lt-gen-jessie-d-dellosa-chief-staff-armed-forces-philippines.

[846] Anti-Torture Act, s.16.

but will need to be followed by concrete steps to hold perpetrators of torture accountable to break the pervasive culture of impunity.

8.5. Reparation

The Anti-Torture Act specifically states that any person who has suffered torture shall have the right to claim for compensation as provided for under Republic Act No. 7309 provided that in no case shall compensation be any lower than 10,000 pesos. Victims of torture shall also have the right to claim for compensation from such other financial relief programmes that may be made available to them under existing laws, rules and regulations.[847]

The Philippine Civil Code[848] recognises several causes of action that can be applied to acts of torture. Those who wilfully or negligently cause damage to another,[849] or wilfully cause loss or injury to another "in a manner that is contrary to morals, good customs or public policy",[850] are liable to compensate the injured party for the damage. Article 32 provides a cause of action to obtain damages from public officers or employees, or any private individual, for violations of the rights to be free from arbitrary or illegal detention, self-incrimination, and cruel or unusual punishment, among other basic rights. It has two unique features not found in the other causes of action described above: it does not allow the defences of good faith or lack of malice; and it imposes liability not only on persons directly responsible for the violation but also those who were indirectly responsible for it. Article 33 also enables an injured party to bring a civil action for damages that is "entirely separate and distinct from the criminal action" in cases of defamation, fraud and physical injury.

The Anti-Torture Act provides that the State "shall endeavour" to provide a psychological evaluation, "if available under the circumstances."[851] The Act also provides for the creation of a comprehensive rehabilitation programme for victims of torture and their families to be established by the Departments of Social Welfare and Development, Justice and Health within one year of the Act coming into force. They shall participate with NGOs to formulate a programme to provide for the physical, mental, social, psychological healing and development of victims of torture and their families.[852] However, as with other aspects of the Anti-Torture Act, access to reparation, the realisation of the right to adequate

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847 Anti-Torture Act, s.18.

848 Republic Act No. 386, the 'Civil Code of the Philippines', available at: http://www.scribd.com/doc/16569370/The-Civil-Code-of-the-Philippines.

849 Civil Code, Art 20.

850 Civil Code, Art 21.

851 Anti-Torture Act, s.12.

852 Ibid, s.19.

reparation, including compensation and rehabilitation remains a challenge for victims of torture in the Philippines several years after the promulgation of the Act.[853]

8.6. Conclusion

The Anti-Torture Act is comprehensive in its criminalisation of torture and ill-treatment and there exist a number of safeguards in the legislation. Nonetheless, torture continues to be routinely practiced by law-enforcement officials and the military in a number of contexts, which can partly be attributed to inadequate training and a lack of knowledge of the required procedural standards. Torture forms part of an institutionalised practice and government rhetoric opposing torture has not been followed up with effective action. Where measures have been taken to eradicate abuse, systemic institutional problems and a lack of enforcement has meant that certain practices continue, such as the use of secret detention facilities and safe houses to torture detainees. Complaints are not always independently investigated, and there are often serious failings concerning the way in which evidence is collected. Thus, lack of effective investigation, lack of accountability and impunity remain the key reasons why torture prevails in the Philippines, thereby resulting in perpetrators going unpunished and leaving victims without appropriate redress or reparation.

[853] See Danilo Reyes, *Torture victims' 14-year quest for justice*, in Article 2, Special Report, The Philippines' Hollow Human Rights System, ALRC, June-Sept 2012, pp. 38-40 and available at, http://www.article2.org/pdf/v11n0203.pdf. See also Ibid., Appendix 1: Stakeholders Submission concerning the UniversalPeriodic Review of the Republic of the Philippines submitted by the Asian Legal Resource Centre, November 28, 2011.

9. Sri Lanka*

9.1. Practice and patterns of torture

Torture in Sri Lanka is a long-standing and acute concern. Its prevalence has been documented in a series of reports and both national and international courts and bodies have found evidence of torture.[854] Reported methods of torture include beating on the soles of the feet (known as falanga), suspending by hands and feet, asphyxiation with plastic bags, blindfolding, the deprivation of food and threats to kill.[855]

The bulk of allegations of torture and other ill-treatment concern the practice of law-enforcement agencies primarily for the purposes of extracting information from suspects and as punishment. Sri-Lankan police officers do not generally receive proper training on how to conduct criminal investigations and there is an overreliance on confession evidence. Consequently, obtaining confessions or information through torture is a widespread practice.[856] Other factors include public pressure to curtail the high rate of crime and widespread corruption among

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* Based on initial contribution by Fr. Nandana Manthunga, Director, Human Rights Office, Sri Lanka.

[854] See for example, Asian Human Rights Commission, *The State of Human Rights in Sri Lanka*, annual reports from 2005-2011, all available at: http://www.humanrights.asia/countries/sri-lanka; REDRESS, *Comments to Sri Lanka's Second Periodic Report to the Committee Against Torture*, 31 October 2005, available at: http://www.redress.org/downloads/publications/SubmissionSL31Oct2005.pdf; REDRESS, Asian Legal Resource Centre, Rehabilitation and Research Centre for Torture Victims, ACAT, *Alternative Report to the Committee Against Torture in Connection with the Third and Fourth Periodic Reports of Sri Lanka*, (hereafter REDRESS, ALRC, RCT, ACAT Alternative Report) September 2011, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/REDRESS_ALRC_RCT_ACAT_SriLanka47.pdf; *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, Communication No. 1250/2004, UN Doc. CCPR/C/87/D/1250/2004 (2006); *The Government of the Democratic Socialist Republic of Sri Lanka v. Suresh Gunasena and Others*, HC Case No.326/2003, High Court of Negombo.

[855] U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Mission to Sri Lanka*,' UN Doc. A/HRC/7/3/Add.6, 28 February 2008, para.71 (hereafter Special Rapporteur Mission Report); Piyanjali de Zoyasa and Ravindra Fernando, Method and sequelae of torture: a study in Sri Lanka, *Torture*, Vol. 17, No.1, 2007, available at: http://archive.cmb.ac.lk/research/bitstream/70130/221/1/methods_and_sequeale%5B1%5D.pdf.

[856] See, for example, Kishali Pinto-Jayawardena (2009), pp.128-130; U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Phillip Alston – Mission to Sri Lanka*, UN Doc. E/CN.4.2006/53/Add.5, 27 March 2006, para.50, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/121/16/PDF/G0612116.pdf?OpenElement.

the police, which lead to an increased likelihood of the infliction of torture or other ill-treatment against poor and marginalised persons including those "accused of nothing more than petty theft".[857]

The use of torture has also been an integral feature of the conflict between the Liberation Tigers of Tamil Eelam (LTTE) and various Sri Lankan governments.[858] The more than two-decade long conflict ended in May 2009 and, although accurate numbers on casualties are unavailable, at least 80,000 and as many as 100,000 persons were killed and approximately 275,000 persons were internally displaced during the conflict.[859] Internally displaced persons were reportedly specifically targeted as a form of punishment for their alleged links with the LTTE.[860] There are also credible allegations of war crimes and crimes against humanity, including torture and enforced disappearances, and both government and the LTTE forces committed grave abuses during the final stages of the conflict.[861]

There are consistent reports that thousands of persons were arbitrarily arrested without charge as LTTE suspects under the Prevention of Terrorism Act (PTA).[862] Since the end of the conflict in 2009, security forces have been holding those detainees in unofficial places including "commandeered school buildings, private homes and factories".[863] Despite the Government's pledge to take measures for the protection of human rights and the adoption of a National Action Plan to promote and protect

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857 Kishali Pinto-Jayawardena (2009), pp. 188-189.

858 See for example, United Nations, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka; Amnesty International, Sri Lanka Amnesty International Report 2008: Human Rights in the Socialist Republic of Sri Lanka; Amnesty International, Amnesty International Report 2007: Human Rights in the Socialist Republic of Sri Lanka*.

859 'Sri Lankan army deaths revealed', *BBC*, 22 May 2009, available at: http://news.bbc.co.uk/1/hi/world/south_asia/8062922.stm; United Nations, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, ss. 132-137.

860 See for example, Committee Against Torture, *Consideration of reports submitted by States Parties under Article19 of the Convention, Concluding observations of the Committee against Torture – Sri Lanka*, UN Doc. CAT/C/LKA/Co/3-4, 8 December 2011, para.20 (hereafter CAT: 2011).

861 See e.g. United Nations, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, ss.151, 214, 215, 220, 234, and 247.

862 Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979; See United Nations, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, s. 222.

863 Amnesty International, *Sri Lanka: Briefing to Committee against Torture*, October 2011, p. 6, available at: http://www.amnesty.org/en/library/asset/ASA37/016/2011/en/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf.

human rights in September 2011,[864] torture is reportedly routinely practiced in police stations and detention centres.[865]

9.2. Legal framework

International law

Sri Lanka ratified the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in January 1994 and is party to the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol.[866] Subsequent to the ratification of those instruments,Sri Lanka enacted "the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act" ("CAT Act")[867] and "the International Covenant on Civil and Political Rights Act" ("ICCPR Act").[868] Sri Lanka is also a party to all four Geneva Conventions, although it has not signed any of the Additional Protocols.[869]

The work of the UN human rights treaty bodies, special procedures and field missions by international bodies, however, seem to have had very little impact domestically. In 2007, the Committee Against Torture recommended that the definition of torture under Sri Lankan law be amended to included acts causing severe suffering in line with Article 1 of the CAT.[870] The government's response was non-committal. It indicated that it would "take steps to refer this matter for the consideration of

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[864] Sri Lanka unveils 5-year action plan to protect human rights, *Jurist*, 7 October 2011, available at: http://jurist.org/paperchase/2011/10/sri-lanka-unveils-5-year-action-plan-to-protect-human-rights-in-response-to-international-pressure--.php; According to Hon Mahinda Samarasinghe M.P., Minister of plantation Industries and Special Envoy of the President on Human Rights, this plan addresses 8 areas, namely civil and political rights, economic, social and cultural rights, children' rights, labour rights, migrant worker rights, and prevention of torture, women's rights and the rights of IDPs. See Statement by the Hon Mahinda Samarasinghe M.P. at the 19thSession of the United Nations Human Rights Council, High Level Segment, 27 February 2012, available at: http://www.dailymirror.lk/top-story/17150-we-genuinely-aspire-stable-and-sustainable-peace-samarasinghe.html.

[865] See Freedom from Torture, *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka 2009-2011: A study of evidence of torture forensically documented in Freedom from Torture's medico-legal reports*, November 2011, available at: http://www.freedomfromtorture.org/document/publication/5857.

[866] Sri Lanka ratified the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1980 and its Optional Protocol on 3 October 1997.

[867] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No.22 of 1994, 20 December 1994.

[868] International Covenant on Civil and Political Rights (ICCPR) Act, No.56 of 2007, 16 November 2007. The ICCPR Act however, fails to fully reflect the international standards contained in the ICCPR in that it does not include a significant number of substantive rights including the right to life and freedom from torture.

[869] Sri Lanka ratified the four Geneva Conventions on 28 February 1959.

[870] Committee Against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention, Concluding observations of the Committee against Torture, Sri Lanka*, UN Doc. CAT/C/LKA/CO/2, para. 5, available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.LKA.CO.2.En?Opendocument.

the Sri Lanka Law Commission to recommend any changes if necessary to bring the domestic legislation in full conformity with the Convention,"[871] The Committee reiterated the above recommendation in 2011[872] but no action has been taken so far by the Sri Lankan Government.

As of January 2012, the UN Human Rights Committee (HRC) had considered 17 individual communications against Sri Lanka and declared violations of Article 7 of the ICCPR in six cases.[873] However, the recommendations of the Committee are rarely implemented, partly due to a lack of national legislation enforcing relevant international standards. For example, in the *Nallaratnam Singarasa* case, the HRC found, *inter alia*, that Sri Lanka has violated Article 14 and Article 2 of the ICCPR by placing the burden of proof on Singarasa to show that his confession was made under duress by virtue of section 16 of the PTA.[874] Accordingly, the HRC recommended that the Government should provide Singarasa "with an effective and appropriate remedy, including release or retrial and compensation" and "avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant."[875] Following a petition filed by Singarasa to enforce the HRC's findings, the Supreme Court ruled that it did not have the authority to do so on the ground that, as a dualist country, a domestic enactment is required in order to give effect to the rights recognised under the ICCPR.[876] Similarly, Sri Lanka has failed to implement the HRC's recommendation regarding standards of treatment of detainees and the investigation and prosecution

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[871] Sri Lanka, *Consideration of Reports submitted by States Parties under Article 19 of the Convention – Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture*, UN Doc. CAT-C/LKA/CO/2/Add.1, 20 February 2007, para.10, available at: http://www.unhchr.ch/tbs/doc.nsf/0/553ddc04e736375dc125728f0056f11f?Opendocument.

[872] *Consideration of Reports submitted by States Parties under Article 19 of the Convention, Concluding observations of the Committee against Torture, Sri Lanka*, UN Doc. CAT/C/LKA/CO/3-4, 8 December 2011, para. 25, available at: http://www2.ohchr.org/english/.../cat/docs/co/CAT.C.LKA.CO.3-4_en.doc.

[873] *Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, UN Doc. CCPR/C/78/D/950/2000 (2003); *Nallaratnam Singarasa v. Sri Lanka*, Communication No.1033/2001; *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, Communication No. 1033/2001, UN Doc. CCPR/C/81/D/1033/2001 (2004); *Raththinde Katupollande Gedara Dingiri Banda v. Sri Lanka*, Communication No. 1426/2005,26, UN Doc. CCPR/C/91/D/1426/2005, (2007); *Anura Weerawansa v. Sri Lanka*, Communication No.1406/2005, UN Doc. CCPR/C/95/D/1406/2005, (2009); *Dalkadura Arachchige Nimal Silva Gunaratna v. Sri Lanka*, Communication No.1432/2005, UN Doc. CCPR/C/95/D/1432/2005, (2009).

[874] *Nallaratnam Singarasa v. Sri Lanka*, Communication No.1033/2001, UN Doc. CCPR/C/81/D/1033/2001 (2004).

[875] Ibid., para.7.6.

[876] *Nallaratnam Singarasa v. The Hon. Attorney General Attorney General's Department Colombo 12, Supreme Court of Sri Lanka*, No. 182/99, 15/9/2006, available at: http://www.ruleoflawsrilanka.org/cases/un-cases-for-sri-lanka/special-case-supreme-court-on-nallaratnam.

of abuses in the *Lalith Rajapakse* and in *Dingiri Banda* cases.[877]

National legal system

The Constitution of the Democratic Socialist Republic of Sri Lanka (hereafter "the Constitution") recognises freedom from torture as a fundamental right.[878] This prohibition, according to the CAT Act, is absolute, even in time of war or public emergency.[879] The Constitution provides, under Article126, that any person whose right to freedom from torture is violated may petition the Supreme Court. The Supreme Court has also held that freedom from torture is a non-derogable right and that even the worst offender is entitled to be free from torture.[880]

The definition of torture is laid down in section 12 of the CAT Act, as:

> "[a]ny act which causes severe pain, whether physical or mental, to any other person, being an act which is - (a) done for any of the following purposes that is to say -(i) obtaining from such other person or a third person, any information or confession; or (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed ; or (iii) intimidating or coercing such other person or a third person; or done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity."

Under the CAT Act, the crime of torture is punishable with seven to ten years imprisonment and a fine of 1,000 to 50,000 rupees (about $8 - $420).[881] However, the statutory minimum sentence does not apply automatically following the decision of the Supreme Court in 2008, which held that the High Court has discretion in determining a sentence notwithstanding the minimum mandatory sentence.[882] Acts of torture can also be prosecuted as intentionally causing harm or grievous harm with the aim to extort confessions

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[877] *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, Communication No. 1033/2001, UN Doc. CCPR/C/81/D/1033/2001 (2004), paras. 9.1-12; *Raththinde Katupollande Gedara Dingiri Banda v. Sri Lanka*, Communication No. 1426/2005,26, UN Doc. CCPR/C/91/D/1426/2005, (2007), paras.7.1-10.

[878] Constitution of the Democratic Socialist Republic of Sri Lanka (revised edition – 2008), Art 11.

[879] CAT Act, Art 3.

[880] For instance, *Amal Sudath Silva v. Kadituwakku Inspector of Police and Others*, Supreme Court, No.186/86, 5 May 1987.

[881] Section 2 of CAT Act: "In addition to a principal, any person who 'attempts to commit torture'; 'aids and abets in committing torture' and 'conspires to commit torture' is also punishable."

[882] In *the matter of a Reference in terms of Art 125(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka* (SC Ref. No.03/08), Judgment of 15 October 2008 rendered by Justice Ratnayake and joined by Chief Justice Silva and Justice Amaratunga, cited in REDRESS, ALRC, RCT, ACAT Alternative Report, p. 11.

or information leading to the detection of an offence or misconduct or to compel restoration of the property under Articles 321 and 322 of the Penal Code.[883] These crimes are punishable with a maximum of ten years imprisonment and a fine. Furthermore, an individual suspected of having committed rape against a female in custody can be prosecuted and punished with a period of ten to 20 years imprisonment and a fine.[884]

The High Court of Sri Lanka has jurisdiction over acts of torture committed outside Sri Lanka if the perpetrator is within Sri Lankan Territory, irrespective of his or her nationality or the nationality of the victim.[885] The exercise of such jurisdiction, however, has yet to be tested. On the other hand, there is so far no specific legislation prohibiting the expulsion, extradition, deportation or removal of a person to a country where he or she would be at risk of torture.

9.3. Safeguards and complaint mechanisms

Limits to and supervision of pre-trial detention

Article 13(2) of the Constitution provides that a person deprived of liberty "shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of person liberty except upon and in terms of the order of such judge made in accordance with procedure established by law". The Code of Criminal Procedure (CCP) also requires police officers to bring a detainee before a Magistrate within 24 hours.[886]

These safeguards, however, were significantly undermined by the Emergency Miscellaneous Provisions and Powers Regulation (the Emergency Regulations)[887] and the Prevention of Terrorism Act (PTA).[888] Under section 19(1) of the Emergency Regulations, for example, the Secretary to the Ministry of Defence can order the detention of a person in preventive custody for up to one year and such an order shall not be challenged before a court of law

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883 Penal Code, ss. 321 and 322.

884 Ibid.,s. 364(2).

885 CAT Act, s. 4(1).

886 Sections 36 and 37 of Code of Criminal Procedure Act, No.15 (1979): this safeguard is also noted in s. 65 of the Police Ordinance and s. 2 of Police Departmental Order No. A. 20, cited from Kishali Pinto-Jayawardena (2009), p.51.

887 Emergency (Miscellaneous Provisions and Powers) Regulations No. 1, 2005.

888 Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

on any ground.[889] The Regulations also set aside the application of the safeguards provided for in the Code of Criminal Procedure in relations to persons detained under Section 19.[890] Similarly, under Section 9(1) of the PTA, a person can be held for up to 18 months in preventive detention upon an order of the Minister where the latter "has reason to believe or suspect" that the person is "connected with or concerned in any unlawful activity". According to Section 9(10) of the Act, "an order made under Section 9 shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise".[891] These provisions are incompatible with international standards, which require that anyone arrested or detained must promptly be brought before a judge, tried within a reasonable time and be able to challenge the legality of his or her detention.[892] The PTA also contains provisions that make detainees particularly vulnerable to torture and other ill-treatment in the hands of the police. For example, section 7(3)(a) provides that a police officer investigating any person arrested or detained under the Act "shall have the right of access to such person and the right to take such person during reasonable hours to any place for the purpose of interrogation and from place to place for the purposes of investigation".

Meanwhile, individuals detained under the PTA can be kept in any place of detention and under any authority determined by a senior defence ministry official and can be taken to or moved around from one place to another by a police officer for purposes of interrogation.[893] The PTA and Emergency Regulations, by vesting

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[889] See s. 19 (1) and (10) of the Emergency Regulations. Section 19(1) mandates the Secretary to order the detention of any person for up to a year to prevent him or her "from acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services, or "from acting contrary to the prohibitions under s. 25 of the Regulations. In carrying out such an order, police or army officers may use such force as is necessary under s. 19 (2). Section 21(1) of the Regulations provide that a person detained under s. 19 can be held for up to 30 days before being brought before a magistrate but the detainee cannot be released on bail without the written permission of the Attorney-General.

[890] Section 21 of Emergency Regulations provide that "The provisions of sections 36,37 and 38 of the Code of Criminal Procedure Act, No.15 of 1979, shall not apply in relation to persons arrested under regulation 19".

[891] Moreover, ss. 6(1) and 7(1) of the PTA grant any police officer above the rank of Superintendent to arrest or order the arrest of any person without a court warrant for up to 72 hours before bringing him before a magistrate. The magistrate is required remand the detainee in custody pending the conclusion of the trial should the superintendent so request.

[892] Art 9 of the ICCPR requires that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. See also Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1* at 8.

[893] PTA, ss. 15(A)1 and 7(3)(a).

the authorities with broad powers while simultaneously restricting or excluding altogether judicial oversight, significantly enhance the risk of torture for anyone detained under these laws.

The Emergency Regulations were supposed to be lifted following the end of the state of emergency in 2011, after having been prolonged intermittently by a series of parliamentary resolutions since 1971.[894] However, on 29 August 2011, the Government adopted a set of new regulations purportedly under the PTA with a view to keeping in detention those suspects who have been previously detained under the earlier regulations.[895]

Even outside the context of emergency legislation, the Magistrates systematically fail to inquire about the treatment of detainees when deciding on applications for remand. Often the victims are unable to freely express their concerns because the police officers stand beside them during the hearing. In those rare cases where the victims complain about theirtreatment,the Magistrates have repeatedly failed to record the complaints or order a medical examination.[896]

Sri Lanka has a National Human Rights Commission (NHRC), established in 1997 in accordance with the Human Rights Commission of Sri Lanka Act (HRC Act).[897] The Commission is mandated to investigate complaints of fundamental rights infringements, to monitor the welfare of detainees, conduct a regular inspection of the places of detention and recommend

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[894] The President made the declaration before parliament just before the Human Rights Council's 18th session where Sri Lanka was on the agenda. See *Sri Lanka State of emergency to end September 14*, CNN, 25 August 2011, available at: http://Articles.cnn.com/2011-08-25/world/sri.lanka.end.emergency_1_tamil-tiger-rebels-president-rajapaksa-foreign-minister-lakshman-kadirgamar?_s=PM:WORLD; The last resolution under the Public Security Ordinance was approved on 30 July 2011 extending the State of Emergency for a period of one month, which was finally lifted on 30 August 2011. See The Parliament of Sri Lanka, *Resolution under the Public Security Ordinance*, 9 August 2011, available at http://www.parliament.lk/news/ViewNews.do?recID=NWS2273. See also Amnesty International, *Sri Lanka: Briefing to the Committee Against Torture*, Index ASA 37/016/2011, October 2011, available at: http://www.amnesty.org/en/library/asset/ASA37/016/2011/si/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf.

[895] The regulations, which are all dated on 29 August 2011, are: Prevention of Terrorism (Proscription of the Liberation tigers of Tamil Eelam) Regulations No. 1 of 2011 and Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) Regulations No. 2 of 2011, (Gazette No.1721/2); Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011 (Gazette No.1721/3), Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011(Gazette No.1721/4)-Prevention of Terrorism (Surrendees Care and rehabilitation) Regulations No. 5 of 2011(Gazette No. 1721/5).

[896] *Guneththige Misilin Nona and Jayalatha v. Muthubanda, Maheepala, Wijemanna, Inspector general of Police and the Attorney General* (No. 429/2003), Supreme Court of Sri Lanka, Judgment of 6 August 2010; REDRESS, Asian Legal Resources Centre and Rehabilitation and Research Centre for Torture Victim, ACAT, *Alternative Report to the Committee Against Torture in Connection with the Third Periodic Report of Sri Lanka*, September 2011, paras.15-17, 23, 41.

[897] Human Rights Commission of Sri Lanka Act No.21 of 1996, 21 August 1996.

compensation.[898] However, the NHRC does not meet the standards set in the Paris Principles, partly due to insufficient resources and lack of independence and cooperation from the Government.[899] For example, under section 28 of the HRC Act, the NHRC should be informed within 48 hours of any arrest or detention under the Emergency Regulations and the PTA. However, lack of access to the places of detention and lack of cooperation from the authorities has made these functions, to a large extent, ineffective. The NHRC is rendered even more amenable to political interference following the adoption of the 18th Amendment to the Constitution in September 2010, which transfers the power to nominate the Commissioner from parliament to the President.[900]

Access to a lawyer and compulsory medical check-up upon arrest

The Sri Lankan Constitution does not guarantee access to a lawyer upon arrest, but provides that "any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent court".[901] Although the authorities tend to grant requests where detainees are able to appoint a lawyer, the lack of access to a lawyer for the majority of detainees increases the risk of torture while in police custody, especially for those arrested under the Emergency Regulations and the PTA.[902]

A medical examination is not compulsory upon arrest under Sri Lankan law. Article 122(1) of the CCP requires an officer in charge of a police station to authorise examination by a medical practitioner when he considers such examination is "necessary for the conduct of an investigation".[903] Magistrates can also order a medical examination upon receipt of complaints from detainees. Such examination should normally be conducted by specialised physicians from the Department of Forensic Medicine referred to as Judicial Medical Officers (JMOs). However, the procedure is reported to be fraught with irregularities. Often detainees are brought for medical examinations long after the time of their arrest or the date of the incidents complained of and doctors who do not have the required training sometimes perform the

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[898] Ibid., s.11.

[899] In fact, no members of the NHRC were appointed during the period between June 2009 and February 2011. See The Asian NGO Network on National Human Rights Institutions (ANNI), *2011 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, p.239 (hereafter "2011 ANNI Report").

[900] CAT: 2011, para.17

[901] Art 13(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka; see also UN Special Rapporteur Mission Report on Sri Lanka, para.36.

[902] See for example, Amnesty International, *Sri Lanka: Briefing to Committee Against Torture*, p.14-18; REDRESS, ALRC, RCT, ACAT Alternative Reportpara.14.

[903] Section 122(1) of the CCP requires an officer in charge of a police station to authorise examination by a medical practitioner when he considers such examination is "necessary for the conduct of an investigation".

examinations.[904] The UN Special Rapporteur has also noted that, when the detainees are presented for medical examination, theyare often accompanied by the same police officers who are allegedly responsible for the abuses, thereby compromising the independence of the process.[905] Detainees also refrain from raising torture complaints during such examinations for fear of retribution upon return to custody.[906] The integrity of the system is further put to doubt amid instances where JMOs seem to have deliberately failed to record injuries or issued Medico-Legal Reports without having examined detainees.[907]

In addition to legal and administrative gaps, there is a severe shortage of qualified medical practitioners in most hospitals in Sri Lanka, which makes access to a medical examination even more difficult for detainees.[908]

Admissibility of evidence obtained under torture

Evidence obtained through torture is generally not admissible according to the Evidence Ordinance Act.[909] The law similarly excludes confessions made by any person while in police custody in the absence of a Magistrate.[910] However, these safeguards are subject to restrictions that may be imposed by law in the interest of national security as provided for under Article 15(1) of the Constitution.[911] Accordingly, the PTA provides that the confession of suspects arrested under the Act is admissible if given to a police officer above the rank of an assistant superintendent of police (ASP).[912] Another troubling aspect of the PTA is that it puts the onus on the victim to prove that their confessions were made

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[904] See Kishali Pinto-Jayawardena (2009), p. 126.

[905] UN Special Rapporteur Mission Report on Sri Lanka, para. 38.

[906] Janasansadaya and Asian Human Rights Commission, *Review of Medico-legal Examination & Documentation of Torture in Sri Lanka, Proceedings of the workshop held from 12-14 December 2008*, available at: http://www.janasansadaya.org/uploads/files/Torture%20ML%20Report-ed%5B1%5D.pdf

[907] See Kishali Pinto-Jayawardena, *A Praxis Perspective on Subverted Justice and the Breakdown of Rule of Law in Sri Lanka*, in Basil Fernando (Ed.), *Recovering the Authority of Public Institution: A Resource Book on Law and Human Rights in Sri Lanka*, 2009, pp. 117-119 and fn. 96 .

[908] See Janasansadaya and Asian Human Rights Commission, *Review of Medico-legal Examination & Documentation of Torture in Sri Lanka, Proceedings of the workshop held from 12-14 December 2008*.

[909] Confession caused by inducement, threats or promises are considered irrelevant under s. 24 of the Evidence Ordinance Act, No.14 of 1895 (An Ordinance to Consolidate, Define and Amend the Law of Evidence).

[910] Ibid., s. 26.

[911] Art 15(1) of the Constitution provides that "The exercise and operation of the fundamental rights declared and recognised by Arts 13(5) and 13(6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph, "law" includes regulations made under the law for the time being relating to public security."

[912] PTA, s. 16 (1).

under duress.[913] These provisions are bound to encourage the use of physical and psychological coercion for the purposes of obtaining evidence that would ensure a conviction. For example, there were incidents where suspects were forced to sign on a blank document, which is then completed and introduced as confessional evidence in court.

9.4. Accountability

While there are several legal avenues for victims of torture and ill-treatment to file complaints, the absence of a system of adequate and effective investigations and prosecutions and the lack of protection puts victims in jeopardy and creates a climate of impunity. Offences under the CAT Act fall within the jurisdiction of the High Court. The investigation into complaints can be filed with the Attorney-General's Office and can then be referred by the Attorney General to the Special Investigation Unit of the police or the Prosecution of Torture Perpetrators Unit under the Attorney General's Office.[914] However, there have been few prosecutions and successful prosecutions are even fewer.[915] It is also worth mentioning that none of the indictments concerned officers above the rank of police inspectors.[916]

According to Article 126 of the Constitution, victims of torture are entitled to bring complaints in respect of a violation or imminent violation of a fundamental right infringed by executive or administrative action to the Supreme Court within one month of the alleged violation. Although the determination of such complaints under this procedure has to be completed within two months,[917] the Court has declared this time limit as merely directory.[918] The Supreme Court, at times, directs the police and

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[913] Ibid.,s. 16(2); see also *Nallaratnam Singarasa v. Sri Lanka*, Communication No.1033/2001.

[914] Special Rapporteur Mission Report, para.50. The Prosecution of Torture Perpetrators Unit monitors the process of investigations by the Special Investigation Unit and the Criminal Investigation Department and if necessary gives advice on their work.

[915] Asian Human Rights Commission, *Sri Lanka: A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment*, 8 July 2011, para.4.b, available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-095-2011 (hereafter "AHRC, *A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment*, 2011"). It was reported that there were only 3 convictions under the CAT Act between by 2008, see Special Rapporteur Mission Report, para.51. According to Amnesty International, there have been far fewer investigations of torture cases since 2008. See Amnesty International, Sri Lanka: Briefing to the UN Committee against Torture 2011.

[916] Special Rapporteur Mission Report, para.52. In a more recent case, however, the High Court of Kurunegala sentenced an Officer in Charge to two years imprisonment and fine for torture committed in 2003 against a seven year old boy. See Asian Human Rights Commission, *Sri Lanka: Conviction under the Torture Act*, available at: http://www.humanrights.asia/news/forwarded-news/AHRC-FST-005-2012/?searchterm=.

[917] Constitution, Art 126 (5).

[918] *Vide Silinona v Dayalal Silva* [1992] 1 Sri LR 195, cited in Kishali Pinto-Jayawardena (2009), p. 86.

other authorities to institute proper investigations into allegations of torture and to put in place proper monitoring mechanisms to prevent torture. However, these directives have not always been respected by the Government and the relevant authorities.[919] In addition, some of the rulings of the Supreme Court in cases involving torture cast serious doubts about its independence. Inone case, for example, the Supreme Court refused to order an independent investigation into a complaint of torture, relying entirely on the account provided by the police.[920]

In 2010, the Department of the Attorney General came under the purview of the President and a new Attorney General, Mr Mohan Peiris, was appointed. The Department subsequently reversed its previous position not to appear before the Supreme Court on behalf of public servants against whom complaints were filed.[921] Given the obvious conflict of interest involved, the Attorney General's Department has little incentive and is said to be reluctant to file torture cases against police officers.

On the other hand, the NHRC is also vested with the authority to conduct investigations into complaints of violations of fundamental rights enshrined in the Constitution, such as the prohibition of torture and ill-treatment. In practice, however, the Commission has failed to live up to its mandate. For instance, often the victim or his or her lawyer is not informed about the progress of the investigation after filing a complaint.[922] Moreover, the Commission can only make recommendations and problems such as a lack of independence and adequate resources curtail its capacity to carry out effective investigations.[923]

The problem of lack of effective investigations into torture cases is further compounded by the fact that there are no mechanisms for the protection of victims and witnesses. The 2008 Draft Bill on Witness and Victims of Crime Protection has yet to be enacted.[924] Torture victims are often threatened or subjected to further torture and even killed when bringing action against police officers. This was the case with the assassinations of two torture victims,

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[919] In his 2007 report, the Special Rapporteur noted, "[g]iven the high standards of proof applied by the Supreme Court in these torture-related cases it is highly regrettable that the facts established do not trigger more convictions by criminal courts". See Rapporteur Mission Report, para. 65.

[920] *Guneththige Misilin Nona and Jayalatha v Muthubanda, Maheepala, Wijemanna, Inspector general of Police and the Attorney General* (No. 429/2003), Supreme Court of Sri Lanka, Judgment of 6 August 2010 rendered by Justice Shiranee Tilakawardane and joined by Justices Sripavan and Imam, cited in REDRESS, ALRC, RCT, ACAT Alternative Report, p.13.

[921] AHRC, *A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment*, 2011, para.4.c.

[922] Ibid., REDRESS, ALRC, RCT, ACAT Alternative Report, p. 6.

[923] 2011 ANNI Report, p. 245.

[924] CAT: 2011, para.19.

namely, Gerald Perera on 24 November 2004 and Sugath Nishanta Fernando on 20 September 2008.[925]

There are also reports of victims' lawyers being subjected to intimidation and harassment by police officers, in particular those representing clients in fundamental rights' applications or those charged with offences under the security laws.[926] For instance, Mr D.W.C. Mohotti was assaulted and verbally harassed by police officers at the Bambalapitiya Police Station in October 2008, while trying to represent his client.[927] Another lawyer, Amitha Ariyaratne, was also subjected to repeated death threats and his office was set on fire in January 2009.[928] These incidents raise serious concerns in that legal counsel cannot be expected to freely and effectively discharge their professional duties without adequate protection. This, in turn, results in a denial of effective access to justice for victims of torture.

9.5. Reparation

There is no distinct right to reparation for victims of torture in Sri Lankan law. According to Article 126(4) of the Constitution, a victim whose fundamental right has been abused or is about to be abused by executive or administrative action is entitled to obtain "relief or make such directions as [the Court] may deem just and equitable in the circumstance". The Supreme Court has recognised the right to compensation in respect of acts of torture.[929] In order to benefit from this procedure, however, victims have to apply within a month after the alleged infringement took place.[930] Although, the time period may be extended if the victim has registered a complaint with the NHRC, the requirement is rather too restrictive and can amount to a denial of the remedy provided by law for many victims.

In addition, under the Code of Criminal Procedure, courts may order an accused to pay compensation to victims of torture if he

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[925] AHRC, *A review of Sri Lanka's compliance with the obligations under the Convention against Torture and Ill-treatment*, 2011, para.4(1).

[926] International Bar Association, *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, May 2009, chapter 4. Given the high standards of proof applied by the Supreme Court in these torture-related cases it is highly regrettable that the facts established do not trigger more convictions by criminal courts.

[927] See e.g. Kishali Pinto-Jayawardena (2009), pp. 124-125.

[928] See e.g. Asian Human Rights Commission, *Sri Lanka: Human rights lawyer's office burnt down*, 31 January 2009, available at: http://www.humanrights.asia/news/press-releases/AHRC-PRL-008-2009.

[929] *De Silva v. Chairman Ceylon Fertilizer Corporation* [1989] 2 Sri L R 393, cited in Kishali Pinto-Jayawardena (2009), p.74.

[930] Constitution, Art 126(2).

or she is convicted.[931] The compensation provided for under the Criminal Procedure Code, however, is nominal. The maximum amount of compensation ordered by a Magistrate's Court is 500 Rupees (which is equivalent to about $4).[932] Victims or their relatives can also bring a civil claim for damages before the District Court for pecuniary and non-pecuniary losses incurred according to the Civil Procedure Code. Where a civil action is filed against the State, a plaintiff must submit a written notice to the Attorney General one month before a suit is instituted.[933]

The NHRC also has the power to recommend compensation for a victim of torture or, in case of death, his or her relative to be paid by the police or army officer.[934] Regarding healthcare and rehabilitation for victims of torture, Sri Lanka does not provide for government funded treatment and counselling services. Consequently, to the extent treatment and counselling is available to victims, this is done with the support of civil society organisations such as the Family Rehabilitation Centre and The Danish Rehabilitation and Research Centre for Torture Victims (RCT).

9.6. Conclusion

The problems identified in this country study are symptomatic of the challenges facing societies that lack adequate guarantees for the rule of law and are emerging from long, drawn out conflicts. Despite the controversy over alleged human rights violations amounting to international crimes committed during the final phase of the war, the end of one of the longest internal armed conflicts in the world should have meant far greater respect for human rights. Yet the current situation in Sri Lanka leaves a lot to be desired in the above respects. The reluctance on the part of the Government to repeal the PTA nearly three years after the end of the conflict as well as reports of the continued application of the emergency regulations, despite having been officially declared inapplicable, are indicative of a prevailing security paradigm that fails to guarantee internationally recognised

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[931] Section 17 (4) of the Code of Criminal Procedure provides that "whenever any person is convicted of any offence or where the court holds the charge to be proved but proceeds to deal with the offender without convicting him, the court may order the person convicted or against whom the court holds the charge to be proved to pat within such time or in such instalments as the court may direct, such sum by way of compensation to any person affected by the offence as to the court shall seem fit". See *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention – Second periodic reports of States Parties due in 1999 – Sri Lanka*, UN Doc. CAT/C/48/Add.2, 6 August 2004, paras. 67 and 102.

[932] Code of Criminal Procedure, s. 17(7).

[933] Civil Procedure Code, ss. 456 and 461.

[934] Human Rights Commission of Sri Lanka Act, s. 15(3).

rights.[935] This is complemented by a series of constitutional and institutional developments that have further eroded the rule of law by strengthening the executive and weakening transparency and accountability.

The prevalence of the practice of torture in Sri Lanka underscores that it is not enough to ratify international treaties and enact domestic laws. There must be a corresponding commitment on the part of the authorities and institutional guarantees against violations of the rights and freedoms protected under international law.

[935] Immigration and Refugee Board of Canada, *Sri Lanka: Changes to the emergency regulations and the Prevention of Terrorism Act (August-September 2011)*, 29 September 2011, LKA103837.E, available at: http://www.unhcr.org/refworld/docid/4f4f31eb2.html.

10. Thailand*

10.1. Practice and patterns of torture

Thailand is a Constitutional Monarchy with a population of over 69 million people. While it is widely referred to as one of the economic success stories of the Asia-Pacific region,[936] it has been beset in recent years by mass political unrest[937] and an on going armed conflict in the South of the country.

The human rights situation has particularly deteriorated in the border provinces of Pattani, Yala, Narathiwat, and Songkhla, in connection with the armed conflict between separatist militants[938] and government forces. The area is home to a predominantly ethnic Malay Muslim population. Over 4,000 people have died and over 7,000 injured since the renewal of hostilities in January 2004.[939] The majority of these casualties have been civilians killed by the insurgents[940] and the use of torture has been reported consistently, with blame for human rights violations being attributed to the various institutions of the State.[941] The separatist insurgents have also been accused of serious abuses, conducting deadly bombing campaigns in civilian areas, brutal murders, and the systematic intimidation of school pupils and staff in the area.[942]

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* Based on initial contribution by Pornpen Khongkachonkiet, Director, Cross Cultural Foundation, Thailand.

936 The World Bank, population data as of 2010, available at: http://www.worldbank.org/en/country/thailand; see also 'Thai economy grows 11% in first quarter' *Reuters*, (FT.com, 21 May 2012) available at: http://www.ft.com/cms/s/0/7c19c116-a2fd-11e1-a605-00144feabdc0.html#axzz1x7ExjUOP.

937 Political protests and mass demonstrations took place during the spring of 2010, mainly in Bangkok, but also in other parts of Thailand. Government forces and officials have been accused of torture, arbitrary arrest and other abuses during the unrest.

938 Current active groups include the National Revolution Front-Coordinate (BRNK), Patani Freedom Fighters (PKP) and the Small Patrol Group (RKK). See: Human Rights Watch *"Targets of Both Sides": Violence against Students, Teachers and Schools in Thailand's Southern Border Provinces*.

939 Ibid. p. 21.

940 Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, Index: ASA 39/001/2009 at p. 4.

941 Ibid.

942 Ibid; see generally Human Rights Watch, *"Targets of Both Sides": Violence against Students, Teachers and Schools in Thailand's Southern Border Provinces*.

The government's response to the situation as a whole has been heavy-handed. As of 2009, it was reported that 45% of the Thai military was stationed in the region, with the use of torture being endemic during interrogations and in custody.[943] Suspects are often beaten, electrocuted, exposed to extreme temperatures, and subjected to mock executions to obtain confessions and gain information on separatist activities.[944] There are also reports of violations being carried out at numerous detention centres, such as the notorious Ingkharayuthboriharn Army Camp, in addition to other unofficial facilities that limit the possibility of holding perpetrators to account.[945] Reports of deaths at these centres, such as that of suspected militant Sulaiman Naesa, which was highly publicised, have highlighted concerns about the possible use of torture by the military.[946]

The imposition of security legislation by the Thai government has essentially been used as a justification for continued human rights violations and has made it difficult to hold perpetrators to account. The Martial Law Act[947] and the Emergency Decree[948] effectively render security forces immune from prosecution[949] and have significantly extended the period that a suspect can be detained. Since the violence resumed in 2004, over 15,000 local people have been arrested and detained, with many of these being tortured, fuelling a feeling of "bitterness" among the Muslim Malay population towards the Thai security forces.[950]

The mass political protests that took place in Bangkok and other parts of Thailand from March to May 2010 also saw numerous allegations of extra-judicial killings and the ill-treatment of protesters directed at the security forces. In clashes with anti-government protesters, led by the United Front for Democracy against Dictatorship (UDD, known as the "Red Shirts"), government forces have reportedly been implicated in torture, arbitrary arrest, and the use of overcrowded detention

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943 Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 4.

944 Amnesty International, *Thailand: Time to end human rights violations – Amnesty International Submission to the UN Universal Periodic Review*, Index: ASA 39/001/2011, July 2011, p. 5, available at: http://www.amnesty.org/en/library/asset/ASA39/001/2011/en/f3c62adf-5601-458a-b525-895016d56407/asa390012011en.pdf.

945 Ibid.

946 Andrew Marshall, Is the Thai military Torturing Detainees?, *TIME*, 1 December 2010, available at: http://www.time.com/time/world/Article/0,8599,2033902,00.html. See also http://www.hrw.org/news/2010/06/16/thailand-investigate-detainee-s-death.

947 Martial Law Act, 27 August B.E. 2457 (1914) available at: http://www.thailawforum.com/laws/Martial%20Law.pdf.

948 Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005), unofficial translation available at: http://www.unhcr.org/refworld/type,LEGISLATION,,THA,482b005f2,0.html.

949 See Emergency Decree, s. 17.

950 *Submission by Society for Threatened Peoples, Universal Periodic Review Twelfth Session: Thailand*, 14 March 2011, p. 1, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/STP-SocietyThreatenedPeoples-eng.pdf.

facilities.[951] These methods were reportedly used to disperse protesters and to coerce confessions,[952] under the auspice of the Centre for the Resolution of Emergency Solutions (CRES) – an ad hoc organisation of military personnel and civilians created by emergency decree.[953]

Torture also remains a problem in the context of the day-to-day administration of criminal justice. The Royal Thai Police[954] are accused of various forms of torture and ill-treatment, including beatings, electrocution and simulated suffocation, usually to extract information.[955] Suspects of illegal drug offences are particularly vulnerable to violations at the hands of the police, who have also been blamed for the extra-judicial killings of suspected drug traffickers.[956]

The criminal justice system in Thailand suffers severely from prison overcrowding which, by the Thai Department of Correction's own admission, adversely affects living conditions for detainees.[957] As of April 2012, the total prison population in Thailand numbered 234,678, of which 26% comprised of pre-trial detainees and remand prisoners, and was double the official capacity of the prison system.[958]

10.2. Legal framework

International law

Thailand acceded to the Convention against Torture (CAT)[959] in 2007, which remains its most significant international commitment in relation to the prevention of torture. It has not ratified the Optional Protocol to CAT, and it is yet to enact

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[951] Human Rights Watch, *Descent into Chaos: Thailand's 2010 Red Shirt Protests and the Government's Crackdown*, May 2011, p. 23, available at: http://www.hrw.org/sites/default/files/reports/thailand0511webwcover_0.pdf.

[952] Ibid., pp. 126-128.

[953] Ibid., p. 23.

[954] The Royal Thai Police is the national police force in Thailand, who has the primary responsibility for maintaining public law and order.

[955] US Department of State, *Country Reports on Human Rights Practices for 2011: Thailand*, 2012, pp. 4-5, available at: http://www.State.gov/documents/organization/186520.pdf. See also Marwaan Macan-Markar, 'Police in the dock for resort to torture', *Inter Press Service*, 11 February 2008, available at: http://ipsnews.net/news.asp?idnews=41137.

[956] Article 2, *Extrajudicial killings of alleged drug dealers in Thailand*, Asian Legal Resource Centre, 5 September 2003, available at: http://www.Article2.org/mainfile.php/0203/85/.

[957] Department of Correction, *Prisoners' rights under the Thai Penitentiary Act*, in *Prison policy and prisoners' rights, Proceedings of the Colloquium of the IPPF, Stavern, Norway, 25-28 June 2008*, Wolf Legal Publishers, 2008, p. 571, available at: http://fondationinternationalepenaleetpenitentiaire.org/Site/documents/Stavern/30_Stavern_Report%20Thailand.pdf.

[958] Statistics as of 01 April 2012 from the International Centre for Prison Studies, available at: http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=114.

[959] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

legislation that fully implements the Convention into domestic law. Thailand is also a party to the Geneva Conventions since 1954, but has not ratified any of the Additional Protocols.[960]

Thailand is also a party to numerous other treaties that protect against torture or related violations. These include the International Covenant on Civil and Political Rights (ICCPR),[961] the International Covenant on Economic Social and Cultural Rights (ICESCR),[962] the Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW) and its Optional Protocol,[963] and the Convention on the Rights of the Child (CRC).[964] It has also signed the Convention for the Protection of All Persons from Enforced Disappearance (CED).[965]

Section 82 of the Thai Constitution stipulates that "the State … shall adhere to the equal treatment principle and comply with treaties related to human rights to which Thailand becomes a party". At the first cycle of the Universal Periodic Review, in October 2011, Thailand was commended for the detailed national report it submitted, and for its contribution to the review of the Human Rights Council.[966] The Thai Government agreed to implement 134 of 172 recommendations, with the remaining 38 rejected because they relate topolitically sensitive issues such as the conflict in the South.[967]

National legal system

The Thai Constitution, as amended in 2007, provides that "a person shall enjoy the right and liberty in his or her life and person" and "torture, brutal act, or punishment by cruel or inhumane means shall not be permitted."[968] Despite this constitutional prohibition, torture is yet to be classified as an offence under Thai

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960 The Four Geneva Conventions of 1949. Thailand ratified the Conventions on 29 December 1954.

961 International Covenant on Civil and Political Rights. Thailand became a party on 29 October 1996 through accession.

962 International Covenant on Economic, Social and Cultural Rights. Thailand acceded on 5 September 1999.

963 Convention on the Elimination of All Forms of Discrimination against Women. Thailand acceded to the convention on 9 Aug 1985 and ratified on 14 June 2000 the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

964 Convention on the Rights of the Child.Acceded to by Thailand on 7 March 1992.

965 Thailand signed the Convention on 9 January 2012.

966 U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Thailand, UN Doc. A/HRC/19/8, 8 December 2011, paras.12-13, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/172/64/PDF/G1117264.pdf?OpenElement.

967 Kavi Chongkittavorn, Ending Thailand's impunity for real, The Nation, 2 July 2012, available at: http://www.nationmultimedia.com/opinion/Ending-Thailands-impunity-for-real-30185269.html.

968 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), s. 32, available at: http://www.senate.go.th/th_senate/English/constitution2007.pdf.

criminal law. Nevertheless, there are provisions in the Criminal Code[969] governing crimes such as assaults,[970] malfeasances,[971] and crimes against liberty[972] that can be theoretically applicable to those who commit acts of torture although they do not fully capture all elements of the crime of torture.

Thailand has not incorporated the principle of non-refoulement enshrined under Article 3 of CAT in its domestic legislation. Furthermore, Thailand is not party to the UN Refugee Convention[973] and the treatment of refugees within the jurisdiction of Thailand has been questionable, with numerous reports of actions by the authorities that are in contravention of Article 3 of the CAT. Thailand has a history of deporting Burmese migrants[974] and there have been repeated assertions by the Thai authorities that they will continue to do so, despite the risk of persecution on their return.[975] Ethnic Hmong people, who claim they face persecution for their support of US forces during the Vietnam War, have also been the subject of deportations, in their case back to communist-run Laos.[976] The repatriation of asylum seekers back to countries where they are at risk of persecution, including torture, continues to be reported.[977] With regards to human trafficking however, legal protection[978] is afforded to victims whose "security and welfare" would be under threat upon return to their country of residence or origin.[979]

The Thai legal system does not provide for the exercise of universal jurisdiction. Crimes committed abroad can only be tried before Thai Courts if either the victim or the offender is a Thai national.[980]

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[969] Criminal Code, B.E. 2499 (1956), as amended until Criminal Code (No.17) B.E. 2547 (2003), available at: http://www.thailandlawonline.com/Laws/criminal-law-thailand-penal-code.html.

[970] Ibid., ss. 295, 297.

[971] Ibid., s. 157.

[972] Ibid., ss. 309-312.

[973] United Nations Convention Relating to the Status of Refugees 1951.

[974] Migrant Assistant Programme, *No Human Being is Illegal, No Migrant Worker is Illegal: 1996-2006*, 11 December 2006, pp. 36-55, available at: http://www.mapfoundationcm.org/pdf/eng/eng_map10years.pdf.

[975] Amnesty International, *Annual Report 2012: Thailand*, 2012, available at: http://www.amnesty.org/en/region/thailand/report-2012.

[976] Thailand deports thousands of Hmong to Laos, *BBC*, 28 December 2009, available at: http://news.bbc.co.uk/1/hi/8432094.stm.

[977] Amnesty International, *Annual Report 2012: Thailand*.

[978] See; ECPAT International, *Thailand: Country Progress Card*, pp. 11-12, available at: http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf.

[979] Anti-Trafficking in Persons Act, B.E. 2551 (2008), s. 38, available at: http://www.unhcr.org/refworld/docid/4a546ab42.html.

[980] Criminal Code, s. 8.

10.3. Safeguards and complaint mechanisms

Limits to and supervision of pre-trial detention

The Constitution confers the right of individuals "to have easy, expeditious, speedy and comprehensive access to justice," as set out in section 40 (1), in addition to the right to have their case tried "in a correct, speedy and fair manner" through section 40 (3).

The Criminal Procedure Code[981] sets out the rights of arrested persons. Section 7(1) entitles an arrestee to take legal advice and receive medical treatment, and section 87 sets out the requirement that he or she be brought before a court within 48 hours of the arrest if he or she has not been granted provisional release. The right to trial within a reasonable period of time is guaranteed under section 8, and arrestees are able to appear via videoconference if necessary under section 87 (1). Such measures, in principle, help to ensure that detention is lawful and can reduce the risk that detainees are tortured. Successive twelve-day periods of detention can be authorised by a court in circumstances where the offence being investigated is punishable by a term of imprisonment of at least ten years, up to a maximum period of detention of eighty-four days.[982] For offences subject to shorter sentences, the maximum detention period is reduced. For an offence punishable by imprisonment for no more than six months, the court cannot order a detention period exceeding seven days.[983] For offences that carry a punishment of more than six months, but no more than ten years imprisonment, the court can order successive pre-trial detention periods of up to twelve days each, up to a total period of forty-eight days.[984] In practice however, arrestees are sometimes denied access to legal counsel and are rarely brought before a court within the forty-eight hour time limit.[985] Detainees are also not always held at a police station as required under the Criminal Procedure Code – instead being kept at unofficial facilities.[986]

Both state bodies and independent organisations conduct monitoring of prisons and other detention facilities. The National

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[981] Criminal Procedure Code of Thailand, as promulgated by Act Promulgating the Criminal Procedure Code, B.E. 2477 (1934), and amended under Amendment No.29 B.E. 2551 (2008), available at: http://en.wikisource.org/wiki/Criminal_Procedure_Code_of_Thailand/Provisions#D1-T4-C2-P1.

[982] Ibid., s. 87.

[983] Ibid.

[984] Ibid.

[985] US Department of State, *Country Reports on Human Rights Practices for 2011: Thailand*, pp. 10-11.

[986] Amnesty International, *Thailand: Time to end human rights violations – Amnesty International Submission to the UN Universal Periodic Review*, p. 5.

Human Rights Commission of Thailand[987] (NHRC) has conducted visits to official detention centres; however, such visits are subject to prior approval and tend to be in reaction to complaints rather than being systematic.[988] The NHRC's composition also raises some doubts regarding its independence.[989] Occasionally, visits by legislative committees are organised in response to allegations of abuses in detention facilities.[990] Visits are also undertaken by the International Committee of the Red Cross.[991] However, these are often restricted to official detention facilities, and are subject to prior approval.

Arrest and detention under the emergency laws

Provisions under the emergency laws applicable in the Southern provinces offer less protection to arrestees and detainees than the Criminal Procedure Code, and are open to abuse. The 2005 Emergency Decree allows suspects to be kept in preventive detention for an initial period of seven days subject to a judicial approval.[992] The period can be extended to thirty days on obtaining authorisation from a court.[993] The Criminal Procedure Code is to apply thereafter, should the officials find that further "restraint" is required.[994] However, detainees are often moved to different locations before the expiry of the period provided under both the Emergency Decree and the Criminal Procedure Code, at which point the authorities re-start the clock.[995] The same person can be detained for 30 days and a seven-day holding period is conferred to the military authorities under the Martial Law Act.[996]

Section 11 of the Emergency Decree has been the basis upon which the Internal Security Operations Command (ISOC) – the unit of the Thai military responsible for national security – has

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[987] As established under the National Human Rights Commission Act, B.E. 2542 (1999); see also Office of the National Human Rights Commission of Thailand website, available at: http://www.nhrc.or.th/2012/wb/en/index.php.

[988] Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 26.

[989] Civil Society and Human Rights Coalition of Thailand (CHRC) joint submission, *A Universal Periodic Review of Thailand For the 12th Session of Universal Periodic Review on October 2-14*, 14 March 2011, para. 13; see also s. 256 of the Constitution, which requires the Commission to be appointed by the King with the advice of the Senate.

[990] The Committee on Violence in the South visited several detention facilities in response to allegations of torture between September 2006 and early 2008 – see Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 26.

[991] International Committee of the Red Cross, *Thailand: nearly four decades of ICRC presence*, 14 May 2010, available at: http://www.icrc.org/eng/resources/documents/interview/thailand-interview-140510.htm.

[992] Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005), ss. 11 (1) and 12.

[993] Ibid. ss. 12.

[994] Ibid.

[995] Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 23.

[996] Martial Law Act B.E. 2457 (1914), s. 15bis

issued regulations[997] on how duties may be discharged during states of emergency. Paragraph 3.1 of the Regulations permits the arrest of a person "believed to act as [an] accomplice ... [or] supporter of the act that has led to states of emergency ... with the aim to give explanation and instil correct attitude so that the person quits the behaviour or stops abetting the act."[998] The scope for abuse in applying this provision is obvious, due to its highly subjective wording. Furthermore, in order to extend the detention period the custodian is not required to bring the detainee to court thereby excluding an opportunity for judicial oversight over the conditions of detention.[999]

Section 12 of the Emergency Decree stipulates that arrested suspects are to be taken into custody at "a designated place which is not a police station, detention centre, penal institution or prison." The ISOC has issued a directive[1000] stating that there are only two official detention facilities that can hold suspected insurgents in the South, however there are reportedly many more. The use of unofficial facilities or "secret places" can facilitate the occurrence of torture,[1001] due to a lack of opportunity for supervision and falling outside the scope of legal safeguards. The Emergency Decree has been in force since 2005, and continues to be periodically renewed in the provinces of Yala, Narathiwat and all but one district in Pattani.[1002]

The Internal Security Act,[1003] which came into force in February 2008, essentially sets out a modified legal basis for the operation of ISOC.[1004] A notable rule that could clearly be prone to abuse is section 21, which stipulates that a court can order a person "to undergo training at a designated place for a period not exceeding six months" if that person is deemed by an investigating officer

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997 'Regulation of Internal Security Operations Command Region 4 Concerning Guidelines of Practice for Competent Officials as per Section 11 Of the Emergency Decree on Government Administration in States of Emergency, B.E. 2548 (2005)', from Annex II of: Muslim Attorney Centre Foundation and Cross Cultural Foundation (MACF), *Report to UPR: Human Rights in Criminal Justice Systems in Southern Conflict & counter-insurgency policies of the State*, 2011, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS8-JointSubmission8-eng.pdf.

998 ISOC Regulations, para. 3.8.

999 The law only provides that the "necessities for the extension must be proven." Ibid., para.3.7.

1000 Directive No. 11/2550 'Detention facilities under the 2005 Emergency Decree on Government Administration in States of Emergency' 24 January 2007, cited in: Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 25.

1001 See: Office of the High Commissioner for Human Rights, *Resolution 2005/39*, available at: http://www.unhcr.org/refworld/category,LEGAL,UNCHR,,45377c550,0.html.

1002 Cabinet extends emergency decree in southern border provinces, *Pattaya Mail*, 19 June 2012, available at: http://www.pattayamail.com/news/cabinet-extends-emergency-decree-in-southern-border-provinces-13824.

1003 Internal Security Act, B.E. 2551 (2008) available at: http://thailaws.com/law/t_laws/tlaw0342.pdf.

1004 See Internal Security Act, s. 5 onwards.

to have committed an offence that affects internal security.[1005] Although the consent of the accused is required for the training,[1006] it has been reported that detainees who refused such an offer on the expiry of the 37-day detention period under the emergency laws, were subjected to further detention.[1007]

Persons detained under the Martial Law Act of 1914, which also confers to the military authorities the power to detain a suspect for seven days,[1008] cannot claim compensation for "any damage which may result from the exercise of powers of the military" pursuant to Section 16.[1009] The power to invoke martial law, as under the Act, rests with a battalion commander within the armed forces "in his or her responsible area."[1010]

The judiciary has limited opportunity to satisfy itself about the security and safety of detainees, as officials are not required to present them before a court when seeking an extension under the paragraph 3.7 of the ISOC Regulations. Furthermore, there does not appear to be sufficient opportunity for detainees to challenge the basis of their detention under the emergency laws. In addition, allegations of torture or ill-treatment taking place in detention must be communicated through complaints submitted to the police – who are usually the perpetrators.[1011] Detainees and their relatives are not always able to present petitions before a court challenging the detention, as they may be unaware of their rights or are afraid to challenge the authority of the officers. In most habeas corpus proceedings, the courts will grant extensions of detention periods without exercising a substantive review of a detainee's request.[1012]

[1005] The UN Special Rapporteur, reporting on the protection of human rights while countering terrorism, held concerns over the application of the emergency laws and in particular the six month "training" period that an official can confer on a suspect under the Internal Security Act. See: U.N. Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Martin Scheinin– Communications with governments: Thailand*, UN Doc. A/HRC/10/3/Add.1, 24 February 2009, paras.278, 287-290, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.3.Add.1_EFS.pdf.

[1006] In 2007, provincial courts ruled that it was in fact unlawful unless truly voluntary: see Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 27; In spite of this, a number of detainees were prevented from returning home: Asian Human Rights Commission, *Update (Thailand): Hundreds released from army detention prevented from going home*, UP-143-2007, 2 November 2007, available at: http://www.humanrights.asia/news/urgent-appeals/UP-143-2007.

[1007] Working Group on Justice for Peace, *"Human Rights under Attack:" Overview of the human rights situation in Southern Thailand*, March 2008, p. 6, available at: http://www.protectionline.org/IMG/pdf/HRunderAttack.pdf.

[1008] Martial Law Act B.E. 2457 (1914), s. 15bis.

[1009] See also Emergency Decree, s. 17.

[1010] Martial Law Act, s. 4.

[1011] Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 24.

[1012] Working Group on Justice for Peace, *"Human Rights under Attack:" Overview of the human rights situation in Southern Thailand*, p. 6.

Access to legal advice and compulsory medical assistance upon arrest

Section 40 (7) of the Constitution provides for the right of a suspect in a criminal case to "legal assistance from an attorney." Detainees are afforded the right to have counsel present during an interrogation, and the right to obtain "expeditious medical treatment" if necessary. The right to legal advice under the ISOC Regulations however, does not appear to be as forthcoming. The second amendment to the Regulations stipulates that for visits from persons other than the detainees' relatives, permission must be sought from an authorised official and the conversation of any such visit can be observed.[1013]

There are reports that access to a lawyer is often denied, with detainees being held incommunicado, and that temporary bail is routinely and unreasonably refused.[1014] Furthermore, the allocation of funding and resources towards legal aid in Thailand has been criticised as being not significant enough, with the provider of the scheme – the Law Council of Thailand – receiving 0.06% of the total budget allocated for justice facilitation.[1015] Access to legal aid is by and large insufficient and ineffective, and lengthy delays are common in the process on the part of the public prosecutor and the courts.

During states of emergency, the ISOC Regulations indicate that "medical treatment must be provided when needed."[1016] However, medical assistance was allegedly denied to some detainees prior to being transferred to official prisons during the political protests in 2010,[1017] and there is a similar situation regarding the unrest in the South, where medical personnel "do not have regular access to detainees."[1018] For those who are tortured during interrogation, only victims with the most severe injuries are likely to receive medical attention.[1019] Even then, many doctors refuse to examine

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[1013] Section 2 of the 2nd Amendment; see also Muslim Attorney Centre Foundation and Cross Cultural Foundation (MACF), *Report to UPR: Human Rights in Criminal Justice Systems in Southern Conflict & counter-insurgency policies of the State*, p. 14.

[1014] *Universal Periodic Review (UPR) Thailand: Joint CSO Submission to the Office of the High Commissioner of Human Rights*, March 2010, para.14, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS9-JointSubmission9-eng.pdf. See also Human Rights Watch, *Descent into Chaos: Thailand's 2010 Red Shirt Protests and the Government's Crackdown*, p. 125.

[1015] Civil Society and Human Rights Coalition of Thailand (CHRC) joint submission, *A Universal Periodic Review of Thailand For the 12th Session of Universal Periodic Review on October 2-14*, para. 23.

[1016] ISOC Regulations, para. 3.9.4.

[1017] Human Rights Watch, *Descent into Chaos: Thailand's 2010 Red Shirt Protests and the Government's Crackdown*, p. 128.

[1018] Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 24.

[1019] Working Group on Justice for Peace, *"Human Rights under Attack:" Overview of the human rights situation in Southern Thailand*, p. 8.

victims and issue medical reports "out of fear."[1020] If detainees are charged under the Criminal Procedure Code, they will be sent to court and eventually held at a provincial prison. Under the prison regulations, an authorised person will examine the detainees and if medical treatment is needed, the Department of Corrections will provide as necessary.[1021] Yet, reportedly, the medical care is often inadequate[1022] and there is usually no expert on torture induced injuries.

Admissibility of evidence obtained under torture

The Criminal Procedure Code prohibits the use of torture and other forms of coercion and inducement by investigators. Section 135 of the Criminal Procedure Code states that "the inquirer shall not perform or cause to be performed an act of promising, threatening, deceiving, torturing, forcibly compelling, or, by unlawful means, encouraging the accused to give any statement in respect of the charge against him." The admission of evidence obtained through such means is dealt with under section 226. The use of evidence in order to prove a defendant's guilt or innocence is permissible, if "it is not obtained by an act of inducement, promise, threat, deception or any other unjust act." However section 226 (1) appears to qualify this protection by reaffirming the court's duty to exclude such evidence, except in cases where it would be "more beneficial to the carriage of justice than detrimental to the... fundamental rights and liberties of the people."

10.4. Accountability

The NHRC has a mandate to "to examine and propose remedial measures ... for the commission or omission of acts which violate human rights", provided the matter is not already subject to court proceedings.[1023] The right to lodge a written petition in event of a violation of human rights is conferred to a victim through section 23 of the Act, and the option to report the matter in the first instance to a private human rights organisation is set out in section 24. As has been noted, however, the efficiency of the NHRC has been called into question due to its perceived lack of independence, thereby often rendering its investigative duties ineffective.[1024]

[1020] Ibid.

[1021] Department of Corrections Prisoner Handbook, p. 9, available at: http://bp.correct.go.th/doccument/handbook.pdf.

[1022] US Department of State, *Country Reports on Human Rights Practices for 2011: Thailand*, p. 5.

[1023] See s.s22 and 15(2) of the National Human Rights Commission Act.

[1024] Civil Society and Human Rights Coalition of Thailand (CHRC) joint submission, *A Universal Periodic Review of Thailand For the 12th Session of Universal Periodic Review on October 2-14*, para.74-76.

Victims are able to report abuses or file complaints directly to the relevant authorities, including the military. The inadequacies of such procedures are obvious, not least because most allegations would be reported to the same institutions implicated in the violation. Furthermore, the Emergency Decree, pursuant to section 17, exempts those officials enforcing the state of emergency from criminal, civil and disciplinary liability, provided they were acting "in good faith".[1025]

Consequently, there is a persisting culture of impunity in relation to allegations of ill-treatment and torture at the hands of many actors, especially in the areas affected by the conflict. The Muslim Attorney Centre reported 113 cases of torture used to obtain confessions in 2007-2008, and a further 130 cases in 2009-2010.[1026] Concerning complaints in the South, the NHRC issued a report documenting 34 torture petitions from 2007 to 2010.[1027] Although these figures may not represent the true extent to which torture takes place, they nevertheless demonstrate the fact that there are numerous leads of enquiry for prosecutors to follow. In spite of this, no government official has been found guilty of committing ill treatment or torture in the southern border provinces.[1028] Even high-profile incidents have seen no action being taken, such as that concerning the alleged torture and eventual death of Muslim Imam Yapha Kaseng, and Sulaiman Naesa among others.[1029]

Reports also suggest that complaining about torture can lead to serious repercussions, resulting in a situation whereby most complainants do not proceed to court or are simply withdrawn for fear of reprisals.[1030] The disappearance of a prominent human rights lawyer, Somchai Neelapaijit, in 2004 and the subsequent conviction of one of his clients for filing a false complaint highlight

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[1025] The UN Human Rights Committee has expressed its concern regarding this issue. See Human Rights Committee, *Concluding observations of the Human Rights Committee: Thailand*, UN Doc. CCPR/CO/84/THA, 8 July 2005, para.13, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/435/04/PDF/G0543504.pdf?OpenElement.

[1026] Muslim Attorney Centre Foundation and Cross Cultural Foundation (MACF), *Report to UPR: Human Rights in Criminal Justice Systems in Southern Conflict & counter-insurgency policies of the State*, para. 18.

[1027] National Human Rights Commission, *Right to Judicial Process in Relation to the Examination of the Complaints Concerning Torture and Other Inhuman Treatment or Punishment in the Southern Border Provinces*, Report No. 275-308/2553, 2010, cited in Muslim Attorney Centre Foundation and Cross Cultural Foundation (MACF), *Report to UPR: Human Rights in Criminal Justice Systems in Southern Conflict & counter-insurgency policies of the State*, para. 21.

[1028] Muslim Attorney Centre Foundation and Cross Cultural Foundation (MACF), *Report to UPR: Human Rights in Criminal Justice Systems in Southern Conflict & counter-insurgency policies of the State*, para. 30. See also US Department of State, *Country Reports on Human Rights Practices for 2011: Thailand*, p. 4.

[1029] Ibid.

[1030] Asian Human Rights Commission, *Thailand: Consolidating internal security State, complaisant judiciary*, AHRC-SPR-012-2011, 2011, p. 8, available at: http://www.humanrights.asia/resources/hrreport/2011/AHRC-SPR-012-2011.pdf/view.

notable obstacles in efforts to hold perpetrators to account. Mr Neelapaijit was investigating the alleged torture by security officials against five of his clients, when he was reportedly abducted on 12 March 2004 by five plainclothes police officers and he remains missing thereafter.[1031] Only one of the officers was convicted for his disappearance, however, he was later acquitted on appeal.[1032] Suderueman Malae, Mr Neelapaijit's client, claimed to have been tortured following his arrest for stealing weapons from an army base. The complaint was investigated by the Department of Special Investigation (DSI) and the National Anti-Corruption Commission (NACC), and was eventually dismissed due primarily to inconclusive physical examination reports.[1033] One of the officers being investigated for torture lodged a counter-claim against Mr Malae for issuing a false complaint, which resulted in the conviction and sentencing of Mr Malae in August 2011 to a two-yearterm of imprisonment.[1034]

The investigation and prosecution of human rights violation committed by both sides during the political clashes in 2010 seem to be conducted along partisan political lines. Following the protests, government forces enjoyed impunity whilst leaders, protesters and militants from the opposition UDD were subject to prosecution.[1035] However, since the arrival of a new government backed by the UDD in August 2011, "the focus of criminal investigations has been entirely on the cases in which government soldiers were implicated."[1036]

Applicability of statutes of limitation, amnesties and immunities

There are no general amnesty laws in place in Thailand. However, there is an on-going initiative to grant an amnesty to high-ranking officials, members of the security forces and politicians for abuses committed during the 2010 political unrest,

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[1031] Asian Human Rights Commission, *Thailand: Continued impunity for enforced disappearance in Thailand*, 21 February 2012, available at: http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc19/ALRC-CWS-19-05-2012.

[1032] Ibid.The case is pending on appeal before the Supreme Court as at this writing.

[1033] NACC public Statement, released 20 December 2010.

[1034] *'Black Case No. 2161/2552*, translated excerpts available in, the 'Thailand: Persecution of torture victims and the legalization of impunity in Thailand', A written Statement submitted by the Asian Legal Resource Centre (ALRC) to the Human Rights Council, Eighteenth session, September 2011, available at: http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc18/ALRC-CWS-18-03-2011.

[1035] Human Rights Watch, *Descent into Chaos: Thailand's 2010 Red Shirt Protests and the Government's Crackdown*, p. 7.

[1036] Human Rights Watch, 'Thailand: Don't Block Accountability for Political Violence', 30 March 2012, available at: http://www.hrw.org/news/2012/03/30/thailand-don-t-block-accountability-political-violence.

which has been criticised by human rights groups.[1037] As noted earlier, official acting "in good faith" are accorded immunity under Section 17 of the Emergency Decree.

The statute of limitation for grievous bodily harm, which is punishable with a maximum sentence of 10 years imprisonment, is fifteen years.[1038] The same limitation period, arguably applies to section 157 of the Criminal Code, which provides for up to 10 years imprisonment for a wrongful exercise of official functions resulting in injury to any person.[1039]

Protection of victims and witnesses

Effective victim and witness protection is essential to ensure that torture suspects are brought to justice. The Constitution affirms the right to appropriate treatment, protection and assistance to victims and witnesses under sections 40 (4) and (5). In addition, the Witness Protection Act requires "a competent official from criminal investigation, interrogation prosecution or the Witness Protection Bureau", as appropriate, to protect a witness in a case where he "loses his security".[1040] Protection under this Act extends to family members where necessary.[1041]

However, the Witness Protection Act has been criticised for itslack of detail and for excluding defendants from its scope, among other things. This presents an obvious problem for those tortured to induce a confession and wish to raise the matter in court.[1042] Victims or their families sometimes fail to register a complaint concerning violations perpetrated by state officials for fear of reprisals.[1043] Furthermore, human rights defenders and lawyers have reportedly faced intimidation and threats for their efforts to investigate human rights violations.[1044] Despite the fact that responsibility for witness protection in principle lies with the Witness Protection Office, the practical authority and

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[1037] Human Rights Watch, *Thailand: Don't Block Accountability for Political Violence*, 30 March 2012. The move has provoked renewed public protests with demonstrators blocking parliament in June 2012. See Thanyarat Doksone, Protesters block Thai Parliament over amnesty bill, Associated Press, 1 June 2012, available at: http://finance.yahoo.com/news/protesters-block-thai-parliament-over-amnesty-bill-151407511.html.

[1038] Criminal Code, ss.95 and 297.It must be noted, however, s. 297 defines grievous bodily injury in such a restrictive way as to require permanent injury or bodily pain causing infirmity for over twenty days, which makes it inapplicable to most instances of Torture and ill-treatment.

[1039] Ibid., s. 157.

[1040] Witness Protection Act, B.E. 2546 (2003), s. 6, unofficial translation available at: http://www.Article2.org/mainfile.php/0503/235/.

[1041] Ibid., s. 7.

[1042] *Protecting witnesses or perverting justice in Thailand*, Asian Legal Resource Centre, June 2006, pp. 13-14, available at: http://www.Article2.org/pdf/v05n03.pdf.

[1043] Working Group on Justice for Peace, *"Human Rights under Attack": Overview of the human rights situation in Southern Thailand*, p. 7, at footnote [19].

[1044] Ibid., p. 10.

overwhelming influence remains with the police.[1045] This has led to a situation whereby the Witness Protection Office rarely questions whether it is appropriate for the police to protect witnesses, and instead focuses on training them for the task.[1046]

10.5. Reparation

The Constitution provides victims with the right to seek a remedy and to obtain a court order to stop the violation. In the context of criminal cases, the right to obtain reparation is set out in the Damages for the Injured Person and Compensation and Expense for the Accused in the Criminal Case Act.[1047] Seeking reparation through this mechanism has not proved to be satisfactory, as many victims do not trust the witness protection programme and are afraid to file charges against offending officials.[1048] Moreover, it often takes a long time to receive compensation and, in financial terms, the amount is often insufficient.[1049] This echoes concerns raised by the UN Human Rights Committee in 2005[1050] that Thai reparation falls short of the standard set in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.[1051] Another avenue through which torture victims can seek reparations from a perpetrator is by claiming for damage sunder the Civil and Commercial Code,[1052] which fall within the jurisdiction of the civil or administrative courts. However, such remedies are curtailed by sections 16 and 17 of the Emergency Decree, which exempt government officials from civil or criminal proceedings as well as from proceedings before the administrative courts.

Although some victims have received compensation for violations carried out by state actors, arrangements are often made out of court to avoid the prospect of criminal prosecutions.[1053] For instance, the family of the aforementioned Imam who died in

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[1045] Article 2, *Protecting witnesses or perverting justice in Thailand*, p. 18.

[1046] Ibid.

[1047] Damages for the Injured Person and Compensation and Expense for the Accused in the Criminal Case Act, B.E. 2544 (2001), unofficial translation available at: http://www.thailawforum.com/laws/Damages%20for%20the%20injured%20person.pdf.

[1048] See Muslim Attorney Centre Foundation and Cross Cultural Foundation (MACF), *Report to UPR: Human Rights in Criminal Justice Systems in Southern Conflict & counter-insurgency policies of the State*, para. 22.

[1049] Ibid.

[1050] Human Rights Committee, *Concluding observations of the Human Rights Committee: Thailand*, para.15.

[1051] *'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'*, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, available at: http://www2.ohchr.org/english/law/remedy.htm.

[1052] Civil and Commercial Code, B.E. 2551 (2008), s. 420, first part available at: http://www.samuiforsale.com/law-texts/thailand-civil-code-part-1.html.

[1053] Asian Human Rights Commission, *Thailand: Compensation without criminal liability is no solution to the killings in Southern Thailand*, AS-24-2004,4 August 2004, available at: http://www.humanrights.asia/news/ahrc-news/AS-24-2004.

custody, Yapha Kaseng,was reportedly encouraged to settle out of court.[1054] Further questions have been raised over the amount of compensation paid. The compensation awarded often does not reflect the harm suffered, and the time to obtain reparations through the existing procedure is overly lengthy.[1055]

The availability of physical and psychological care is integral to the rehabilitation of torture victims. In Thailand, there are notable obstacles to the effective provision of such services, which includes lack of publicly funded treatment facilities, denial of access to medical treatment and the reluctance of health professionals to treat certain categories of torture victims because of fear of reprisal from state actors.[1056]

10.6. Conclusion

The protection of human rights in Thailand, including the right not to be tortured, is safeguarded by the Constitution. In practice, however, torture continues to be a serious problem, with endemic levels of abuse reported in the Southern border provinces in particular.

Draconian measures under the emergency laws have effectively encouraged violations by weakening procedural safeguards and virtually guaranteeing impunity for the actions of state officials. Despite numerous reports documenting torture and ill-treatment by the authorities in a variety of contexts, there appears to be little desire to investigate and prosecute those responsible. Intimidation of both victims and witnesses has proved to be another major obstacle in holding perpetrators to account. These conditions provide a sense of added urgency to calls from thevariety of NGOs and international bodies for the Government to criminalise torture.

The weakness of both the judiciary and the National Human Rights Commission has resulted in there being limited opportunity for victims to seek redress for their suffering. Access to medical treatment at all stages is either insufficient or denied for a variety of reasons, including undue state influence on health professionals. Although torture victims and their families are sometimes provided with compensation, it is often paid after a long delay as part of an out of court settlement and fails to reflect the gravity of the abuse that has taken place.

[1054] Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, p. 12.

[1055] Article 2, *Institutionalised torture, extrajudicial killings & uneven application of law in Thailand*, Asian legal Resource Centre, 15 April 2005, para.11(x), available at: http://www.Article2.org/mainfile.php/0402/186/.

[1056] Human Rights Committee, *Considerations of Reports Submitted by States Parties under Article 40 of the Covenant Initial report: Thailand*', 2 August 2004, UN DOC No.CCPR/C/THA/2004/1, para. 154, available at: http://www.unhchr.ch/tbs/doc.nsf/0/3feaef356b22ca8cc1256f1800499748/$FILE/G0443072.pdf.

Whilst compared favourably in some respects to many of its Asia-Pacific neighbours, the issue of torture in Thailand remains to be fully addressed. It would appear that offering better legislative protection, enhancing the independence of the judiciary and other oversight bodies as well as curtailing the use of emergency laws in volatile areas would be important first steps in tackling the problem.

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