REDRESS

Ending Torture. Seeking Justice for Survivors

LEGAL FRAMEWORKS TO PREVENT TORTURE IN AFRICA:

Best Practices, Shortcomings and Options Going Forward

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I. Introduction

Torture is one of worst scourges known to humankind. It is a problem in all regions of the world and affects all kinds of persons. Torture is a calculated assault on the body and/or the mind by persons with the responsibility to protect. It is done to instil fear, to dehumanise and degrade, to assert power and control. It represents the antithesis of the rule of law; where torture is allowed to fester, a range of other associated human rights abuses also tend to be present. This underscores why taking active steps to prevent torture and other forms of ill-treatment is so important. It also underscores why torturers must be prosecuted and why the survivors of torture must receive reparation, including compensation for the harms they suffered and access to rehabilitation.

International human rights law and in particular the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Convention Against Torture or UNCAT] place an obligation on States to investigate and prosecute allegations of torture. States Parties to the Convention Against Torture are obliged to take all legislative and other measures to prevent torture and other forms of cruel, degrading and inhuman treatment and punishment (ill-treatment), and provide redress to victims.

The criminalisation of torture is central to the prohibition – the need to make torture a crime under domestic law. But, this is not the sum total of States' obligations nor is it a barometer of States' compliance with the Convention Against Torture. The process of criminalisation must align with international law standards. The criminal law definition must adequately capture the different kinds of torture that can take place whether physical or mental or both; must not exempt certain officials from responsibility or provide other exceptions to responsibility linked to particular security or other contexts, and where an individual is found guilty of torture, it must result in an appropriately severe penalty.

Beyond criminalisation, there are a range of additional steps that States must take to adequately prevent, prohibit and redress torture and guarantee non-recurrence. States must put in place effective safeguards to reduce the risks of torture and ill-treatment and drastically limit the circumstances under which torture and ill-treatment can take place. Since the risk of torture and ill-treatment is greatest during arrest and detention, custodial safeguards are particularly important and widely recognised in international law and many legal systems. The exclusion of evidence obtained under torture is another important safeguard required under UNCAT. States are also under an obligation not to extradite, deport, expel or otherwise transfer a person to a State where he or she is at real risk of torture or ill-treatment. Regular monitoring of all detention centres by independent bodies is another important safeguard against torture. Further, adequate and accessible complaints procedures, including investigation and oversight mechanisms, an effective victim and witness protection operational framework and legal aid are all crucial safeguards against torture and important pre-requisites to facilitate victims' access to redress and enable accountability of perpetrators.

The Convention Against Torture also requires States to train law enforcement agents and other relevant officials on the prohibition of torture so that they can become agents

of change and to afford victims adequate and effective reparation. The effective implementation of States' obligations requires them to enforce transparently the laws and procedures that they put in place without exception and without discrimination.

The phrase 'anti-torture legislative framework' in this Report therefore refers not only to constitutional prohibitions and criminal laws but to the entire corpus of domestic laws and procedures relating to the prohibition, prevention, investigation and prosecution of torture and ill-treatment as well as victims' right to reparation. The existence of an adequate anti-torture legislative framework is central to the effective prohibition and prevention of torture. There is a considerable risk that States not having such a framework in place fall short of their international obligations.

In recent years, a number of countries around the world have adopted anti-torture legislation or are in the process of doing so. This is an important development which also involves a number of States in Africa that have taken the lead in such processes. This growing body of practice presents an opportunity to assess and build upon lessons learned and to take advantage of the current momentum with a view to ensuring that States put in place adequate anti-torture legislative frameworks and implement them effectively.

This Report is part of a regional project entitled "***Anti-Torture Legislative Frameworks: pan-African strategies for adoption and implementation***" in which REDRESS examined the anti-torture legislative frameworks in seven countries: the **Democratic Republic of the Congo** (DRC), **Kenya**, **Namibia**, **Nigeria, South Africa, Tunisia and Uganda**. The regional project is aimed at engaging and supporting States Parties to the African Charter on Human and Peoples' Rights to introduce, adopt and implement adequate and effective anti-torture legislation. The project builds on important work carried out by other civil society organisations and governments in the seven countries and beyond. The project furthermore benefits from the insights and advice of the Committee for the Prevention of Torture in Africa (CPTA) of the African Commission on Human and Peoples' Rights (African Commission). The CPTA is instrumental in engaging States Parties to the African Charter on Human and Peoples' Rights (African Charter) to encourage and foster greater compliance with States' obligations under Article 5 of the African Charter, including through the adoption of relevant legislation, as also highlighted in its Operational Work Plan for 2015-2016. In addition, the adoption of the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa in 2002 established a solid basis for the work of the CPTA and others to encourage and assist States in their vital work to adopt adequate legislative frameworks to prevent and prohibit torture and other ill-treatment. This is also fostered by the diplomatic and associated demarches undertaken by the Convention Against Torture Initiative.[1]

This Report is intended to assist the CPTA and other governmental and nongovernmental stakeholders working on and advocating for the adoption of anti-torture legislative frameworks in Africa. It presents an in-depth assessment of the legal frameworks in place in the countries researched in light of international and regional standards, including in particular the UNCAT and the Robben Island Guidelines. The

[1] A global initiative launched by the Governments of Chile, Denmark, Ghana, Indonesia and Morocco established to assist States to ratify and implement the Convention against Torture. See: http://www.cti2024.org/.

Report identifies best practices, shortcomings and the key components of an effective anti-torture legislative framework.

The Report is based on research carried out in the seven target countries on the basis of a detailed questionnaire drafted by REDRESS. It covers the body of international and regional instruments ratified; the status of international law in each of the countries and the corresponding substantive and procedural laws in each country. The research also considers relevant legislative processes in each country designed to further improve the legal and institutional anti-torture framework.

REDRESS would like to acknowledge and thank the following researchers for their in-depth research and their support throughout this project: **DRC**: Maître Thsiswaka Masoka Hubert, human rights lawyer; **Kenya**: Vincent Kodongo, legal human rights consultant; **South Africa**: Gwen Dereymaeker and Lukas Muntingh, Civil Society Prison Reform Initiative (CSPRI); **Namibia**: Jamil Ddamulira Mujuzi, Associate Professor, University of Western Cape; **Nigeria**: Nathanial Ngwu, human rights lawyer; **Tunisia**: Halim Meddeb, World Organisation against Torture (OMCT); **Uganda**: African Centre for the Treatment of Torture Victims (ACTV). The Report was written by REDRESS and incorporates invaluable research assistance from Laura Notes, Marte Johannessen and Hamsa Aboelfotouh, interns with REDRESS. All errors and omissions are attributable to REDRESS alone.

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II. Legal framework on the prohibition of torture and ill-treatment

II.1 International law

Ratification of a treaty signals a State's commitment to the principles and obligations set out therein; its agreement to be bound by the terms of the treaty. However, usually States will need to take a number of positive steps in order to ensure that they are capable of practically complying with all aspects of the treaty. A failure to implement the obligations and ensure respect of its provisions can undermine a State's commitment to the treaty to the point where it becomes practically meaningless. Immediately upon ratification, therefore, if not beforehand, States Parties to international treaties must ensure that their domestic law is in line with their obligations under the relevant treaties and that State institutions with particular roles under the treaty are well-prepared to act in compliance with the treaty. As most treaties clearly set out, States Parties are bound to make such legislative and other practical or procedural modifications as may be necessary to ensure the fulfillment of the obligations contained in the treaties.

States have discretion on the procedure they use to incorporate treaty obligations. The implementing procedure available to States will normally depend on their constitutional and political system. The Convention Against Torture requires States Parties to ensure that their domestic legislative framework prohibits conduct amounting to torture and that States Parties abstain from conduct amounting to torture. It also requires States Parties to take specific measures to ensure practical implementation of the prohibition of torture, including positive measures of prevention, ensuring adequate and effective mechanisms to investigate allegations of torture and where sufficient evidence exists to initiate prosecutions. The Convention also requires effective remedies and reparation for victims, and where relevant, their families.[2] The Robben Island Guidelines similarly request State Parties to the African Charter to take a range of legal and practical measures to comply with their obligations under Article 5.[3] The Guidelines also request States to ratify "relevant international and regional human rights instruments [including UNCAT] and ensure that these instruments are fully implemented in scope for accessing the human rights the circumstances of the case, including the duration of the treatment or punishment, its physical and mental effects that they establish."[4]

a. Ratification of international and regional instruments

All seven countries covered by the project have expressly committed to the prohibition of torture by ratifying the UN Convention Against Torture, the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR).[5] However, only the **Democratic Republic of the Congo (DRC)**,

[2] See Article 2 (1) of the UN Convention Against Torture, which states that: "[E]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."
[3] African Commission, 'Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa,' 2002, at http://www.achpr.org/instruments/robben-island-guidelines-2008/.
[4] Ibid, Part I (A).
[5] All seven countries are also parties to the Rome Statute of the International Criminal Court and the 1949 Geneva Conventions.

Nigeria and **Tunisia** are parties to the Optional Protocol to UNCAT (OPCAT) which provides a clear framework for the establishment of national preventative mechanisms (monitoring bodies) and supervision by the UNCAT Subcommittee on the Prevention of Torture. **Kenya**, **South Africa**, **Tunisia** and **Uganda** have ratified the Protocol establishing the African Court on Human and Peoples' Rights whereas the **DRC**, **Namibia** and **Nigeria** have signed but not ratified the Protocol. None of the countries examined has ratified the International Convention for the Protection of All Persons from Enforced Disappearance (CED). There is an important link between enforced disappearances and torture. The victims of enforced disappearance are often subjected to torture and additionally, the failure by States to reveal to family members the whereabouts of their missing loved ones can cause extreme mental anguish and has been held to constitute a particularly cruel form of ill-treatment which may also amount to torture.[6]

All seven States have ratified the Geneva Conventions of 1949 and the Statute of the International Criminal Court (Rome Statute). Common Article 3 of the four Geneva Conventions of 1949 and various other provisions in those conventions prohibit cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment of civilians and persons *hors de combat*.[7] Torture is also recognised in the two Additional Protocols.[8] In addition, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health constitute grave breaches of the Geneva Conventions.[9]

Torture is also reflected as an underlying offence in the Rome Statute.[10] It is one of the possible underlying offences for a war crime, a crime against humanity, and/or genocide. Torture can constitute a crime against humanity if it is perpetrated as part of a widespread or systematic practice or attack on a population. It can constitute a war crime in both international and non-international armed conflicts when it is perpetrated on persons protected under one or more of the Geneva Conventions. It can also constitute genocide in certain circumstances. The ICC Statute provides that causing serious bodily or mental harm to members of an ethnical, racial or religious group as such, committed with intent to destroy, in whole or in part, that group, satisfies the definition of the crime of genocide.[11]

[6] This has been recognised by numerous court and treaty bodies, including the African Commission. See, for example, *Mouvement Burkinabé des Droits de l"Homme et des Peuples v. Burkina Faso,* Comm. No. 204/97 (2001), para. 44.
[7] Geneva Convention 1 Art. 12(2); Geneva Convention 2 Art. 12(2); Geneva Convention 3 Arts. 13, 17(4), 87(3), 89; Geneva Convention 4 Arts. 27, 32.
[8] Additional Protocol I Art. 75(2); Additional Protocol II Art. 4(2).
[9] Geneva Convention 1 Art. 50; Geneva Convention 2 Art. 51; Geneva Convention 3 Art. 130; Geneva Convention 4 Art. 147; Additional Protocol I Art. 11.
[10] E.g., ICC Statute, Arts. 7(1)(f); 8(2)(a)(ii) and 8(2)(c)(i).
[11] Art. 6(b) ICC Statute.

Table 1: Overview of relevant treaties ratified

Country	ACHPR	ICCPR	UN CAT	OPCAT	African Court Protocol	CED	Geneva Conventions	Rome Statute
DRC	✔	✔	✔	✔	---	---	✔	✔
Kenya	✔	✔	✔	---	✔	---	✔	✔
Namibia	✔	✔	✔	---	---	---	✔	✔
Nigeria	✔	✔	✔	✔	---	---	✔	✔
South Africa	✔	✔	✔		✔	---	✔	✔
Tunisia	✔	✔	✔	✔	✔	---	✔	✔
Uganda	✔	✔	✔		✔	---	✔	✔

b. Status and applicability of international law in the domestic legal system

The applicability of treaty-based international law in the domestic legal system varies among the seven target countries. In the **DRC** and **Tunisia**, duly ratified treaties have a superior status over domestic laws and are directly enforceable.[12] While no comprehensive anti-torture legislation exists in either country, there is a criminal law prohibition of torture in both the DRC and Tunisia.

The Constitutions of the **DRC**,[13] **Kenya**[14] and **Namibia**[15] provide that international instruments that have been ratified by the State automatically form part of domestic law and can be directly invoked in national courts. However, legislative practice in these countries suggests that domestic implementing legislation is nonetheless adopted in regards to specific treaties. **Namibia** for instance has adopted specific legislation in regards to the 1949 Geneva Conventions, while **Kenya** has incorporated the definition of torture from Article 1 of the UN Convention Against Torture into the National Police Service Act of 2011 and the National Intelligence Service Act of 2012. Similarly, the DRC in 2011 adopted the "Law Criminalising Torture" incorporating some of its obligations under UNCAT.[16]

The **Ugandan** Constitution is silent about the status of international law in the domestic legal system, yet there is nonetheless a practice of adopting implementing legislation for various treaty obligations. UNCAT for instance has been implemented by the Prevention and Prohibition of Torture Act of 2012 (PPTA of 2012).

Nigeria and **South Africa** have a dualist system in relation to treaty-based international law, and therefore require specific implementing legislation to enable the application of international treaties before national courts.[17] **Nigeria** has implementing legislation for

[12] However, according to Article 215 of the Constitution of the DRC, treaties can only be directly invoked once they have been published in the Official Journal.
[13] Constitution of the DRC, Article 215.
[14] Constitution of Kenya, Article 2(6)
[15] Constitution of Namibia, Article 144.
[16] See further below, Section II.2.
[17] Section 231 of the South African Constitution reads that an international agreement is binding only after it has been approved by Parliament *and* after the adoption of domesticating legislation. See, Constitution of the Republic of South Africa, s. 231(2) and (4). Section 12(1) of the 1999 Constitution of Nigeria provides that: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."

the African Charter[18] but not yet for the UNCAT.[19] **South Africa** has enacted domestic legislation in relation to a variety of treaties including UNCAT through the Prevention of Combating and Torture of Persons Act 13 of 2013 (South Africa Torture Act).

The research confirms further that the introduction of specific legislation and/or amendment of existing legislation are crucial components of treaty compliance, irrespective of the legal system (civil or common law, dualist or monist). States are therefore strongly encouraged to carry out a thorough review of the domestic legal framework and assessment of its compliance with obligations, in particular where relevant legislation (such as the national Penal Code, Code of Criminal Procedure) date back to a time prior to ratification. The CPTA could make it a standard procedure to assess a State Party's legal framework in the margins of promotional visits and when reviewing States' Periodic Reports. The CPTA's recent practise of using a model questionnaire on Article 5 when examining States' Periodic Reports, with questions on the legal framework, takes this approach. In addition, civil society organisations could make available to the CPTA information on legislative (and practical) gaps regarding State compliance with Article 5. Such information could be taken into account by the CPTA's annual report to the ACHPR on the state of torture in Africa.

II.2 Definition of torture and ill-treatment under domestic law

a. Defining torture

The criminalisation of torture is one of the key obligations under UNCAT. States should ensure that torture is designated and defined as a specific and separate crime of the utmost gravity in national legislation.[20] To subsume torture within a broader, more generic offence (for instance assault causing grievous bodily harm or the abuse of public office) fails to recognise the particularly odious nature of the crime. Also, it makes it more difficult for States to track, report upon and respond effectively to the prevalence of torture. It also prevents the procedural aspects of the Convention from applying to acts that would otherwise amount to torture, such as limitation periods, immunities and amnesties.

The most effective way to ensure compliance with the Convention is to ensure that all acts of torture are criminalised and to insert a definition of torture in conformity with

[18] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10, Laws of the Federation of Nigeria 1990. In the case of *Inspector General of Police v. A.N.P.P* (2007) 18 NWLR Pt1066, 457, the Court held that Act Cap 10 is a "Statute with international flavor… [and] if there is a conflict between it and another Statute, its provisions will prevail over those of that Statute for the reason that is presumed that the Legislature does not intend to breach an international obligation," para.37.

[19] At the time of writing, an anti-torture bill was being developed in Nigeria.

[20] Article 4 of UNCAT provides: "[E]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 1 of the Convention Against Torture.[21] While the African Charter does not provide a definition of torture, the Robben Island Guidelines stipulate that "States should ensure that acts, which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems."[22] Inserting a clear definition of torture into the relevant national law that incorporates the definition under Article 1(1) UNCAT minimises the possibility that courts will fail to interpret the crime in line with international requirements. Accordingly, States should ensure that the definition of torture in national law reflects the following key elements of torture as highlighted in Article 1 (1) of UNCAT:

> "For the purposes of this Convention, the term "torture" means any act by which **severe pain or suffering**, whether **physical or mental**, is **intentionally** inflicted on a person for **such purposes** as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a **public official** or other person acting in an **official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to **lawful sanctions**."[23]

(1) The requirement of intent

The Convention requires that for an act to constitute torture it must have been committed with **intent**. As such, acts committed through negligence would not amount to torture. As former UN Special Rapporteur on Torture Manfred Nowak has explained, "A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food *for the purpose* of extracting certain information, that ordeal, in accordance with article 1, would qualify as torture."[24]

Yet, the degree of intent required for an act to constitute torture is itself not free from debate. In the period following the 11 September 2001 terrorist attacks in the United States, the Office of Legal Counsel at the US Department of Justice issued a memorandum in which a specific intent requirement was inserted into the US Government's understanding of torture. Torture was limited to "acts inflicting, and that are specifically intended to inflict, severe pain or suffering."[25] However, a more accepted understanding is that the perpetrator need not have intended to cause serious pain or suffering; it is enough if the severe pain and suffering is the natural and most obvious

[21] Some States have extended the definition in Article 1 of UNCAT by expressly including acts of torture committed by non-State actors, see for instance section 3 of the Ugandan PPTA of 2012.
[22] Robben Island Guidelines, para.4.
[23] Article 1 (1) of UNCAT.
[24] Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/13/39/Add.5, 5 February 2010, para. 34.
[25] Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 1 August 2002.

result of the conduct. This approach was taken in a recent decision of the UN Committee Against Torture concerning Burundi, in which the Committee determined that:

> "The Committee has noted the State party's argument that the actions of the police officers were unplanned, that the officers were not acting on orders and that therefore the acts in question cannot be classified as torture. In this regard, the Committee observes that, according to information provided by the complainant that has not been contested by the State party, the individuals who beat and interrogated him were uniformed police officers armed with rifles and belts. Furthermore, the complainant was severely beaten for two hours by police officers within the police station itself. Based on the information provided to it, the Committee concludes that the abuse inflicted upon the complainant was committed by agents of the State party acting in an official capacity and that the acts constitute acts of torture within the meaning of article 1 of the Convention."[26]

In assessing whether an act was committed intentionally, courts have considered that the burden of proof shifts to the State to disprove torture once a credible allegation has been made.[27] The European Court of Human Rights noted in a case where there was no direct evidence of intent, that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused."[28]

(2) The severity of the pain or suffering, whether physical or mental

The Convention also specifies that for an act to constitute torture, it must constitute severe pain or suffering whether physical or mental. The Convention does not enumerate a list of acts that are severe enough to satisfy the threshold of what is meant by torture. This is because the severity of the act must be analysed in view of the context in which it is carried out and the impact it has on the victim, and because it would be impossible to exhaustively list all of the different forms of torture; there continue to be new forms of ill-treatment dreamt up by perpetrators which would amount to torture.

In assessing whether a particular treatment is sufficiently severe to meet the test of severity for torture, courts have considered the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The African Commission for instance found in the *Abdel Hadi Radi* case that conduct "ranging from severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their bodies, death threats, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after, as well as other forms of ill-treatment,"[29] which resulted in serious physical injuries and psychological trauma, amounted to torture. According to the Commission, "this treatment and the surrounding

[26] *EN v. Burundi*, UNCAT, Communication No. 578/2013, UN Doc CAT/C/56/D/578/2013, 16 February 2016, para. 7.3.
[27] See for instance, European Court of Human Rights (ECtHR), *Selmouni v. France* (Grand Chamber), Judgment, 28 July 1999, para. 87. See also, ECtHR, *Aksoy v Turkey*, Judgment, 18 December. 1996.
[28] *Selmouni*, ibid.
[29] African Commission, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication 368/09, 5 November. 2013, para. 71.

circumstances were of such a serious and cruel nature that it attained the threshold of severity as to amount to torture."[30]

(3) Specific purpose

For an act to be considered as torture under Article 1 (1) of the Convention Against Torture it must be inflicted for a specific purpose (such as a form of punishment, intimidation, soliciting information, discrimination). This list is non-exhaustive as Article 1(1) provides for "such purposes as" and it has been interpreted broadly.[31] States are free to add other purposes to this list, yet must ensure that the list of purposes remains open and flexible for inclusion of other purposes not mentioned in the definition.[32]

(4) Official capacity

For treatment to amount to torture under international human rights law, it must be carried out by, or at the instigation of or consent or acquiescence of public officials or another person acting in an official capacity. This emphasis on the State reflects the overall role of human rights law to regulate the relationship between individuals and communities with that of the State; it is the State that takes on obligations vis-à-vis those persons and groups within its effective control. It also reflects the odiousness of the crime. The involvement of the State – the body with the obligation and the power to protect all those subject to its jurisdiction – in causing severe pain or suffering makes the crime even more heinous. Nonetheless, international human rights law recognises at least two contexts of torture involving non-state actors. First, the UN Committee against Torture has considered that acts by *de facto* authorities, such as rebel and insurgent groups which "exercise certain prerogatives that are comparable to those normally exercised by legitimate governments" may amount to torture within the definition of Article 1(1).[33] Second, the Committee has also considered that the obligation to prevent torture requires States to exercise due diligence to protect persons within their jurisdiction from acts causing severe pain or suffering. In *Dzemajl et al. v. the Federal Republic of Yugoslavia,* the police, though present at the scene, failed to intervene to prevent the destruction of a Roma settlement by private citizens. The Committee determined that this failure to act amounted to acquiescence in the acts, which were understood to amount to cruel, inhuman or degrading treatment.[34]

In contrast, international humanitarian law and international criminal law do not restrict the notion of torture to acts carried out by State officials. At the International Criminal Tribunal for the former Yugoslavia (ICTY), the *Kunarac* Trial Chamber determined that

[30] Ibid, para.73.
[31] See for instance International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Delalić et al.,* Trial Chamber (TC), 16 November 1998, para. 470.
[32] This interpretation is reflected in the Inter-American Convention to Prevent and Punish Torture, which in Article 2 refers to "for any other purpose." The requirement for a specific purpose also does not feature in the Rome Statute of the ICC for the underlying offence of crimes against humanity (but it is incorporated in the Statute for war crimes, see ICC Elements of Crimes, 8(2)(a)(ii)-1(2) and 8(2)(c)(i)-4(2)),
[33] UN Committee Against Torture, *Elmi v Australia*, Communication No. 120/1998, 14 May 1999, UN Doc. CAT/C/22/D/120/1998, para. 6.5.
[34] UN Committee Against Torture, *Hajrizi Dzemajl et al. v. Federal Republic of Yugoslavia*, Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000, 21 November 2002, para. 9.2.

the "characteristic trait of the offence. . . is to be found in the nature of the act committed rather than in the status of the person who committed it."[35] Consequently, "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law."[36] The Appeals Chamber affirmed this reasoning.[37] The jurisprudence of the International Criminal Tribunal for Rwanda[38] and the provisions of the ICC Statute[39] largely reflect this ICTY jurisprudence.

Our research and activities during the Project suggest that the 'Public Official Requirement' is a point of significant discussion among lawmakers, civil society and other stakeholders in almost every country considering introducing anti-torture legislation and/or a definition of torture in domestic law.[40] Proponents of a definition of torture limited to acts involving public officials underline that it is the 'official- element' and link to the State what distinguishes the crime of torture from other crimes – it is this breach of duty to those to which the State owes an obligation to protect, which makes the crime of torture so particular and so heinous. To drop the public official requirement is to lessen the stigma of the crime. Also, it might undermine the prospect of holding the State accountable, by leading to an overly broad understanding of torture that may result in it being used primarily or only against non-State actors. Those arguing in favour of widening the definition point towards the extremely egregious crimes committed with increasing frequency by non-State actors that would meet the severity threshold of torture, for instance in the context of armed conflict, and the corresponding need for accountability of perpetrators and justice for victims. However, in certain instances, the contexts would engage international humanitarian law, and thus prosecution frameworks exist – both at the international law level and through States' implementation of the Geneva Conventions and the International Criminal Court Statute into domestic law. However, there may be instances in which egregious crimes committed by non-State actors do not satisfy the additional elements for the offences of crimes against humanity, war crimes or genocide. In such cases, in most States it would only be possible to prosecute such individuals for common criminal offences such as assault causing bodily harm. There has thus been debate as to whether there is a need to widen the definition of torture to allow for torture prosecutions of non-State actors and whether the benefits outweigh the risks. A number of countries, including Algeria, Armenia, Australia (Queensland), Belgium, Brazil, Montenegro, Slovenia and Russia define torture without requiring a link to a public official. In some of these countries, these laws have been used to prosecute extreme forms of domestic violence, including child abuse.

[35] ICTY, *Prosecutor v. Kunarac et al.*, TC, Judgment, 22 Feb. 2001, para. 495.
[36] Ibid, para. 496.
[37] ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, 12 June 2002, para.148.
[38] ICTR, *Prosecutor v. Semanza*, TC, Judgment, 15 May 2003, paras. 342-343.
[39] Arts. 7(1)(f) (Crimes against Humanity) and 8(2)(c)(i) and (ii) (War Crimes).
[40] There were discussions on this theme during a project meeting organised by REDRESS for researchers from the seven countries covered by the research, which took place in Nairobi, September 2015, and during an expert meeting convened by REDRESS and the Independent Medico-Legal Unit in Nairobi from 25-26 January 2016.

(5) Lawful sanctions and the prohibition of corporal punishment

While the definition of torture under the Convention does not include "pain or suffering arising from, inherent in or incidental to lawful sanctions," this limitation has been interpreted restrictively. A sanction considered lawful under national law may nonetheless constitute torture or other prohibited treatment under international law if it causes severe pain or suffering and meets the additional elements of the definition.

Forms of corporal punishment that have been outlawed under international law include using canes or whips, lashes, "excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."[41] The African Commission considered in a case against Sudan that lashes imposed as a form of punishment amounted to a violation of Article 5 of the African Charter, finding that "[T]here is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty."[42] Similarly, the CPTA has determined that judicial corporal punishment is cruel, inhuman or degrading "because the punishment is carried out in public, oftentimes on the bare backside of a victim, and in the case of flogging, the injuries sustained are severe…"[43] The CPTA stressed that this form of sanction is "clearly a punishment of the past" amounting "to torture or other cruel, inhuman or degrading treatment or punishment."[44]

Corporal punishment is prohibited as a form of discipline or as judicial sanction in all of the countries examined in this Report except for **Nigeria**, where caning is authorised as a sentence for crime,[45] and other severe forms of corporal punishment such as lashing, amputation, and stoning to death are authorised by the Shari'a penal codes in the Northern states.[46] While partly rooted in tradition, these provisions can also be traced to colonial legislation, such as Nigeria's Criminal Procedural Act of 1945, underlining an urgent need for law reform. The provision of corporal punishment under Shari'a law has been criticised by scholars holding that Shari'a should be confined to ideal just societies that we do not live in today.[47] A number of UN human rights bodies have raised concerns in relation to the maintenance of corporal punishment in Nigeria, both in relation to provisions of the criminal code and the Shari'a penal codes.[48] These bodies,

[41] UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (UN Human Rights Committee, General Comment No.20), 1992, para.5.
[42] African Commission, *Curtis Francis Doebbler v Sudan*, Communication 236/00, para. 42.
[43] See CPTA, Inter-Session Activity Report (May 2015 to November 2015) and Annual Situation of Torture and Ill-treatment in Africa Report, November 2015, para.15, at http://www.achpr.org/files/sessions/57th/inter-act-reps/241/57os_intersession_report_pt_eng.pdf.
[44] Ibid, para.28.
[45] Nigeria, Criminal Procedure Act, Article 385-7.
[46] Section 93 of the Centre for Islamic Legal Studies' Draft Harmonised Sharia Penal Code Annotated, http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_4_4_chapter_4_part_III.pdf (note this does not reflect the actual law of any one state; rather it represents a summary of the Shari'a Penal Codes of ten of the Northern states, with annotations explaining the differences among the States).
[47] See for instance A. An Naim, 'Towards a Cross- Cultural Approach to Defining International Standards on Human Rights: The meaning of Cruel, Inhuman or Degrading Treatment or Punishment, in A. An Naim (ed), Human Rights in Cross- Cultural Perspectives: A Quest for Consensus, University of Philadelphia, 1992, pp. 19-43, particularly at pp. 34-57.
[48] UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Nigeria, A/HRC/7/3/Add.4, 22 November 2007; UN Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention; Concluding observations: Nigeria, CRC/C/NGA/CO/3-4, 21 June 2010, paras 40-41; UN Commission on Human Rights, Report of the Special Rapporteur on freedom of religion or belief: Mission to Nigeria, Civil and Political Rights, Including Religious Intolerance, E/CN.4/2006/5/Add.2, 7 October 2005, para. 66-68; 72-74; 99-102.

including the UN Special Rapporteur on torture and the UN Committee on the Rights of the Child have consistently called for the prohibition of corporal punishment in Nigeria.[49]

The **Ugandan** Supreme Court ruled as unconstitutional corporal punishment as a sentence for crime.[50] It is also prohibited as a disciplinary measure in penal institutions in Uganda.[51] Corporal punishment is not authorised in **South Africa** as a disciplinary measure in prisons,[52] and is prohibited as a criminal sentence following the Constitutional Court ruling in *S v Williams and Others*, a case concerning 'judicial corporal punishment' of six juveniles convicted and sentenced to caning. The Court decided that such punishment was unconstitutional.[53] Similarly, the Supreme Court of **Namibia** has held that corporal punishment amounted to ill-treatment and is therefore unconstitutional under Article 8(2)(b) of the Constitution.[54] There is also a general prohibition of corporal punishment in **Kenya** in accordance with Article 29(e) of the Constitution, which specifically outlaws the practice, as well as the Criminal Law (Amendment) Act 2003. In the **DRC**, corporal punishment is prohibited as a sentence for crime in accordance with Ministerial decision.[55]

But corporal punishment has a much wide application beyond criminal law detention or punishment settings, covering "in particular, children, pupils and patients in teaching and medical institutions."[56] The countries covered by the research all prohibit corporal punishment in education settings with certain limitations. For instance, in the **DRC**, it is prohibited as a disciplinary measure in schools.[57] The prohibition forms part of **Kenya**'s Basic Education Act 2013,[58] section 56 of **Namibia**'s Education Act,[59] article 94(9) of **Uganda**'s Children Act 2003 and there is a specific bill currently under consideration which includes a prohibition of corporal punishment in schools.[60] It is prohibited in **South Africa** as a form of discipline in schools and places of detention and care for juveniles.[61] In Nigeria however, corporal punishment is also not prohibited in schools and penal institutions[62] and has been justified as being a necessary "immediate response to

[49] See for example, UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum: Follow up to the recommendations made by the Special Rapporteur visits to China, Denmark, Equitorial Guinea, Georgia, Greece, Indonesia, Jamaica, Jordan, Kazakhstan, Mongolia, Nepal, Nigeria, Paraguay, Papua New Guinea, the Republic of Moldova, Spain, Sri Lanka, Togo, Uruguay and Uzbekistan, A/HRC/19/61/Add.3, 1 March 2012, para 85-92; UN Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention; Concluding observations: Nigeria, CRC/C/NGA/CO/3-4, 21 June 2010, paras 40-41.
[50] Supreme Court of Uganda, *Kyamanywa Simon v.Uganda*, Constitutional Reference No.10 of 2000, 14 December 2001.
[51] Uganda, The Prisons Act (2003, in force May 2006), see section 81 (2): ""Stripping a prisoner naked, pouring water in a cell of a prisoner, depriving him or her of food and administrating corporal punishment and torture is prohibited."
[52] Corporal punishment was removed from the legislation in 1996 (Correctional Services Second Amendment Act 1996) but is not expressly prohibited in the Correctional Services Act 111 of 1998. Segregation and mechanical restraints cannot be used as a disciplinary measure: ss. 30(9) and 31(6) of the CSA.
[53] Constitutional Court, *South Africa, S v Williams and Others* (CCT20/94) 1995 (3) SA 632 (CC) (9 June 1995).
[54] Supreme Court of Nigeria, Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State (SA 14/90) [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991).
[55] Ministerial decision No. MINEPSP/CABMIN/00100940/90 of 1 September 1990.
[56] HRC, General Comment no. 20, para. 5. See also, Committee on the Rights of the Child, 'General Comment No.8 on the Prohibition of all forms of Corporal Punishment, CRC/C/GC/8, 2 March 2007, para.32
[57] Ministerial decision No. MINEPSP/CABMIN/00100940/90 of 1 September 1990.
[58] Kenya, Basic Education Act 2013, section *36.*
[59] Namibia, Education Act No. 16, 2001.
[60] Uganda, The Children (Amendment) Bill (No. 2, 2015). See Global Initiative to End all Corporal Punishment of Children, Corporal punishment of children in Uganda, January 2016, http://www.endcorporalpunishment.org/assets/pdfs/states-reports/Uganda.pdf.
[61] South African Schools Act 84 of 1996, s. 10; Regulations under the Children's Act 38 of 2005, arts. 65, 69, 73 and 76.
[62] See Global Initiative to End all Corporal Punishment of Children, Corporal punishment of children in Nigeria, June 2015, http://www.endcorporalpunishment.org/assets/pdfs/states-reports/Nigeria.pdf.

indiscipline," "an essential aspect of discipline" to be preferred over other forms of punishment, such as suspension from school.[63]

Despite the recognition of this wide application of the principle at the international level, corporal punishment in the home, for example, is not prohibited in any of the countries, except **Tunisia**.[64] This is of serious concern, as it provides a virtual license for domestic violence and violence against children. For example in **Uganda**, corporal punishment can be applied on children in the home within the common law rule of "reasonable chastisement." In **South Africa**, corporal punishment is not prohibited in the home, despite civil society advocacy and government commitments to expressly prohibit it by statute.[65] In the **DRC** there is no prohibition in place for corporal punishment in the home, day care and alternative care settings. Article 326(4) of the Family Code 1987 for instance states that "a person exercising parental authority may inflict reprimands and punishments on the child to an extent compatible with its age and the improvement of its conduct."[66] In **Nigeria**, Corporal punishment is also lawful in the home as per Article 295 of the Criminal Code (South) and Article 55 of the Penal Code (North).

b. Defining torture in domestic legislation in countries covered by the research

The legal frameworks in the **DRC** and **South Africa** criminalise torture and provide for a definition of torture that reflects the UNCAT definition.[67]

Namibia and **Nigeria** have not criminalised torture as such and torture is not defined in the legal framework of either country. Until the adoption of the anti-torture bills currently pending in both countries, acts which would amount to torture could in principle only be prosecuted and punished under common law crimes such as assault causing grievous harm, which does not carry the same weight or stigma. As highlighted above, this makes it difficult to track instances of torture and to ensure that those responsible are adequately held to account and that victims of torture obtain adequate redress for their harm suffered.

The **Ugandan** PPTA in its 'Second Schedule' includes a long list of "[A]cts constituting torture", including physical, mental and pharmacological torture. The anti-torture bills currently being developed in **Kenya**[68] and **Nigeria**[69] similarly include lists of acts constituting torture, with both bills underlining the non-exhaustive nature of the lists. Even though they are non-exhaustive, such lists of acts amounting to torture can nonetheless be problematic as they may discourage judges and other actors including

[63] See for instance, Dr. E.D. Nakpodia, "Principals' Attitude Towards Corporal Punishment in Nigeria Secondary Schools," in Global Journal of Human Social Science Linguistics & Education, 2012, p. 2.
[64] Law No. 2010-40 of 26 July 2010, amending article 319 of the Criminal Code, Code of Child Protection, the Code of Criminal Procedure (amended 2005) Law No. 2001-52 (2001) on the Organisation of Prisons.
[65] Global Initiative to End all Corporal Punishment of Children, *Corporal punishment of children in South Africa*, July 2015, available at http://www.endcorporalpunishment.org/assets/pdfs/states-reports/SouthAfrica.pdf.
[66] See Global Initiative to End all Corporal Punishment of Children, Corporal punishment of children in the Democratic Republic of the Congo, August 2015, http://www.endcorporalpunishment.org/assets/pdfs/states-reports/DRCongo.pdf.
[67] See e.g., DRC, Article 48bis of Law 11/008 of 9 July 2011.
[68] Kenya Prevention of Torture Bill, 2011 (version of January 2015), First Schedule, section 2, copy on file with REDRESS.
[69] Nigerian Law Reform Commission, 'A bill for an Act to prevent, prohibit and penalize acts of torture, cruel, inhuman or degrading treatment or punishment and for other related matters,' copy on file with REDRESS.

litigants from recognising as torture new forms of cruelty that have not made their way onto the list and may also dissuade judges from analysing the facts on a case by case basis and taking into account the specific context and circumstances of each case. Equally, it might prompt perpetrators to tailor their cruel behaviour to avoid those methods of torture that have been listed. Some conduct which is not listed may nonetheless constitute torture if in the circumstances and taking into account the particular situation of the victim, it produced severe pain or suffering and was carried out for a specific purpose. The UN Human Rights Committee has noted that it does not "consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."[70]

Unlike the UNCAT definition the **Ugandan** PPTA of 2012 does not include specifically, discrimination as an enumerated purpose for which torture might be inflicted. The list of purposes set out in the Ugandan PPTA is non-exhaustive ("torture means any act…inflicted for such purposes as") yet by failing to expressly include discrimination as a purpose, the definition in that respect is arguably restrictive. From a practical perspective, litigants and judges interpreting the provision may not think to consider discrimination when assessing whether torture occurred.

Tunisia's definition of torture which appears in the 1999 amendment to the Criminal Code[71] as amended by Decree No. 106 in 2011,[72] limits torture to those acts committed for the purposes of extracting a confession or information and for racial discrimination. It excludes other prohibited purposes, specifically removing the critical purpose of "punishment" and its reference to racial discrimination rather than to "discrimination of any kind" is overly narrow, excluding an array of other possible forms of discrimination.[73] The UN Special Rapporteur on Torture called on Tunisia in June 2014 to ensure that "the national definition of torture [is] brought into accordance with the UN Convention against Torture."[74]

The **Ugandan** PPTA definition provides for torture inflicted "by or at the instigation of or with the consent or acquiescence of any person whether a public official or other persons acting in an official or private capacity."[75] The reason for extending the definition was to include widespread acts of violence committed by rebel groups in the conflict in Northern and Western Uganda, in particular the Lord Resistance Army and Allied Democratic Forces.

In **Kenya**, an anti-torture bill criminalising torture more broadly has been pending since 2011 but has yet to be discussed in Cabinet and presented to Parliament for adoption. As a result, Kenya does not have a comprehensive criminal law prohibiting torture:

[70] UN Human Rights Committee, General Comment No.20, para.4.
[71] Article 101bis of the Tunisian Criminal Code, amended by Law no. 89 of 2 August 1999.
[72] Décret-Loi 2011-106 of 22 October 2011 amending the Code of Criminal Procedure; the amendment provided that any public "official or similar person who orders, encourages, endorses or keeps silent about torture" could be considered a perpetrator.
[73] World Organisation against Torture (OMCT), "L'Interdiction-de-la-torture-et-des-mauvais-traitement en Tunisie : Etat de lieu et recommandations"; see also Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Follow up report: Missions to the Republic of Tajikistan and Tunisia, A/HRC/28/68/Add.2, 27 Feb 2015, para. 64.
[74] See UN Office of the High Commissioner for Human Rights (OHCHR), 'Tunisia: More than political will is needed to eradicate torture- UN rights expert,' 6 June 2014, at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14671&LangID=E.
[75] Section 2, PPTA of 2012.

torture is defined and criminalised under the National Police Service Act of 2011 and the National Intelligence Service Act of 2012. The definitions provided under the two acts mirror the definition of torture under UNCAT.[76] Torture is similarly an offence under Section 20 of the Chief's Act[77], the Children's Act,[78] and the Persons Deprived of Liberty Act 2014.[79] Despite the fact that the definitions reflect the UNCAT definition, there is a risk that Kenya's piece-meal approach to the definition and criminalisation of torture prevents a uniform and coherent approach to ensuring accountability for torture as well as redress for victims. This is further underlined by the different procedural rules applicable to the above Acts, and different penalties applicable for torture committed under these Acts.[80] Furthermore, as torture is not a specific offence under Kenya's penal code, other officials as well as persons acting in an official capacity not falling within the categories covered by the respective acts, including for instance officers of the Kenya Wildlife Service, Kenya Forest Guards, and Kenya Defence Forces, cannot be held criminally responsible for torture.

c. The prohibition of cruel inhuman and degrading treatment or punishment (ill-treatment)

In addition to torture, UNCAT explicitly prohibits other acts of cruel, inhuman and degrading treatment or punishment and requires States to prevent such acts in any territory under their jurisdiction.[81]

While there is arguably no obligation on States under the UNCAT to criminalise ill-treatment as a special offence in domestic legislation, Article 16 UNCAT provides a strong incentive for doing so as criminalising ill-treatment is one way in which States can prevent it. In the countries reviewed, the prohibition of ill-treatment is found in the Constitutions of most countries. Despite this, most of these countries have not defined ill-treatment or created a specific criminal offence of ill-treatment. Thus, instances of ill-treatment will only be investigated and prosecuted when the facts correspond to other common law offences such as assault. This is the case for the **DRC**, **Namibia**, **Nigeria** and **South Africa**, where acts amounting to ill-treatment could in principle be prosecuted and punished as 'ordinary offences' under the respective penal codes.

Introducing the prohibition of and criminalising ill-treatment as a separate offence can be challenging, mainly because no precise definition of ill-treatment exists under international law. Despite this, several countries such as **Kenya** and **Uganda** have made ill-treatment a separate offence. **Kenya** makes ill-treatment a specific criminal offence under Sections 2 and 51 of the National Police and Intelligence Services Acts.[82] The Acts define ill-treatment as "a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a person in authority or the agent of the person in authority against a person under his custody, causing suffering, gross humiliation or debasement of the person." As with the crime of torture, the application of the ill-

[76] Kenya, National Police Service Act of 2011, s.2; National Intelligence Service Act of 2012, s.51.
[77] Kenya, Chiefs' Act, as amended, Act No. 10 of 1997, s 20.
[78] Kenya, Children's Act No. 8 of 2001, s.20.
[79] The Persons Deprived of Liberty Act 2014, Article 5(1)-(2).
[80] See below, Section II.4.
[81] Article 16 UNCAT.
[82] Kenya, National Police Service Act of 2011, s.2 and National Intelligence Service Act of 2012, s.51; Ill-treatment is also punishable under the Chief's Act and the Children's Act.

treatment provisions is limited in Kenya to the specific category of officials covered by the listed Acts.

The **Ugandan** Prevention and Prohibition of Torture Act also criminalises ill-treatment, yet leaves it to the discretion of the courts to determine what acts may constitute ill-treatment, with section 7(2) providing that whether an act constitutes ill-treatment should be determined by reference to the definition of torture and the circumstances of the case.[83] This approach may pose certain challenges with respect to legal certainty and associated defense fair trial rights. Ill-treatment is similarly a punishable offence in **Tunisia**,[84] yet the definition is vague and restrictive in that it refers simultaneously to ill-treatment committed without legitimate motive and on account of a statement made by an accused, witness or an expert or in order to obtain confessions and statements.

II.3 The absolute prohibition of torture

The prohibition of torture is absolute and non-derogable.[85] This means that there can be no exceptions or limitations to the prohibition such as in times of public emergencies, war or in the fight against terrorism or organised crime. Nor can the prohibition be subjected to balancing against other considerations such as national security interests. The absolute nature of the prohibition is not limited to those instances in which public officials carry out ill-treatment resulting in severe pain or suffering. It also extends to those instances in which States remove persons to places where they face a real risk of torture. The State is prevented from such removals, transfers or deportations even when the persons concerned are convicted criminals, suspected terrorists or others judged by the State to be undesirable or some kind of threat.

The UN Human Rights Committee has confirmed the absolute nature of the prohibition, stating that

> "… [, even in situations of public emergency …, no derogation … is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."[86]

Freedom from torture and other prohibited ill-treatment is constitutionally guaranteed in all countries examined. Putting the prohibition of torture in the Constitution is in and of itself an important safeguard against a State subsequently introducing new legislation or issuing a decree which contradicts the constitutional principle. Freedom from torture is enshrined as a non-derogable right under the Constitutions of the **DRC**,[87] **Kenya**,[88]

[83] Ugandan PPTA of 2012, s. 7.
[84] Tunisia, Criminal Procedure Code, Article 103.
[85] Article 2 (2) UNCAT; Article 4 ICCPR; see also Article 15 European Convention on Human Rights; Article 27 American Convention on Human Rights; the African Commission has confirmed the non-derogable nature of the prohibition of torture and ill-treatment as enshrined in Article 5 of the African Charter, see for instance African Commission, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Communications 105/93, 128/94, 130, 94, 152/96, paras. 67-69.
[86] UN Human Rights Committee, General Comment No.20, para.5.
[87] Constitution of the DRC, Articles 16 and 61.

Namibia,[89] **South Africa**,[90] and **Uganda**.[91] This aligns with the international law position on non-derogability as set out above.

In contrast, **Tunisia**'s new Constitution of 26 January 2014 explicitly prohibits torture, stating that "[t]he state protects human dignity and physical integrity, and prohibits all types of moral and physical torture."[92] The Tunisian Constitution also provides that the crime of torture shall not be barred by statutes of limitation but does not make the prohibition non-derogable.[93] Similar to Tunisia, the **Nigerian** Constitution does not include freedom from torture and ill-treatment among its enumeration of non-derogable rights.

Enshrining the freedom from torture and other prohibited ill-treatment as a non-derogable right in the Constitution is consistent with the international law position on non-derogability. It can also serve as a useful point of reference in times when the absolute nature of the prohibition of torture becomes a subject of debate, such as for instance in the fight against terrorism in response to terrorist attacks or following the introduction of emergency measures and legislation. The absence of such a non-derogable right in the **Nigerian** Constitution might have served as a basis for the justification of certain violations committed by armed forces during the state of emergency between 2012 – 2015,[94] 'special measures' were needed to fight effectively Boko Haram. This situation furthermore underlines the need for the non-derogatory nature of the prohibition to be enshrined in Nigerian law, for instance by way of an amendment to the Constitution and/ or an express provision to that effect in the anti-torture bill. The draft anti-torture bill under review at the time of writing provided, in Article 2(3) that "[N]o exceptional circumstances may be invoked as a defence or justification for torture."[95]

A constitutionally enshrined non-derogatory right to freedom from torture also helps safeguard the absolute prohibition as changes to the Constitution are typically more difficult to achieve than amendments to and/or repeal of statutory legislation.

II.4 Criminal sanctions for torture and ill-treatment

States must provide appropriate penalties that reflect the grave nature of torture.[96] Overly lenient penalties may fail to deter torture, while rigid and draconian penalties may result in courts being unwilling to apply the law as it fails to flexibly take into account

[88] Constitution of Kenya, Articles 25 and 29.
[89] Constitution of Namibia, Articles 8 and 24.
[90] Constitution of the Republic of South Africa, s. 12(1) (d) and (e).
[91] Constitution of Uganda, Articles 24 and 44.
[92] Constitution of Tunisia, Art. 23
[93] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Follow up report: Missions to the Republic of Tajikistan and Tunisia, A/HRC/28/68/Add.2, 27 Feb 2015, para. 63; UN Committee against Torture, List of issues in relation to the third periodic report of Tunisia, CAT/C/TUB/Q/3, 6 January 2016, para 1.
[94] See further below, Section III.1.
[95] Nigerian Law Reform Commission, 'A bill for an Act to prevent, prohibit and penalize acts of torture, cruel, inhuman or degrading treatment or punishment and for other related matters,' copy on file with REDRESS.
[96] Article 4 (2) of the Convention.

individual circumstances. The practice of the UN Committee Against Torture indicates that a significant custodial sentence is generally appropriate.[97]

There are significant variations among the countries examined in the nature and severity of punishment provided for torture and other prohibited ill-treatment. Some of these variations relate to differences in legal traditions. In the **DRC** for example, the law provides for a minimum as well as a maximum allowable penalty. Accordingly, the crime of torture attracts a five to ten year prison sentence and a fine of 50,000 to 100,000 Congolese francs; in aggravated cases, the sentence increases to ten to twenty years' imprisonment and a fine of 100,000 to 200,000 Congolese francs (approximately $110-$220 USD). If the acts cause the death of the victim, the penalty is life imprisonment.[98]

The **Ugandan** PPTA of 2012 provides that a person convicted of torture can be sentenced up to 15 years' imprisonment or a fine of 360 currency points or both.[99] The sentence can be increased up to life imprisonment for aggravated torture.[100] These two sanctions (imprisonment or fine) are provided as alternatives given that the latter can be considered more lenient in relation to the gravity of the offence. The penalty for cruel, inhuman, or degrading treatment is imprisonment up to seven years, a fine up to 3,360,000 Ugandan shillings (approximately $ 980 USD), or both.[101]

The **South Africa** Torture Act provides that acts of torture can be punished by a sentence of imprisonment, including imprisonment for life, but without stipulating a minimum sentence.[102]

In **Tunisia**, a person convicted of torture faces prison terms ranging from eight years and a fine up to life imprisonment, the latter being applicable where the torture resulted in the death of the victim.[103] The law provides for aggravated sentences from ten to sixteen years' imprisonment plus a fine of up to 25,000 dinars (approximately $12,400 USD) where the torture was committed against a child and/or has caused the fracture or amputation of a limb or permanent disability.[104] The sentence for the offence of ill-treatment is five years' imprisonment and 5,000 dinars (approximately $2,500 USD), while the threat of the use of ill-treatment is punishable with a six-month prison term.[105]

Torture and ill-treatment are both punishable with imprisonment not exceeding fifteen years under **Kenyan** National Police and Intelligence Services Acts.[106] However, the sanctions provided under the Chiefs Act and Children Act[107] - acts of torture are punished with a fine not exceeding 10,000 shillings (approximately $100 USD), or to imprisonment for a term not exceeding one month- are nominal in view of the gravity of

[97] Chris Inglese, 'The UN Committee against Torture: An Assessment', The Hague/ London/ Boston: Kluwer Law International, 2001, p. 342.
[98] Aggravating factors include: causing grave trauma to the victim, illness, a permanent incapacity, physical or psychological impairment or when the victim is a pregnant woman, a minor or an elderly person or disabled, see Criminal Procedure Code, Article 38ter.
[99] 360 currency points = 7,200,000 Uganda shillings (approximately $2,100 USD).
[100] According to section 5 of the Act, aggravated circumstance include the use or threatened use of a deadly weapon, sex or any other acts considered as aggravating by the court. Aggravated torture also includes circumstance where the victim was a person with a disability, pregnant, under the age of 18 or has acquired HIV/AIDS or was incapacitated as a result of the torture.
[101] Ugandan PPTA of 2012, s. 5.
[102] Criminal Procedure Act, s. 276; Prevention of Combating and Torture of Persons Act 2013, s 4(2)
[103] Tunisia, Criminal Procedural Code, Article 101ter Id.
[104] Ibid.
[105] Ibid, Article 103, as amended.
[106] Kenya, National Police Service Act, 2011, s.95; National Intelligence Services Acts, s.51.
[107] Kenya, Chiefs' Act, s.20 and Children Act, s.18.

the offence although those sanctions are without prejudice to any other penalty prescribed by law. Under The Persons Deprived of Liberty Act, cruel inhuman or degrading treatment is punishable by a fine not exceeding 500,000 shillings (approximately $5,000 USD) or imprisonment for a term not exceeding two years or both.[108]

In **Namibia**, as torture and ill-treatment are yet to be criminalised, the alleged offender will be charged with either assault with intent to do grievous bodily harm (provided for under section 266 of the Criminal Procedure Act) or *crimen injuria*. There is no specific punishment for the offence of assault, which will be imposed upon the discretion of the court.

As torture (and ill-treatment) have not been criminalised in **Nigeria**, acts amounting to torture would have to be prosecuted and punished as assault or grievous bodily harm under the Criminal Code, providing for one year imprisonment for ordinary assault; three years for serious assault; and seven years for grievous bodily harm.[109] Manslaughter is punishable by life imprisonment and murder by the death sentence.[110] Rape is punishable by life imprisonment, with or without caning.[111]

In addition to criminal sanctions, the domestic legislative framework should ensure that officials are subject to disciplinary proceedings and sanction when there are allegations of torture or ill-treatment. While emphasising that disciplinary sanctions cannot replace criminal sanctions, the UN Committee Against Torture has found a violation of Articles 2(1) and 4(2) of the CAT in a case where light penalties and pardons were conferred on the officials who had tortured the complainant and the officials were not subject to disciplinary proceedings while the criminal proceedings were in progress.[112] In most of the countries examined, disciplinary measures such as suspensions (with or without pay) or dismissals are possible; however, there is too little evidence to provide an accurate picture of the extent to which they are used in practise. Too few States suspend from active duty police, military or other officials accused of torture or ill-treatment while investigations are ongoing. Suspensions are important particularly when there is a possibility that the suspect might interfere with the investigation, tamper with evidence or threaten the victim. They are also crucial to ensure that the torture ends, both for the victim in question who may remain vulnerable to further torture if he or she remains in detention but also for other potential victims.

Where specific anti-torture criminal legislation exists it appears that relevant regulations and laws providing for disciplinary action have not been amended following the adoption of the respective Acts. In **South Africa** for instance, relevant regulations list criminal offences, which can lead to suspension without pay, including murder and assault with the intent to do grievous bodily harm, but do not mention torture.[113]

[108] Persons Deprived of Liberty Act 2014, Article 5(2).
[109] Kenya, Criminal Code Act, 1990, sections 351, 335, 356.
[110] Ibid, ss. 319 and 325.
[111] Ibid, s. 358.
[112] UN Committee against Torture, *Urra Guridi v. Spain*, CAT/C/34/D/212/2002, 24 May 2005, para 6.6-6.7.
[113] Regulations for the South African Police Service R643 of 3 July 2006, Reg. 13.

Table 3: Domestic Legal Frameworks

Country	Specific Anti-Torture Law	Constitutional Prohibition + non-derogable	Criminalisation of Torture	Criminalisation of Ill-Treatment	UNCAT Definition of Torture	Absolute prohibition of corporal Punishment
DRC	--[114]	✔	✔	--	✔	--
Kenya	Pending	✔	✔[115]	✔[116]	✔[117]	--
Namibia	Pending	✔	--	--	--	--
Nigeria	Pending	--	--	--	--	--
South Africa	✔	✔	✔	--	✔	--
Tunisia	--	--	✔	✔	--	✔
Uganda	✔	✔	✔	✔	✔[118]	--

[114] For the purposes of this report, the 2011 law criminalising torture in the DRC does not qualify as an 'anti-torture law' as it focuses solely on the criminalisation of torture, but does not integrate other obligations under the Convention.
[115] Torture is not criminalised in the Penal Code, but only in other pieces of legislation.
[116] Ill-treatment is not criminalised in the Penal Code, but only in other pieces of legislation.
[117] Torture is not defined in the Penal Code but only in other pieces of legislation.
[118] The definition in Uganda's Prevention and Prohibition of Torture Act in 2012 is narrower regarding the list of purposes, as it does not mention discrimination. It goes beyond the UNCAT definition in that it also includes conduct carried out by non-state actors.

III. Safeguards and monitoring mechanisms

There are a range of legal safeguards that can serve to minimise the risks of torture and/or limit the circumstances under which torture and ill-treatment take place. These safeguards are enshrined in the international and regional instruments to which the States examined in the present study are parties.[119]

It is important to note, however, that torture and ill-treatment will not only occur in detention settings. It is important for States to establish adequate and effective safeguards to eradicate these practices which occur outside of detention too.

III.1 Safeguards in the context of arrest and detention

Since torture and ill-treatment are frequently committed during arrest and detention, the prohibition of arbitrary detention, the regulation of pre-trial detention and the conditions of detention are crucial safeguards against torture and other prohibited ill-treatment.[120]

These include: the prohibition of arbitrary arrest and detention; constitutional and statutory provisions guaranteeing the right to be informed in a language which the detainee understands about the reasons for his/her arrest and of his/her rights, including the right to remain silent and the right to counsel; and, in most of the jurisdictions, the right to communicate with and be visited by relatives and a chosen medical practitioner. All of the States considered in our review have provisions in their Constitutions or statutory laws providing some guarantees against arbitrary deprivation of liberty and varying levels of protection for detainees.[121]

Under international law, anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.[122] The UN Human Rights Committee has considered "promptly" to mean 48 hours, as this would be "ordinarily sufficient to transport the individual and to prepare for

[119] Detailed safeguards for detainees are provided in the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175, 8 January 2016; the UN Code of Conduct for Law Enforcement Officials, A/RES/34/169, 17 December 1979; and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988. UNCAT additionally requires States Parties to train law enforcement agents and other relevant officials on the prohibition of torture. The Robben Island Guidelines set out in para. 20, the "[B]asic procedural safeguards for those deprived of their liberty."

[120] The regulation of pre-trial detention, particularly with regard to limiting its length, is an important safeguard against torture which has been routinely invoked by the Committee Against Torture as an obligation of States parties to the UNCAT under article 2, see, General Comment No. 2, Implementation of Article 2 by States parties, CAT/C/GC/2, 24 January 2008 (Committee Against Torture, General Comment No.2), para. 13, at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en. Relevant procedural safeguards are enshrined in Articles 9 and 14 ICCPR, and highlighted in the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Commission's Fair Trial Principles), May 2003, at http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf.

[121] Article 7 and 11(1) of the Namibian Constitution and Article 29 of the Tunisian Constitution; Article 35 of the South African Constitution; Article 49 of the Kenyan Constitution; Article 18 and 36 of the DRC Constitution; Section 35(2) of the Constitution of the Federal Republic of Nigeria and Section 5 of the Criminal Procedure Code of Nigeria. While the right to remain silent and to be informed of one's rights is not included in the Namibian Constitution, Namibian jurisprudence has recognised that it is a right, see for instance *S v Schiefer* (CC 17/2008) [2011] NAHC 240 (10 August 2011) which examined whether the accused had been afforded his rights, including his right to remain silent; according to Article 28 (1) of the Code of Criminal Procedure of the DRC, custody is an exceptional measure.

[122] See Article 9 (3) of the ICCPR.

the judicial hearing."[123] Any delay longer than 48 hours must remain absolutely exceptional and be justified.[124]

The right to challenge the lawfulness of detention is considered to be non-derogable. According to the African Commission's Fair Trial Principles, "[J]udicial bodies shall at all times hear and act upon petitions for habeas corpus…. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus."[125] The Human Rights Committee emphasises that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[126]

In most countries reviewed, constitutional provisions require that detainees be brought before a judicial officer within 48 hours or as soon as reasonably possible thereafter.[127] Article 18 of the Constitution of the **DRC** provides that an individual that is arrested must be brought before a competent judicial authority within 48 hours or be released.[128] However, there are discrepancies between the Constitution and the Criminal Procedure Code, with the latter providing that the accused must be taken before a judge within five days starting from the provisional detention decision of the public prosecutor, if the judge is located in the same district.[129] As a result, individuals are only taken before a judge after five days, rather than within the 48 hours stipulated by the Constitution. In **Tunisia,** recent amendments to the Code of Criminal Procedure introduced several important safeguards such as the right to be brought before a judicial officer within 48 hours, the right to be informed about the reasons for arrest and the right to choose a lawyer and to a medical examination. The amendments enter into force on 1 June 2016.[130]

In **Kenya**, **Nigeria** and **South Africa**, detainees can file an application for enforcement of their fundamental rights in the High Court.[131] The right of habeas corpus is similarly enshrined as a non-derogable right under the **Ugandan** Constitution.[132] In **Namibia,** the right to challenge the legality of detention is established in case law but not specifically provided for in the Constitution.[133] There are no specific procedures for challenging the legality of detention in the **DRC**. Although the law allows an appeal from a provisional

[123] Human Rights Committee, General Comment No.35, 'Article 9 (Liberty and security of person)', 16 December 2004, CCPR/C/GC/35, para.33.
[124] Ibid.
[125] African Commission's Fair Trial Principles, M(2)(e).
[126] See further, Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), 31 August 2001, para.16.
[127] Constitution of Namibia, Article 11(3). See also, *Sheehama v Minister Safety & Security and Others* (A22/2011) [2011] NAHC 81 (17 March 2011) para. 5; Article 23(4) of the Uganda Constitution provides that a person arrested or detained must be brought to court as soon as possible or "no later than forty-eight hours from the time of his or her arrest". Similarly, the South African Constitution in s. 35 (1) (d) provides that an individual must be brought before a court "as soon as reasonably possible, but not later than 48 hours after the arrest" or on the next court day if the 48 hours expire outside court hours or on a day which is not a court day. Under the Nigerian Constitution, sections 34-35 provide that detained persons must be brought before a court within a "reasonable time", which is defined as 24 hours where the court of competent jurisdiction is within 40 kilometres. If the court is further than 40 kilometres, the time shall be two days or "such longer period as in the circumstances may be considered by the court reasonable," section 35 (5) (b).
[128] Constitution of the DRC, Article 18.
[129] DRC, Criminal Procedure Code, Article 39(4).
[130] See Dignity, 'Tunisia passes crucial bill in the fight against torture', 10 February 2016, at https://www.dignityinstitute.org/news-and-events/news/2016/tunisia-passes-crucial-bill-in-the-fight-against-torture/.
[131] Constitution of Nigeria, section 46; sections 23 and 165 of the Kenyan Constitution and section 35(2)(d) of the South African Constitution.
[132] Constitution of the Republic of Uganda, Articles 23(9) and 44(d).
[133] Supreme Court of Namibia, *Kabuyana v Ministry of Safety And Security* (I 546/2013) [2014] NAHCMD 61 (20 February 2014). *Gawanas v Government of the Republic of Namibia* (SA 27/2009) [2012] NASC 1 (3 April 2012); *S v Araeb* (CA17/05) [2006] NAHC 61 (25 October 2006).

detention order of a magistrate or a district court,[134] it places a considerable restriction on the detainee's ability to exercise the right by imposing a 24 hour time limit for filing the appeal.[135]

A concern however, is the degree to which States have implemented the safeguards they have put in place. In Nigeria, research by Amnesty International suggests that custodial safeguards are rarely implemented in practice; individuals are "arrested- both by the military and police- without warrants, had been interrogated in incommunicado detention- without having access to their families or lawyers- and had not been produced before a court within a reasonable time."[136]

The special circumstances of the fight against terrorism and/or a state of emergency have been used to limit the application of certain safeguards and in particular by certain countries to significantly expand the number of days in which a person may be detained before being brought before a judge. For example, in **Tunisia**, the anti-terrorism law adopted in 2015 undermines safeguards set out in Tunisia's Constitution and, since 2 February 2016, also its Criminal Procedural Code, including by allowing for a person to be detained for up to 15 days before being brought before a judge. The Committee Against Torture has requested the Government of Tunisia to clarify these and related amendments. At the time of writing, this request was pending, with Tunisia's review before the Committee Against Torture scheduled to take place in April 2016.[137] In **Uganda,** while the Constitution provides for the right to be brought to court within 48 hours, this is frequently ignored, with the majority of complaints submitted to the UHRC highlighting detention beyond 48 hours before being brought to court.[138] This is particularly the case in regards to terrorism and corruption suspects, and the Ministry of Internal Affairs has reportedly initiated a process to deny suspects of these crimes the right to be brought before a court within 48 hours.[139] In **Kenya**, December 2014 amendments to security legislation make it possible for persons suspected of having committed acts of terrorism to be detained for almost one year without a hearing, and with no guarantees against being held incommunicado. This is contrary to Article 50(2)(e) of the Constitution, for the right to a fair trial and significantly enhances the risk of torture and ill-treatment since there is no provision for checks on the welfare of such person.[140]

Another concern common to some of the countries reviewed is the lack of regular and adequate judicial supervision over the length of pre-trial detention. In **South Africa**, pre-

[134] DRC, Code of Criminal Procedure, Article 37.
[135] Ibid, Article 39 (1).
[136] See Amnesty International, 'Welcome to Hell Fire: Torture and other ill-treatment in Nigeria', 2014, p.8, at https://www.amnesty.org/download/Documents/4000/afr440112014en.pdf.
[137] UN Committee against Torture, List of issues in relation to the third periodic report of Tunisia, CAT/C/TUB/Q/3, 6 January 2016, para. 6.
[138] UHRC, Annual Report 2014, stating that "[T]he deprivation of the right to personal liberty (detention beyond 48 hours) continued to be the highest registered complaint increasing by 34.54% from 275 complaints registered in 2013 to 381," p. 1, at http://www.uhrc.ug/system/files_force/ulrc_resources/UHRC%2017th%20Annual%20Report%202014.pdf?download=1.
[139] See Uganda Radio Network, 'DPP, Police Seek to Waive 48-hour Detention Rule for Terrorism, Corruption Suspects,' 30 September 2014, at http://ugandaradionetwork.com/a/story.php?s=67441.
[140] See Kenya National Commission on Human Rights, 'Advisory on the Security Laws (Amendment) Bill, 2014, p.6, at http://www.knchr.org/LinkClick.aspx?fileticket=nHQXz0BInQA%3D&portalid=0; see also The Security Laws (Amendment) Act, 2014, at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf; see also submission by REDRESS and others to the United Nations Committee against Torture regarding the Periodic Review of Kenya: List of Issues Prior to Reporting (LOIPR), 29 June 2015, at http://www.redress.org/downloads/publications/15.6.29.LOIPR_Kenya.pdf.

trial detention does not have to be judicially reviewed at regular intervals. Section 49(g) of the Correctional Services Act requires each Head of Centre to refer a remand detainee to a court if he or she has been detained for more than two years, in order for the court to rule on the prolonged detention of that person. In **Tunisia**, a person can be remanded on a pre-trial detention order for six months which can be extended once by three months for petty offences and twice to four months for other offences.[141] The only opportunity for review is if the detainee chooses to exercise his/her right to file a bail application at the expiry of each month and bring an appeal to the Indictment Chamber in the event of denial of bail. While a relatively shorter period of 15 days is provided for a remand in custody in the **DRC**, the law allows for an indefinite number of renewals of one month at a time.[142] The **Namibian** Constitution simply provides that an accused must be tried within a reasonable time or released.[143]

III.2 Right of access to a lawyer upon arrest

The right to prompt access to a lawyer can help minimise the risks of torture and other ill-treatment in detention, as recognised in relevant international standards, such as the International Covenant on Civil and Political Rights, the Istanbul Protocol[144] and regional instruments including the African Commission's Fair Trial Principles.[145] Access to a lawyer can also facilitate the prompt filing of complaints on behalf of those who have already been exposed to torture or other ill-treatment. The ICCPR underlines the right to legal assistance "in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it."[146] The UN Human Rights Committee has considered that "legal assistance must be provided free of charge where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance and where the interest of justice so requires."[147]

While the right to counsel is generally guaranteed as a constitutional right in most countries, few countries specifically provide for the rights of indigent detainees to have access to publicly funded legal aid upon arrest. In **South Africa**, the right to legal representation is subject to a judicial determination of whether "substantial injustice would otherwise result".[148] In **Uganda,** where the right to be assisted by counsel of one's choosing is a constitutional right, only those accused of capital offences or offences that carry life imprisonment are entitled to a State-appointed lawyer.[149] Article 19 of the Constitution of the **DRC** is more specific in guaranteeing the right to be

[141] Tunisia, Code of Criminal Procedure, Article 85.
[142] DRC, Criminal Procedure Code, Article 31(1).
[143] Constitution of Namibia, Article 12(1)(b)..
[144] 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 (Istanbul Protocol), 2004.
[145] African Commission's Fair Trial Principles, M(1)(f).
[146] ICCPR, Article 14 (d).
[147] UN Human Rights Committee, *Allan Henry v Trinidad and Tobago*, Communication No.752/1997, 10 February 1999, para.75.
[148] Constitution of South Africa, section 35 (2) (c).
[149] Constitution of Uganda, Article 28 (e); in practice, there rarely are enough State funds to retain adequate counsel. Additionally, suspects detained in unauthorised facilities have no access to legal representation. See *John Livingstone Okello Okello v. Attorney General*, High Court of Uganda, HCT 02-CV-MA 063, 2002, involving incommunicado detention, in which the High Court held that the denial of access to lawyers and next of kin constitutes a violation of Article 28.

assisted by counsel of one's choosing at all stages of the criminal procedure, including the police investigation and the pre-trial enquiry. It is at the judge's discretion to appoint a lawyer in relation to indigent detainees.[150] In practice, legal representation of indigent detainees is delegated to local bar associations. In **Kenya**, legal aid services are only provided by civil society organisations as no publicly funded legal aid is available.[151]

The **Namibian** Constitution in Article 95 provides for "a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State".[152] The Supreme Court has indicated that the statement is not binding on its own, but when read together with the Constitution's fundamental rights provisions, it requires the State to provide legal aid to indigent defendants.[153]

III.3 Access to a medical examination upon arrest and after detention

A compulsory and independent medical examination upon arrest and again after detention is an important safeguard against custodial torture and other forms of prohibited ill-treatment.[154] A medical examination provides the means to establish evidence of possible violations after arrest and during detention,[155] and in this sense can also dissuade would-be perpetrators from carrying out torture.

Most of the jurisdictions examined have provisions in their legal framework requiring that detainees are medically examined in prisons. The examinations are usually carried out by prison medical officers. In **Nigeria**, for example, all new prisoners received into a prison either from the courts, or upon transfer from another prison, must be seen by the Superintendent-in-charge and the medical officer within 24 hours of reception.[156] The Superintendent, on the recommendation of the medical officer, may decline to admit a prisoner with grievous bodily injuries.[157] Where the medical officer believes imprisonment will endanger the life of the prisoner, or that the prisoner should be released on medical grounds, he or she should report this to the Superintendent, and the Superintendent is then obligated to forward the report to the Controller of Prisons in the relevant State.[158] In **Tunisia**, a medical examination is carried out systematically on

[150] Article 123 of the Code of Criminal Procedure.
[151] Examples of organisations providing legal aid to victims of torture/ ill-treatment include: Independent Medico-Legal Unit; Kenya Human Rights Commission; Muslims for Human Rights; International Commission of Jurists – Kenya Chapter; Coalition on Violence Against Women; International Justice Mission; National Coalition on Human Rights Defenders.
[152] Constitution of Namibia, Article 95(h).
[153] Supreme Court of Namibia, *Government of the Republic of Namibia and Others v Mwilima and Others* (2002) AHRLR 127 (NaSC 2002).
[154] Robben Island Guidelines, which provides that upon arrest, individuals have "a right to an independent medical examination," at para. 20 (b).
[155] 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 UN Code of Conduct for Law Enforcement Officials, General Assembly Resolution 34/169 (17 December 1979), Article 6; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 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. It is also enshrined in the Istanbul Protocol, Ch. II (D)(1). It has also been recognised as an important safeguard by the UN Human Rights Committee, see General Comment No. 20, para.11.
[156] Nigeria, Prisons Standing Order, R.E. 2011, s.1.
[157] Ibid, s. 6(b).
[158] Ibid, s. 502.

entry to prison, usually within 48 hours. However, the UN Special Rapporteur on Torture has learned of cases where medical examinations were "delayed and performed only after physical signs of torture or other ill-treatment disappear from detainees' bodies."[159] The Correctional Services Act of **South Africa** prescribes that every prisoner must undergo a "health status examination" as soon as possible upon admission.[160] In **Kenya**, the Prisons Rules only require a medical examination where a prison officer has used force against a detainee or where the detainee is sentenced to confinement in a separate cell.[161] However, the 2014 Persons Deprived of Liberty Act provides for a general right to medical examinations, treatment and health care.[162]

Access to a medical examination, however, is not mandatory in police stations although some jurisdictions such as **South Africa** and **Tunisia** allow detainees to consult a doctor at their own cost if they so wish or in cases where they are deemed to require urgent medical attention.[163] According to the South African Police Services Act, if a detainee complains to the medical practitioner that he or she was subjected to torture by the police, the medical practitioner must examine these allegations and the police station commander must then request that the medical practitioner send the medical report to the Independent Police Investigative Directorate (IPID, see section 3.2.2.).[164] Article 23 of the **Ugandan** Constitution provides that a detainee shall be allowed "reasonable access" to a doctor of his or her choice and to medical treatment.[165]

III.4 Independent monitoring and oversight mechanisms

Regular monitoring of detention centres by independent organisations is another important safeguard against torture.[166] It can foster constructive dialogue between detention staff and monitors on detention conditions which can lead to practical and realistic recommendations and real improvements in policies or practices for the benefit of detainees. Monitoring can also provide a concrete protection to detainees – if detention staff is aware that their centre can be visited at any time, it may have a deterrent effect and reduce the incidence of torture and other prohibited ill-treatment. In its 2014 Annual Report, the **Kenyan** Human Rights Commission referred to inspections of 34 prisons, noting that "[T]here was a marked reduction of torture in all places of detention inspected." According to the Commission, this "can be attributed to continued advocacy and inspection of prisons and places of detention."[167] The important role played by monitoring is also illustrated by an example of one of the **Namibian**

[159] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Follow up report: Missions to the Republic of Tajikistan and Tunisia, A/HRC/28/68/Add.2, 27 Feb 2015, para. 72.
[160] South Africa, Correctional Service Act, s. 6(5).
[161] Prison Rules 1963, Rule 45(3).
[162] Persons Deprived of Liberty Act 2014, Article 15
[163] The South African Police Services (SAPS) Standing Orders; s.35 (2) (f) of the Constitution further provides that detainees have the right to communicate with a chosen medical practitioner.
[164] SAPS Standing Orders (General), Order 349.
[165] Constitution of Uganda, Article 23 (5) (b).
[166] The preamble of OPCAT stresses that "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."
[167] Kenya National Human Rights Commission, Annual Report 2013/2014, p.33, at http://www.knchr.org/Portals/0/AnnualReports/KNCHR%20%20Annual%20Report%202013-2014.pdf.

Ombudsman's visits to police cells in 2013. During the visit, one of the investigators discovered a person who had been in police detention for nearly three years. The person had been waiting to be transferred to the psychiatric ward in Windhoek for mental observation and an assessment of his capacity to stand trial. The case prompted the Ombudsman to open a wider investigation to determine how many persons were detained in police cells awaiting mental examination and the length of and reasons for delays in transferring such persons to psychiatric wards or prisons. The investigation identified one person detained for more than five years, one for more than three and three more for more than one year.[168]

Traditionally, the monitoring of detention centres has been done by an array of governmental actors (human rights commissions, ombudsperson institutions, prison inspectorates, judges) and nongovernmental organisations (human rights organisations, humanitarian organisations, and depending on the context International actors such as the International Committee of the Red Cross.

The OPCAT was designed to ensure a degree of common standards for monitoring. It provides for the establishment of National Prevention Mechanisms (NPM) to monitor and inspect all places of detention. These specially designated mechanisms have very specific roles to play under the OPCAT. Some countries have created brand new institutions to undertake this work, In many other countries, existing mechanisms, such as national human rights institutions or prison inspectorate bodies have been tasked with taking on the functions of the NPM, and/or have had their mandates modified in order to take on those responsibilities. States parties to OPCAT must grant functional independence to the NPM and its individual members. Necessary resources should be provided to "permit the effective operation of the NPM."[169]

In the absence of a separate mechanism for the monitoring of places of detention, a range of bodies have in the past concluded an agreement with the Ministry of Justice to conduct prison visits, including non-governmental human rights organisations.[170]

Although the **DRC**, **Nigeria** and **Tunisia** are parties to OPCAT, only the latter two have designated NPMs in 2011 and 2013 respectively. The **Tunisian** NPM was formally constituted in November but at the time of writing it was not yet operational.[171] The **Nigerian** NPM – the Nigerian Committee on Torture - has reportedly conducted visits to places of detention but has not published its reports of those visits. Civil society and other experts voiced concerns regarding the lack of financial and logistical resources provided to the Committee, preventing it from playing a meaningful role in monitoring places of detention.[172] The UN Special Rapporteur on Torture in 2012 "encouraged the Government [of Nigeria] to take measures to ensure that the National Committee on

[168] Namibia, Annual Report of the Ombudsman (2013) at http://www.ombudsman.org.na/reports/annual-reports/finish/3-annual-reports/188-annual-report-2013, p.28.
[169] See for instance, Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Guidelines on national preventive mechanisms,' 9 December 2010.
[170] According to our research, this includes for instance the Tunisian League for Human Rights, which entered into such an agreement in 2015.
[171] Association for the Prevention of Torture, NPM database, Tunisia, at http://www.apt.ch/en/opcat_pages/npm-designation-70/.
[172] Association for the Prevention of Torture, NPM database, Nigeria, at http://www.apt.ch/en/opcat_pages/npm-working-methods-21/?pdf=info_country/. These concerns were re-iterated by experts participating in a workshop organised by the Human Rights Implementation Centre of the University in Bristol, on 13 November 2015, in Abuja, Nigeria.

Torture mandated to visit places of detention and investigate allegations of torture, is fully equipped with the necessary financial human resources."[173]

The **Nigerian** Human Rights Commission is also mandated to carry out visits to places of detention and has carried out visits jointly with the Nigerian Committee on Torture yet reports of those visits are not publicly available. The Nigerian Human Rights Commission can visit any police detention facility or prison without prior notice and its decisions can be registered in the high court and enforced as decisions of the court.[174] The **Ugandan** Human Rights Commission (UHRC) can also visit jails, prisons and other places of detention or related facilities unannounced, with a view to assessing and inspecting conditions of detention and the well-being of the inmates, and make recommendations.[175] The UHRC has made extensive use of this mandate, inspecting 1122 prisons, police stations and posts, military detention facilities and remand homes in 2014 alone. Following its inspections, the UHRC reports on issues of concern such as the condition of the facilities or instances of arbitrary detention. It also receives complaints at the various facilities it inspects, including complaints of torture: in 2014, the UHRC reported it had received nine complaints of torture during inspections.[176]

In **Namibia**, independent monitoring is carried out by the Ombudsman, who has "a general duty to monitor places of detention to ensure humane treatment."[177] This is important as Namibia has yet to ratify OPCAT and therefore does not have a specially designated independent monitoring mechanism to examine the treatment of persons in detention.

The **Kenyan** Human Rights Commission does not have an express mandate to visit places of detention but it can and has inferred such a mandate from its powers to investigate any matter relating to human rights in a public office or a private institution or any other body or agency of the State. The National Human Rights Commission of the **DRC**, established in 2013, also has the power to carry out regular visits to detention centers either on the basis of complaints received or *ex officio* yet at the time of writing it was not yet operational.[178]

In **South Africa**, the Judicial Inspectorate for Correctional Services (JICS) is mandated to inspect prisons in order to report on the treatment of prisoners and on conditions of detention. JICS is headed by an Inspecting Judge and carries out its mandate through its lay visitors' mechanism involving the Independent Correctional Centre Visitors (ICCVs). ICCVs regularly visit prisons (including by conducting unannounced visits) and interview prisoners in private; they are given access to all parts of a prison and to all relevant documents, and attempt to resolve complaints directly with the Head of Correctional Centre (HCC).[179] Prisoners can also record complaints in the internal

[173] See UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2012, A/HRC/19/61, 1 March 2012, Add.3, para. 92.
[174] Nigeria, National Human Rights Commission (Amendment) Act 2011, Section 6(1).
[175] Constitution of Uganda, Article 51; Uganda Human Rights Commission Act No. 4, (1997).
[176] UHRC, 17th Annual Report, p.61, at http://www.uhrc.ug/sites/default/files/ulrc_resources/UHRC%2017th%20Annual%20Report%202014.pdf.
[177] Namibia, Annual Report of the Ombudsman (2013) page 27, at http://www.ombudsman.org.na/reports/annual-reports/finish/3-annual-reports/188-annual-report-2013.
[178] DRC, Organic Law No. 13/011, 21 March 2013 'Concerning the establishment, organisation and functioning of the National Human Rights Commission, Article 6.
[179] South Africa, Correctional Services Act, s. 93(1) and (2).

complaints register called a “G-365” although complaints of assault or torture would usually be directly brought to the attention of an ICCV.

States considering to ratify OPCAT and/or to set up a specially designated monitoring mechanism are advised to consult the Subcommittee on the Prevention of Torture’s “Guidelines on national preventive mechanisms”[180] and the Association for the Prevention of Torture’s Implementation Manual for OPCAT.[181] States should make certain that the NPM is sufficiently resourced so as to act effectively and independently. The NPM should have full and unhindered access to the entire facilities, to all places of detention not only official places of detention used in the criminal justice sectors. NPM officials should be able to carry out their visits without advance notice and meet with any detainees of their choosing in private.

[180] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Guidelines on national preventive mechanisms”, UN Doc CAT/OP/12/5, 9 December 2010.
[181] APT, “Optional Protocol to the UN Convention against Torture: Implementation Manual” available at: http://apt.ch/content/files_res/opcat-manual-english-revised2010.pdf, 2010.

IV. Exclusion of evidence obtained under torture

As enshrined under Article 15 of UNCAT, confessions and other evidence obtained by torture are inadmissible in legal proceedings, except against a person accused of such treatment as evidence that the statement was made.The exclusion of evidence obtained by torture is an important aspect of States' obligations to prevent torture. It counteracts one of the main enumerated purposes of torture – to elicit a confession. The rationale for the exclusionary stems from a combination of factors: i) the unreliability of evidence obtained as a result of torture (ii) the outrage to civilised values caused and represented by torture (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process.

The exclusionary rule is also reflected in the African Commission's Fair Trial Principles, which call on prosecutors to refuse any evidence they know or believe to have been obtained through unlawful means, including torture and ill-treatment. The burden of proof should be on the prosecution to "prove beyond reasonable doubt that a confession was not obtained under any kind of duress."[182]

With respect to the seven countries reviewed in this Report, all with the exception of the **DRC**, have clear constitutional and/or statutory provisions making evidence obtained under inducement, threats and promise by a person in authority, or torture, inadmissible in judicial proceedings.[183] For example, the inadmissibility of evidence obtained by torture is enshrined in **South Africa**'s Constitution and has been explicitly upheld by the South African Supreme Court.[184] Section 28 of the 1990 Evidence Act of **Nigeria**, provides that a confession to a charge made by an accused person "cannot be used to secure a conviction against him or her" if it appears to have been caused by "any inducement, threat or promise from a person in authority and sufficient to give the accused person grounds for supposing that he or she would avoid any evil of a temporal nature." The **Ugandan** Torture Prevention Act not only provides for the exclusion of evidence obtained by torture[185] but also makes the use of such evidence to prosecute a person (other than the torturer) a criminal offence.[186]

The wording of the relevant legislation in **Namibia** and **South Africa** suggests that it is the prosecution which bears the burden of proving that a confession made before a

[182] See for instance, UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2012, A/HRC/19/61, 1 March 2012, Add.3, para.89.
[183] See e.g., Kenya, Evidence Act (Cap 80, Laws of Kenya), s. 26; Evidence (Out of Court Confessions) Rules, 2009; Namibia, Criminal Procedure Act 51 of 1977, Article 17. See also, s. 35 of the South African Constitution, which provides for the exclusion of evidence obtained in a manner that violates the Bill of Rights "if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."
[184] See Supreme Court, *S v Mthembu* 2008 (2) SACR 407 (SCA). In Namibia, courts have held that evidence obtained through torture is inadmissible, see *S v Malumo and Others* (CC 32/2001) [2013] NAHCMD 33 (11 February 2013).
[185] Prevention and Prohibition of Torture Act, Uganda, s. 14.
[186] Ibid, s. 15.

police or prison official was made freely and voluntarily.[187] This has also been confirmed by the highest courts in both jurisdictions.[188] The Evidence Acts of **Kenya** and **Uganda** contain more ambiguous language that provides for the exclusion of a confession if "it appears to the court" that it was made through inducement, threat or inappropriate promise.[189]

These provisions notwithstanding, some countries have faced difficulty to fully implement the exclusionary rule. In regards to **Nigeria**, the UN Special Rapporteur on Torture expressed his concern that "in practice, confessions obtained under torture are not expressly excluded as evidence in court."[190] Research by Amnesty International suggests that suspects in "police and military custody across the country are subjected to torture as punishment or to extract 'confessions' as a shortcut to 'solve' cases- particularly armed robbery and murder."[191] As victims are often too poor to afford a lawyer, "concerns about how "confessions" have been extracted are often not raised before the court in such cases."[192] In **Tunisia**, the code of criminal procedure was amended in October 2011 to exclude confessions and witness statements obtained under torture or duress.[193] However, our research suggests that judges in Tunisia are reluctant to apply this provision in practice and to carry out an investigation to establish whether evidence has indeed been obtained through torture (or duress). Judges appear to take their decisions without investigating, and without, for instance, sending the defendant who alleges to have been tortured for a medical examination. No 'practice direction' or procedural guidance currently exists to help guide Tunisian judges as to what steps to take when allegations are raised in court.[194]

In addition to confessions, other evidence derived from torture (also referred to as the "fruits of the poisonous tree" or "derivative evidence") should also be declared inadmissible.[195] A ban of such evidence is also in line with the objective to deter the use of torture to obtain evidence in the first place. The Inter-American Court on Human Rights for instance has considered in a case against Mexico that "the absolute character of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action.

[187] Criminal Procedure Act of 1977, s. 217 (1) (as in force in South Africa and Namibia). The section reads, in relevant part: "Evidence of any confession made by any person in relation to the commission of any offence shall, *if such confession is proved to have been freely and voluntarily made* by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence" (emphasis added).
[188] Supreme Court of Namibia, *S v Shikunga* (SA 6/95) [1997] NASC 2; South Africa Constitutional Court, *S v Zuma and Others* (CCT5/94) 1995 (2) SA 642 (5 April 1995).
[189] Kenyan Evidence Act, s. 26; Uganda Evidence Act, s. 24.
[190] See UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/19/61/Add.3, 1 March 2012, para 89.
[191] See Amnesty International, 'Welcome to Hell Fire: Torture and other ill-treatment in Nigeria', 2014, p.6; This impression was shared by participants in an expert meeting organised by REDRESS and the Human Rights Implementation Centre of the University in Bristol in Abuja, Nigeria, 26 January 2016.
[192] Amnesty International, Ibid, p.7.
[193] See Article 155 (2) of the Criminal Procedure Code, as amended by Law No.2011-16 of 22 October 2011.
[194] Interview with representative of civil society working with judges in Tunisia.
[195] See for instance, the determination of the European Court of Human Rights that "[I]incriminating evidence – whether in the form of a confession or real evidence- obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention [on the prohibition of torture and other ill-treatment] sought to proscribe," in ECtHR, *Jalloh v. Germany* (Grand Chamber), Judgment, App. No. 54810/00, 11 July 2006, para. 105. See also, ECtHR, *Gäfgen v. Germany* (Grand Chamber), Judgment, App. No. 22978/05, 1 June 2010, paras. 103-109.

Consequently, the Court considers that excluding evidence gathered or derived from information by coercion adequately guarantees the exclusionary rule."[196]

The research in the seven countries suggests that this approach is not fully reflected in the legal framework of the countries examined and no statutory rules exist that prohibit the admissibility of evidence secured as result of information obtained through torture. Nonetheless, courts in **South Africa**[197] and **Namibia**[198] have ruled that such evidence is inadmissible. In addition, in a fundamental rights petition, the **Kenyan** High Court has ordered an injunction against the use of "data obtained as a direct result and/or incidental to the blood and saliva samples" forcibly taken from a petitioner accused of rape.[199]

[196] Inter-American Court of Human Rights, *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico*, Judgment of 26 November 2010 (Preliminary Objection, Merits, Reparations and Costs), para. 167.
[197] South African Supreme Court of Appeal, *Mthembu v The State* (379/2007)[2008] ZASCA 51 (10 April 2008), paras. 34, 36.
[198] Supreme Court, Namibia, *S v Minnies and Another* 1990 NR 177 (HC).
[199] High Court of Kenya, *Antony Murithi v O.C.S Meru Police Station & 2 others* [2012], petition No. 79 of 2011.

V. The Prohibition of *refoulement*

Article 3 of UNCAT places an obligation on States both to protect individuals from being subjected to torture within their territory and requires that they do not deport, extradite, expel or otherwise transfer persons to countries where there is a real risk that they may be exposed to torture. The prohibition of *refoulement* in UNCAT is absolute and not subject to exception.[200] No one can be deported, transferred, expulsed out of the territory for any reason whatsoever where to do so would put the person at a real risk of torture. The UN Committee Against Torture considered that the initial burden of proof rests on the individual to show that there are "substantial grounds for believing that the individual would be in danger of being subjected to torture were he/she to be expelled, returned or extradited."[201] The Committee has stressed that the risk of torture "does not have to meet the test of being highly probable."[202] Where the individual has provided sufficient credible detail, the burden of proof shifts to the State.[203]

While all of the States covered in this Report are bound by the prohibition of *refoulement*, **South Africa**, **Tunisia** and **Uganda** are the only countries that have legislation specifically incorporating the principle in relation to torture.[204] The Extradition Act of **Namibia** provides that a request for extradition shall not be granted if there is evidence "that the granting of the request for such return would be in conflict with Namibia's obligations in terms of any international convention, agreement, or treaty," which would include UNCAT.[205] Other countries, including the **DRC**,[206] **Kenya**,[207] and **Nigeria**[208] have laws incorporating the prohibition as contained in the Refugee Convention. This is problematic however, as the Refugee Convention which concerns the prohibition on returning someone when there is a legitimate fear of persecution, has an exception. A person fearing persecution might be denied refugee status under Article 1 F of the Refugee Convention (for instance if the individual is suspected of having committed war crimes). In contrast, as indicated, the non-refoulement prohibition in the Convention against Torture is absolute, allowing for no exceptions. As such, the Refugee Convention prohibition does not go far enough, in all cases, in regards to the torture prohibition. Furthermore, States should make adequate provision for the circumstances in which an individual is denied refugee status (because of the Article 1f exception) but nevertheless allowed to stay because of a real risk of torture in the receiving state. In some countries, persons in such circumstances may be denied access to benefits, schooling and the ability to work, which if those hardships persist may amount to cruel, inhuman or degrading treatment, if not torture.

[200] See for instance, European Court of Human Rights (ECtHR), *Chahal v. United Kingdom,* Judgment, App. No. 22414/93, 15 Nov. 1996. See also, Robben Island Guidelines, which provide that "[S]tates should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture," para.15.
[201] UN Committee Against Torture, General Comment No.1 on the implementation of article 3 of the Convention in the context of article 22, paras. 5-6.
[202] Ibid, para.6.
[203] UN Committee Against Torture, *A.S. v Sweden*, Communication No 149/1999, 15 February 2001, para.8.6.
[204] South African Torture Act; s. 8; Article 313 of the Tunisia Criminal Procedure Code as amended by Decree No 2011 and Article 88 (3) of the Organic Law on Combating Terrorism; Ugandan Prevention and Prohibition of Torture Act of 2012, s. 22.
[205] Namibian Extradition Act 11 of 1996, s. 5(1)(h).
[206] DRC, Organic Law No. 021/2002, 16 October 2002, on the status of refugees in the Democratic Republic of Congo, OG Special 1 November 2002, Article 30.
[207] Kenya, Refugee Act, Chapter 173, s. 18.
[208] Nigeria, National Commission for Refugees Act, 1989, Article 15.

VI. Criminal accountability for torture

Under UNCAT, States are obliged to conduct prompt, impartial and effective investigations into allegations of torture and to prosecute, where there is sufficient evidence indicating that torture has been committed.[209] These obligations are reflected in the jurisprudence of the African Commission in regards to Article 5 of the Charter, as well as in the *Robben Island Guidelines*.[210] The African Commission has furthermore underlined that the obligations to investigate and prosecute form part of the obligation to provide victims of torture and ill-treatment with an effective remedy.

The full realisation of States' obligations with respect to accountability requires accessible and effective complaints procedures as well as oversight mechanisms that are mandated to look into the conduct of police officers and security forces. States are also obliged to protect victims and witnesses to ensure that instances of torture are adequately reported, investigated and prosecuted. Moreover, States are bound to remove impediments to prosecution including amnesties and immunities and overly short statutes of limitation, which, according to the Committee Against Torture, "violate the principle of non-derogability" of the prohibition of torture[211] and prevent the exercise of the right to effective redress under Article 14 of the UNCAT.[212]

In all of the countries reviewed, the absence of statistical evidence of the number of complaints filed, investigations and prosecutions initiated and convictions for acts amounting to torture and ill-treatment makes it difficult to assess compliance with UNCAT and Article 5 of the African Charter. However, the limited number of successful prosecutions for torture and ill-treatment where these are pursued as a separate offence suggests a lack of compliance that is also of concern to the UN Committee against Torture. The Committee for instance urged that **Kenya** "should ensure that, in the presence of evidence of acts of torture, public officials should be prosecuted for the crime of torture, in accordance with the definition contained in article 1 of the Convention" and to "take all necessary measures to ensure that the National Police Service Act is effectively implemented, ascertain that all allegations of acts of torture or ill-treatment by police officials are promptly, effectively and impartially investigated, duly prosecuted under the offence of torture or other cruel, inhuman or degrading treatment or punishment, and if convicted, punished appropriately."[213]

The UN Special Rapporteur on Torture expressed concern that in **Tunisia** the number of convictions for torture is extremely low and there is a "lack of severe penalties for cases of torture, despite the availability of legal, administrative and national redress

[209] Articles 12 and 13 of UNCAT require States to ensure that any individual who alleges torture has the right to lodge a complaint to competent authorities, who are obliged to examine complaints of torture promptly and impartially.
[210] See for instance, the Commission's admissibility decision in the case of *Hawa Abdallah (represented by the African Centre for Justice and Peace Studies) v Sudan*, Communication 401/11, 1 August 2015, para. 57.
[211] Committee Against Torture, General Comment No 2 (2007), *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP. 1/Rev.4, 23 November 2007 (Committee Against Torture, General Comment No.2), paras. 1 and 5.
[212] Committee Against Torture, General Comment No. 3 (2012), *Implementation of Article 14 by States Parties*, CAT/C/GC/3, 13 December 2012 (Committee Against Torture, General Comment No.3), paras. 38 and 41.
[213] Committee against Torture, Concluding Observations on the second periodic report of Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, paras.7 and 11.

mechanisms."[214] According to information provided by non-governmental sources more than 400 complaints alleging violence by state officials were recorded between early 2011 and May 2014, however, 70% of these were closed without further action.[215]

A Promotion Mission of the African Commission to **Uganda** in 2013 identified the "Prevalence of torture despite the Anti-Torture Act" as an area of concern.[216] In 2014, the Uganda Human Rights Commission (UHRC) received 357 complaints related to torture or cruel, inhuman, or degrading treatment or punishment.[217] Most of these complaints were against State agents and "the alleged violation of torture and ill-treatment mostly occurred during pre-trial detention while interrogating suspects."[218] The UHRC recommended in its most recent Annual Report that "State agencies and institutions indicated as respondents should cooperate with UHRC to enable it effectively implement its mandate and fight impunity in the country."[219]

In the **DRC**, the UN Joint Human Rights Office monitors and reports on incidents of torture and other ill-treatment. Between June 2014 and May 2015 the Office documented 605 violations by torture and ill- treatment, affecting 1,191 victims.[220] In this regard the report notes that implementation of the 2011 law prohibiting torture, "has been weak".[221] The report suggests that the low number of convictions may be due to a lack of awareness of the law against torture within the judiciary and that more efforts are needed to raise awareness.[222] The report further noted that structural problems in the justice system, particularly its lack of independence when dealing with cases against political opponents and civil society actors, remain of great concern and stated that these issues have resulted in the still low prosecution rate of human rights violations.[223]

Our research indicates that effectiveness of investigations into allegations of torture by law enforcement is the major hurdle in achieving accountability in **South Africa**. This can be explained by a lack of relevant investigatory training to document torture (for instance on the application of the Istanbul Protocol), but most importantly by the absence of cooperation from various authorities in allowing their staff to be investigated impartially and effectively. There is no public information available on how the National Prosecuting Authority (NPA) takes a decision to prosecute a law enforcement official or not, or on the number of cases that reach the NPA and the number of cases that make it to trial, making it difficult to assess the NPA's willingness to prosecute law enforcement officials.

[214] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Follow up report: Missions to the Republic of Tajikistan and Tunisia, A/HRC/28/68/Add.2, 27 Feb 2015, para. 87.
[215] Ibid, para. 88.
[216] African Commission on Human and Peoples' Rights, Report of the Joint Promotion Mission Undertaken to the Republic of Uganda by Commissioner Lucy Asuagbor, Commissioner Faith Pansy Tlakula, Commissioner Med S. K. Kaggwa & Commissioner Pacifique Manirakiza, 25-30 August 2013, Para 244(viii), p. 58.
[217] UHRC, The 17th Annual Report of the Uganda Human Rights Commission to the Parliament of the Republic of Uganda regarding 2014, published 2015, p. 18.
[218] Ibid, p. 19.
[219] Ibid, p. 45.
[220] UN Human Rights Council, Situation of human rights and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo: Report of the United Nations High Commissioner for Human Rights, A/HRC/30/32, 27 July 2015, para. 37.
[221] Ibid, para. 41.
[222] Ibid.
[223] Ibid, para. 71.

VI.1 Complaints and investigation mechanisms and jurisdiction

The Committee Against Torture has underlined the importance of independent complaint and investigation mechanisms for States to abide by their obligation to investigate torture promptly, impartially and effectively. This is particularly true in regard to allegations of torture by the police, the institution that ordinarily would be tasked with investigating torture.[224] The Robben Island Guidelines call on States Parties to the Charter to "[E]nsure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment."[225] The African Commission has also underlined in its jurisprudence on Article 5 of the African Charter that the obligation to investigate forms part of a State's procedural obligation to prevent torture, and to provide redress to the victims.

Some of the countries reviewed in this Report have established special investigation/complaint mechanisms for the investigation of human rights violations, including torture. In addition to the standard procedure for reporting a criminal offence or filing a complaint with the police, countries such as **South Africa**, **Uganda**, **Kenya** and **Nigeria** have special oversight mechanisms that are mandated to receive and investigate allegations of abuses on the part of the police and prison personnel. In Uganda, victims of torture and ill-treatment can file complaints directly before a magistrate who can investigate and bring formal charges, which can then be taken up by the prosecuting authority. In **Kenya**, the Independent Policing Oversight Authority (IPOA)[226] is mandated to receive and investigate complaints of torture and ill-treatment allegedly committed by police officers. However, despite continued allegations, no police officer has yet been charged and prosecuted for torture or ill-treatment under the National Police Services Act of 2011, raising questions about the effectiveness of IPOA, which is hampered by a lack of cooperation from the police. In addition, authorities have not responded to persistent patterns of torture, such as torture at particular police stations and targeting of particular groups.[227] Recent reports indicate that "police reforms - including measures to improve accountability for police abuses - have lagged."[228]

Human Rights Commissions in **Kenya** and **Uganda** can also receive complaints and investigate cases of torture.[229] In discharging its mandate to investigate allegations of crimes committed by the Police, including torture, the **Kenyan** Human Rights Commission noted that it encounters challenges in obtaining cooperation from the police when investigating human rights violations, including gaining access to information to "enable them [Commission staff] independently to ascertain how the operation was

[224] See for instance, Concluding Observations of the Committee Against Torture, Cambodia, UN Doc. CAT/C/CR/31/7, February 2004; Concluding Observations of the Committee Against Torture, Latvia, UN Doc. CAT/C/CR/31/3, 5 February 2004, para.6(b); see also Istanbul Protocol, paras.85-87.
[225] Robben Island Guidelines, para.17.
[226] See website of IPOA at http://www.ipoa.go.ke/.
[227] See for instance Independent Medico- Legal Unit, 'A Cry for Justice: torture and ill-treatment of Hawkers and Small Scale Traders in Nairobi City County,' 2014, at http://www.imlu.org/2011-06-30-23-44-4/2015-08-28-09-08-23/reports/finish/2-reports/279-torture-and-ill-treatment-of-hawkers-and-small-scale-traders-in-nairobi-city-county/0.html.
[228] Human Rights Watch, 'World Report 2014,' Country Chapter: Kenya, at https://www.hrw.org/world-report/2014/country-chapters/kenya.
[229] Kenya National Commission on Human Rights Act, 2013, section 8(b).

being conducted…".[230] In **Uganda**, the Ugandan Human Rights Commission (UHRC) has relatively broad investigative powers and can recommend the opening of criminal investigations. The recommendations however, are not binding on the authorities, and are rarely complied with. Furthermore, prior to deciding whether an allegation of torture referred by the UHRC to the national prosecution agency should be prosecuted, the Ugandan Director of Public Prosecutions usually uses the police to investigate cases. This seriously undermines the effectiveness of the investigation particularly when the allegations concern the police and there is mistrust among the public about the willingness and capacity of the police to investigate allegations committed by their peers.[231] It is therefore not surprising that, despite the introduction of the Prevention and Prohibition of Torture Act in 2012 and an increase of cases reported to the authorities, there have been hardly any prosecutions for torture in Uganda.

While **Kenya**, **Namibia**, **Nigeria** and **South Africa** allow for private prosecutions where the State prosecutor has declined to bring a case, such prosecutions are prohibitively expensive and are very rare in practice. The country research did not reveal any such private prosecutions involving torture or ill-treatment. In addition to having jurisdiction to grant private prosecutions where the public prosecutor has refused to prosecute, the Kenyan courts can grant leave to bring a prosecution where it will serve as a safeguard for "extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies."[232]

Public prosecutors generally have a broad discretion when deciding whether to bring charges. In **South Africa** and **Namibia**, any decision not to prosecute can only be subject to judicial review under stringent conditions. In **South Africa**, a decision not to prosecute is an administrative decision and subject to the constitutional right to 'just administrative action' regulated by the Promotion of Administrative Justice Act of 2000.[233] While a decision to prosecute is not reviewable, there has been judicial debate about whether a decision *not* to prosecute can be reviewed, with the Supreme Court stating in a case related to allegations of corruption, that a decision not to prosecute would be subject to "general principles of legality and rationality."[234] In **Kenya**, the decision of the Director of Public Prosecutions not to prosecute is not subject to judicial review, with the Constitution providing that "[T]he Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."[235] However, the Constitution also provides for specific considerations the Prosecutor needs to take into account in reaching a decision whether to prosecute, including the public interest, the interests of

[230] Kenya National Human Rights Commission, Annual Report 2013/2014, p.25, at http://www.knchr.org/Portals/0/AnnualReports/KNCHR%20%20Annual%20Report%202013-2014.pdf.
[231] Presentation of participant from Uganda during REDRESS – IMLU meeting in Nairobi, 25-26 January 2016.
[232] Criminal Procedure Code, s 88(1), 89, 90; see also High Court of Nairobi, *Isaac Aluoch Aluochier v Stephen Kalonzo Musyoka & 2189 others*.
[233] Constitution of the Republic of South Africa, s. 33.
[234] South Africa, Supreme Court, *National Director of Public Prosecutions and Others v Freedom Under Law* (67/2014) 2014 (4) SA 298 (SCA) (17 April 2014), para. 27.
[235] Constitution of Kenya, Article 49 (1) (h).

the administration of justice and the need to prevent and avoid abuse of the legal process."[236]

In the **DRC** and **Tunisia**, victims and their representatives can constitute themselves as civil parties and require the institution of criminal proceedings. Tunisia recently amended its legislation to allow NGOs to be able to file civil party complaints.

VI.2 The protection of victims and witnesses

Article 13 of the UN Convention against Torture provides that: "Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given The obligation to protect victims and witnesses is also reflected in the Istanbul Protocol, which provides that: "Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation."[237]

Protecting victims and witnesses is a crucial part of any strategy to combat torture. Effective protection contributes to strengthen institutions and governance and provides citizens with the security needed to break cycle of violence. If protected, victims will feel sufficiently secure to lodge complaints and witnesses to give testimony freely, both of which are necessary factors to enhance the prospect of perpetrators being held accountable and for victims to obtain redress. The Robben Island Guidelines provide that States should "[E]nsure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation."[238]

An effective protection system should include protection legislation, the criminalisation of threats, harassment and intimidation of victims and witnesses and the establishment of relevant mechanisms to proactively ensure the safety and security of all victims and witnesses and promptly respond to any threats or risks of reprisal and implement interim or provisional measures requested by human rights bodies such as the African Commission and the UN Committee Against Torture. All States should establish effective victim and witness protection programmes to which all victims and witnesses at risk have unhindered access, including those involved in human rights claims against the State.[239] Most protection programmes are activated on the initiative of the police or

[236] Constitution of Kenya, Article 157(10)- (11).
[237] Recommended by GA res'n 55/89 of 4 Dec. 2000, para. 3(b).
[238] Robben Island Guidelines, para. 49.
[239] See further for an analysis of the different components of an effective system of protection REDRESS, 'Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A call to Action,' December 2009, at http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf.

prosecution services, and usually when high profile witnesses are involved. This can be limiting for claims lodged by victims of human rights abuses who may not have access to protection services if their claims are not supported by the prosecution services. Furthermore, it is rare for protection systems to operate with sufficient independence in regards to threats emanating from public officials, a common problem in torture cases.

South Africa[240] and **Kenya**[241] have separate laws on witness protection. The **South African** Witness Protection Act 112 of 1998 provides for the protection of witnesses in the criminal justice system, yet it does not contain any specific provision applicable to victims of torture and other ill-treatment. This is problematic in particular in respect of detainees who remain in detention after having reported the incident. In addition to its witness protection legislation, the South African Police Service has developed a National Instruction 2/2012 on Victim Empowerment, which outlines the Police Service's obligations in relation to victims[242] and should be read together with the Department of Justice's Service Charter for Victims of Crime, adopted in 2004.[243] However, the Instruction is not a binding document and there is no information available on its implementation in practice. The **Kenyan** law on witness protection similarly does not specifically provide for victims of torture and other ill-treatment and only provides for protection of witnesses "if they are witnesses of the state or its collaborators (e.g. international bodies) in criminal proceedings."[244] However, in 2014, Kenya enacted a comprehensive Victim Protection Act which recognises a right to protection, including special protection for vulnerable victims. According to the Victim Protection Act, a victim has a right to "(a) be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse; (b) have their safety and that of their family considered in determining the conditions of bail and release of the offender; and (c) have their property protected."[245] As the Act only came into force in late 2014, there is insufficient information on how it has been applied in practice.

Other countries also have laws with specific provisions on the protection of victims and witnesses. The **Ugandan** Torture Act, for example, provides that the State has the responsibility to protect a "complainant", "witness" and "a person making a complaint, whether that person is a victim or not."[246] The Uganda Human Rights Commission Act[247] similarly refers to protection against the victimisation of witnesses and provides such persons immunity for their actions and testimony at the Commission. Neither Act extends protection to victims other than those giving evidence or filing a complaint. The absence of comprehensive victim and witness protection legislation has been identified as one of the key obstacles to securing the prosecution of officials responsible for torture in Uganda.[248]

[240] South Africa, Witness Protection Act, 1998 (Act No. 112 of 1998).
[241] Kenya, Witness Protection (Amendment) Act, 2010.
[242] A summary can be found at South African Police Service, 'Victim Emowerment Service in the South African Police Service,' at http://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf.
[243] See here for a copy of the Charter, Department of Justice and Constitutional Development, 'Service Charter for Victims of Crime in South Africa, at http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf.
[244] Witness Protection Act, Chapter 79.
[245] Victim Protection Act of 2014, s. 10.
[246] Uganda, PPTA of 2012, s. 21.
[247] Uganda Human Rights Commission Act, s. 23.
[248] Ugandan expert participating in a meeting organized by REDRESS and the Independent Medico- Legal Unit in Nairobi, 25-26 January 2016.

VI.3 Procedural barriers to accountability (amnesties, immunities and statutes of limitation)

The UN Human Rights Committee has criticised States that have sought to impose amnesties or allow immunities for serious violations of human rights.[249] In its General Comment No. 31, it stressed that States have obligations to investigate and bring to justice perpetrators of violations including "torture and similar cruel, inhuman and degrading treatment..., summary and arbitrary killing... and enforced disappearance". The Committee recognised that "the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations", and that States "may not relieve" public officials or state agents who have committed criminal violations "from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities."[250]

Amnesties and immunities are also contrary to specific duties under international law to investigate, prosecute and punish perpetrators and provide a remedy.[251]

a. Amnesties

Amnesties are legal measures that have the effect of prospectively barring criminal prosecution and, in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption, or retroactively nullifying legal liability previously established.

Amnesty laws are in force in the **DRC** and **Uganda**. In the **DRC**, the amnesty act explicitly excludes amnesty for torture,[252] whereas the **Ugandan** Amnesty Act of 2000 does not have a similar exclusion.[253] The **Ugandan** amnesty applies to "any Ugandan who has at any time since the 26th January 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda."[254] As the Amnesty Act also includes serious human rights violations that impose an obligation on States to, among others, investigate and prosecute those responsible, it has been criticised by a range of actors, including the UN, as being contrary to Uganda's international law

[249] For example: Comments on Uruguay, CCPR/C/79/Add.19 (1993); Concluding Observations on El Salvador, CCPR/C/79/Add.34 (1994); Nineteenth Annual report of the Human Rights Committee A/50/40 (1995); Preliminary Observations of the Human Rights Committee: Peru CCPR/C/79/Add.67 (1996); Concluding Observations on France, CCPR/C/79/Add.80 (1997); Concluding Observations on Lebanon, CCPR/C/79/Add.78 (1997) and Concluding Observations on Chile, CCPR/C/79/Add.104 (1999); Concluding observations on Argentina, CCPR/CO/70/ARG (2000); Concluding Observations on Congo, CCPR/C/79/Add.118 (2000).
[250] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States parties to the Covenant (2004), CCPR/C/21/Rev.1/Add.13, 29 March 2004, para.18.
[251] According to the Committee Against Torture, amnesties which result in the impunity of torturers are incompatible with the spirit and purpose of the Convention: O.*R., M.M. and M.S. v. Argentina*, nos. 1/1988, 2/1988, and 3/1988, A/45/44, Annex V, p.108, at p. 112, para. 9 (1990); see also, in relation to amnesties for enforced disappearances, Working Group on Enforced or Involuntary Disappearances, General Comment on Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, U.N. Doc. E/CN.4/2006/56, 27 December 2005, pp.17-19.
[252] In the DRC, Law No. 014/006 of 11 February 2014 provides for an amnesty for acts of insurrection, war acts and political offences. However, Article 4 provides for an exclusion of the application of an amnesty for acts of torture and other forms of ill-treatment.
[253] In Uganda, the Amnesty Act provides for an amnesty to any Ugandan for any crime committed in the cause of the war or rebellion (in Northern Uganda).
[254] Uganda, The Amnesty Act, 2000, part II, para.3 (1), at https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/$FILE/Ugandan+Amnesty+Act+2000.pdf.

obligations.[255] The Ugandan Torture Act of 2012, on the other hand, expressly prohibits amnesty for a person accused of torture. The compatibility of the two acts has not yet been tested. In **South Africa**, perpetrators of acts of torture during the Apartheid era and whose testimonies were accepted by the Amnesty Committee of the South African Truth and Reconciliation Commission, received an amnesty. However, the many alleged perpetrators who refused to testify (and therefore never having benefited from an amnesty) were never prosecuted for the crimes they allegedly committed, despite the Truth and Reconciliation Commission sending a list of names of alleged perpetrators to the National Prosecution Agency. This *de facto* immunity was condemned by the UN Committee Against Torture in 2006.[256]

b. Immunities

Immunities are legal grants to individuals or entities to prevent them from being held liable for a violation of the law. Such legal immunity may be from criminal prosecution or civil liability or both. There are a variety of forms of immunity that are granted to government officials in order to enable them to carry out their functions without fear of being sued or charged with a crime for so doing. Subject matter immunity covers the official acts of all state officials and is determined by reference to the nature of the acts in question rather than the particular office of the official who performed them. Other types of immunity attach to the person personal or, with regard to diplomatic agents, diplomatic immunities), which, while that person is in office, cover *any act* that some classes of state officials perform. This includes acts in a private capacity, and it is based on the idea that this category of officials must be immune so as to allow those officials to exercise their official functions while in office. Once the individual has left office, he or she ceases to be entitled to such immunity.

It is widely recognised that functional immunities are not available in relation to certain categories of crimes under international law, including genocide, war crimes, crimes against humanity and torture.[257] In contrast, the International Court of Justice ruled, in respect of prosecutions in foreign domestic courts, that the personal immunities of a very limited category of officials - the Head of State, Head of Government and Minister for Foreign Affairs, continue to apply while they are in office, even in relation to crimes under international law.[258] The extent to which state officials are subject to prosecution in foreign domestic courts for torture or other international crimes is dealt with under the section VI.4: Extra-territorial jurisdiction, below.

[255] See further Kirsty McNamara, "Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo," 2013, in Washington University Global Studies Law Review, Vol.12, Issue 3 The International Criminal Court At Ten (Symposium).
[256] UN Committee against Torture, Conclusions and recommendations of the Committee against Torture, South Africa, CAT/C/ZAF/CO/1, 7 December 2006, paras. 13-22.
[257] Cassese, Antonio, 'When May Senior State Officials Be Tried for International Crimes? Some comments on the *Congo v Belgium* Case', European Journal of International Law, 2002, pp. 864-865; see also ECtHR, *Al Adsani v. the United Kingdom*, Judgment (Grand Chamber) of 21 November 2001, application no. 35763/97, para. 61; see also the judgments of Lord Millett and Lord Phillips of Worth Matravers in the Pinochet case: *R v Bow Street Metropolitan Stipendiary Magistrate & Others*, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3) [1999] 2 All ER 97 at pp. 171-9 (Lord Millet) and pp. 186-90 (Lord Phillips of Worth Matravers).
[258] International Court of Justice, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Judgment, Merits, 41 ILM 536 (2002), paras. 51-54.

According to the Committee Against Torture, granting immunity for acts of torture is incompatible with the State's obligation to prosecute and the obligation to provide redress for victims.[259] It has indicated that "when impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights."[260]

Most of the countries covered by the research clearly specify the applicability of personal immunities for serving Presidents or Heads of State and in some instances, the most senior officials. For example, the **Namibian** Constitution provides the President of the Republic with immunity from prosecution "in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President."[261] The Constitution expressly stipulates that after the President's term has ended, he or she may be prosecuted for acts / omissions alleged "to have been perpetrated in his or her personal capacity whilst holding office as President."[262] However, any prosecution of a former President requires a resolution from Parliament to remove immunity from the President, based on an assessment whether any proceedings are "justified in the public interest."[263] Diplomatic agents and Members of Parliament similarly enjoy immunity while in office. No other officials are entitled to immunity under Namibian law. Similarly, the Constitution of **Nigeria** restricts prosecutions of the President, the Vice-President, the Governor and the Deputy-Governor during their "period of office."[264] The **Kenyan** Constitution limits the immunity accorded to the President of Kenya to the time he or she is in office, and, importantly, by providing that "[T]he immunity of the President…shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."[265] In **Uganda**, the Constitution provides for personal immunity of the President of Uganda in that "[C]ivil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or personal capacity before or during the term of office of that person."[266]

The notable exception to constitutionally enshrined immunity for the Head of State is **South Africa**, where the Torture Act specifically provides that no immunity for acts of torture can be provided to an accused person "who is or was a head of State or government, a member of a government or parliament, an elected representative or a government official."[267]

With respect to the majority of other government officials, the practice of States is mixed. In some instances there is a positive statement that there is no functional immunity. For instance, public officers, such as police, do not benefit from immunity under **Kenyan** law. Article 241 of Kenya's penal code provides that "[A]ny person authorized by law or by

[259] See UN Committee Against Torture, General Comment No. 3, paras.38, 42.
[260] Ibid, para. 42.
[261] Constitution of Namibia, Article 31 (2).
[262] Ibid, Article 31 (3) (b).
[263] Ibid, Article 31 (3) (b).
[264] Constitution of Nigeria, s. 308 (3).
[265] Constitution of Kenya, Article 143.
[266] Article 98 (5) of the Constitution of Uganda.
[267] South Africa Torture Act, s. 4 (3); this provision is reflected in the Implementation of the Rome Statute of the International Criminal Court Act, Act No.27, 2002, providing that "the fact that a person…is or was a head of State or government, a member of the government of parliament, an elected representative or a government official…is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime," section 4 (2) (a).

the consent of the person injured by him to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess."[268] In **Nigeria**, the Police Act provides in section 44 that "[N]othing in this Act shall be construed to exempt any police officer from being proceeded against by the ordinary course of law when accused of any offence punishable under any Act or law.[269]

However, functional immunities are often set out with respect to the army or other security officials, and there is often no clear exception for human rights violations including torture. In **Nigeria**, for example, Section 392 of the Armed Forces Act of Nigeria provides an indemnity for actions in aid to civil authority and military duty, stipulating that "[N]o action, prosecution or other proceeding shall lie against a person subject to service law under this Act for an act done in pursuance or execution or intended execution of this Act or any regulation, service duty or authority or in respect of an alleged neglect or default in the execution of this Act, regulation, duty or authority, if it is done in aid to civil authority or in execution of military rules."[270] There is no jurisprudence suggesting how courts will interpret this provision and how it will be applied in regards to crimes, including human rights violations, committed by members of the armed forces, including for instance in regard to crimes committed in the fight against Boko Haram.[271] The **Ugandan** 2002 Anti-Terrorism Act provides that a police officer of other public officer may use "reasonable force for the purpose of exercising any functions" conferred on him or her under the Act, and that "[n]o police officer or other public officer or person assisting such an officer is liable to any civil proceedings for anything done by him or her, acting in good faith, in the exercise of any function conferred on that officer under this Act."[272] This prevents victims from pursuing civil remedies against officers under the Act, contrary to international standards.[273]

c. Statutes of limitation

It is usual for common crimes in domestic jurisdictions to be accompanied by prescription regimes. This is intended to promote legal certainty.

In contrast, there is wide recognition of the inapplicability of statutes of limitations to certain crimes under international law. The reasons are because international crimes pose particular investigatory and prosecutorial challenges that can result in often extensive delays and because imprescriptibility underscores the seriousness of the crimes, and that neither space nor time will provide escape from responsibility. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[274] provides that the relevant crimes are imprescriptible "irrespective of the date of their commission." As has been

[268] Article 241, Penal Code of Kenya [CAP.63].
[269] Police Act of 2004, Section 44.
[270] Armed Forces Act of 1994, section 392, at https://www.icrc.org/ihl-nat.nsf/0/049ea0330082bc31c12576ea005be4a3/$FILE/ARMED%20FORCES%20ACT.pdf.
[271] See above, Section III.4.
[272] Uganda, 2002 Anti-Terrorism Act, section 33, text available at https://www.unodc.org/tldb/showDocument.do?documentUid=6589.
[273] See UN Committee Against Torture, General Comment No.3, para. 26: "[C]ivil liability should be available independently of the criminal proceedings and necessary legislation and institutions for such purposes should be in place."
[274] General assembly resolution 2391 (XXIII), 1968.

recognised by the UN Independent Expert who updated the Set of principles for the protection and promotion of human rights through action to combat impunity, "the general trend in international jurisprudence has been towards increasing recognition of the relevance of this doctrine [on the imprescriptibility of certain offences] not only for such international crimes as crimes against humanity and war crimes, but also for gross violations of human rights such as torture."[275] Statutes of limitation are inconsistent with States' absolute duty to prosecute or extradite suspects of torture as such laws introduce qualifications to that duty.[276]

There are differences among the countries that have criminalised torture on the issue of statutes of limitation. The **DRC** law criminalising torture explicitly provides that a criminal action for torture shall not be time-barred. In **Tunisia**, the Code of Criminal Procedure was amended to expressly state that statutes of limitation shall not be applicable in regard to torture.[277] In **Kenya**, the Public Authorities Act provides for a period of twelve months from the time of the act to submit claims against the Government. An attempt to extend this provision to human rights cases brought against the Government under the Constitution was successfully challenged in the High Court on the basis that such a limitation is inconsistent with the fundamental rights protected in the Constitution.[278]

South Africa and **Uganda** do not have specific provisions on statutes of limitation in their respective anti-torture laws and the relevant rules of the standard criminal procedure apply. Accordingly, in **South Africa** the relevant statute of limitation is 20 years. In **Uganda**, torture is not time-barred, as it does not fall under the limited category of offences that are time-barred. In **Namibia**, the statute of limitation for actions in relation to assault and related offences is 20 years as in South Africa.

In **Nigeria**, no statutes of limitation for criminal offences exist. However, acts falling within the Public Officers Protection Act are subject to a three month limitation period after the "act". This applies to "any action, prosecution…against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority."[279] This can be a significant obstacle to a successful prosecution of torture or ill-treatment committed by public officers and is not in line with international standards.

[275] Report of Diane Orentlicher to update the Set of principles to combat impunity, E/CN.4/2005/102, 8 February 2005, para.47.
[276] The Committee against Torture has repeatedly stated that there should be no statutory limitations for torture, e.g. Turkey, UN Doc. CAT/C/CR/30/5, para.7 (c). See also the Inter-American Court of Human Rights in the *Case of Barrios Altos v Peru*, Judgment of 14 March 2001 (Merits), para. 41: "provisions on prescription ... are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture", and the ICTY, *Prosecutor v. Furundzija*, IT-95-17/1-T, 10 December 1998, para.157: one of the "consequences" of the jus cogens nature of the prohibition on torture is that "torture may not be covered by a statute of limitations."
[277] See Organic Law No.2013-43 of 21 October 2013, at http://www.legislation-securite.tn/fr/node/32692.
[278] High Court of Kenya, *Wachira Waheire V. Attorney General*, Miscellaneous Civil Case No. 1184 of 2003, para 6; Public Authorities Limitations Act, section 3.
[279] See Section 2 of the Nigerian Public Officers Protection Act [CAP.379], 1916.

VI.4 Extra-territorial jurisdiction and extradition

Article 5(2) UNCAT provides that States must prosecute or extradite a suspected perpetrator of torture found on their territory. As the Convention prohibits States from extraditing individuals to another State where there is a substantial risk of them being subjected to torture, and there often instances when the State where the crimes took place does not request extradition, States where the suspects are located have an obligation to ensure that their domestic law expressly provides for jurisdiction over torture in "cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him."[280]Accordingly, legislation must provide for jurisdiction over torture regardless of the nationality of the suspect or the victim or the place where the act of torture has allegedly been committed. Article 6(1) UNCAT also provides that the competent authorities must have the power to take the suspected perpetrator of torture into custody or to take other legal measures to ensure his/her presence at trial.

The incorporation of this form of extra-territorial jurisdiction into domestic law is fundamentally important to ensure that alleged perpetrators of torture can be held accountable anywhere in the world. It also increases victims' opportunities to obtain justice where they have been denied access to justice in the courts of the country where the torture was committed.

In **South Africa**, two non-governmental organisations filed a complaint against Zimbabwean security officials allegedly implicated in the torture (amounting to crimes against humanity) of persons opposing the ruling ZanuPF party in Zimbabwe. The organisations provided detailed information on the crimes committed and which established that at least some of the suspects travelled to South Africa on a regular basis. The organisations requested the South African Police Service and the National Prosecuting Authority to investigate the matter and, if need be, arrest and charge the suspects under the Implementation of the Rome Statute of the International Criminal Court Act (27 of 2002). When the authorities refused to investigate, the organisations requested a judicial review, and the case ultimately was heard by the Constitutional Court, which found:

> "The Supreme Court of Appeal was therefore correct to rule that on the facts of the case, international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity."

The Court found further that "the duty to investigate international crimes may be limited by considerations like resource allocation. This judgment formulates limiting principles and finds that anticipated presence of a suspect in South Africa is not a prerequisite to

[280] See UNCAT, Article 5 (2).

trigger an investigation. It is only one of various factors that needs to be balanced in determining the practicability and reasonableness of an investigation."[281]

In this case, the decision not to investigate related to torture amounting to crimes against humanity under the International Criminal Court Act of 2002, rather than the South Africa Torture Act, which provides for universal jurisdiction in Article 6 (2). However, Article 6(2) of the Torture Act subjects the prosecution of suspects of torture on the basis of universal jurisdiction to the "written authority of the National Director of Public Prosecutions" as provided for in section 179 (1) (a) of the Constitution. This unduly limits the exercise of universal jurisdiction and risks that universal jurisdiction will not be exercised over torture where the Director of Public Prosecutions refuses to authorise a prosecution, given the challenges in reviewing decisions not to prosecute [as opposed to investigate] as outlined above (see Section VI.1.).

Courts in the **DRC** can exercise jurisdiction over ICC Statute crimes (including torture as a crime against humanity or war crime) committed abroad within the terms of their respective implementing legislation,[282] though there are no known cases in which cases have been lodged. In **Namibia** and **Nigeria**, such a possibility exists in respect of crimes falling within their respective laws domesticating the Geneva Conventions. The **Ugandan** PPTA does not provide explicitly for universal jurisdiction, yet stipulates that jurisdiction may be exercised if torture is committed by "any person who is for the time being present in Uganda."[283] In the absence of any jurisprudence it is not clear how this provision will be interpreted, should an alleged perpetrator of torture committed outside Uganda be present in Uganda.

[281] *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014), paras 80-81, footnotes omitted.
[282] On 2 November 2015, the Senate in the DRC approved a new law on the implementation of the Rome Statute into the DRC ordinary 'civil jurisdiction,' thereby considerably widening the mechanisms to address international crimes, see Parliamentarians for Global Action, "PGA salue 'adoption de la loi de mise en oeuvre du Statut de Rome de la CPI par le Senat de la RDC," Press Release, 2 November 2015, at http://www.pgaction.org/pdf/2015-11-02-PR-DRC-Implementing-Rome%20Statute-Adopted%20Senate-FR.pdf.
[283] Uganda, PPTA, section 17 (f).

VII. Redress

The right to redress for victims of torture and other prohibited ill-treatment is enshrined in a number of international and regional human rights instruments, including UNCAT, the Banjul Charter and the ICCPR. It is also reflected in international standard-setting texts, such as the African Fair Trial Standards, the Robben Island Guidelines and 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').[284] Accordingly, States need to ensure that their legal and institutional frameworks enable victims of torture and other prohibited ill-treatment to access and obtain redress, including the right to an effective remedy and to adequate reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Recently, the UN Committee Against Torture issued a General Comment on Article 14 of the Convention, which concerns the right to redress. In addition, the African Commission's Committee for the Prevention of Torture in Africa has embarked on the process of developing a General Comment on the right to redress for victims of torture.[285] In the Committee Against Torture's General Comment, the Committee makes clear that States should have the necessary legislation in place to implement their obligations to afford victims an effective remedy and the right to obtain adequate and appropriate redress,[286] and highlights the importance of States ensuring that victims are able to pursue redress through transparent and accessible procedures that enable and foster victim participation.[287]

The research suggests that the right to redress for acts of torture and ill-treatment is not fully reflected in the domestic legislative framework in any of the countries examined. Laws allow for compensation in some countries. For instance, the PPTA of 2012 in **Uganda** specifically provides for the court to order restitution, compensation (for any economically assessable damage) and rehabilitation.[288] In **Kenya**, **Namibia**, **Nigeria**, and **Uganda** victims can rely on constitutional remedies while compensation for damages can be sought in all countries either by bringing a civil action or becoming a civil party in criminal proceedings. **South Africa**'s Torture Act does not include any provision on the right to redress. In civil law countries such as **DRC** and **Tunisia** it is possible for victims to claim compensation at the end of a criminal trial. Nonetheless, the research shows that access to judicial remedies for torture are protracted, expensive and fraught with challenges in most countries, and reparation measures, in the few instances in which they are ordered are inadequate and often left un-implemented. National human rights institutions also provide possible avenues for obtaining reparation. In most instances, however, they can only issue recommendations, which

[284] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005.
[285] See, "Report on Technical Meeting on Drafting a General Comment on the Right to Redress for Victims of Torture and Ill-Treatment under Article 5 of the African Charter on Human And Peoples' Rights," organised by the Committee for the Prevention of Torture in Africa, In collaboration with The Redress Trust, the Centre for the Study of Violence and Reconciliation, and the Kenya Human Rights Commission, 6 to 7 July 2015, *Miklin Hotel, Accra, Ghana, available at: http://www.achpr.org/news/2015/09/d191/.*
[286] Paras. 20, 21.
[287] Paras. 29, 30.
[288] Prevention and Prohibition of Torture Act, 3 2012, s. 6.

then fall on the competent authorities to implement; implementation in most instances has been piece-meal and weak.

Furthermore, most of the States under review have failed to put in place adequate measures of rehabilitation, leaving the bulk of the work to nongovernmental organisations.

VII.1 Constitutional petitions

A petition for reparation, including compensation can be filed by or on behalf of victims under the Constitutions of the **DRC**, **Kenya**, **Nigeria**, **Namibia** and **Uganda**. In **Kenya,** the High Court has jurisdiction "for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."[289] The Constitution outlines the range of remedies available which correspond to some of the elements of reparation as enshrined in the UN Basic Principles and Guidelines and includes the declaration of rights, declaration of invalidity of laws, injunctions and conservatory order.[290] According to the corresponding Practice and Procedure Rules, individuals and associations can also bring an action in the public interest or in the interest of their members.[291]

Similarly, Section 46 of the **Nigerian** Constitution provides that any person, not just the victim, alleging a violation of a Constitutional right may institute proceedings before the Federal or State High Court. The Fundamental Rights (Enforcement Procedure) Rules, 2009 specify that no human rights case should be dismissed because of a lack of *locus standi*, and that human rights groups, non-governmental organisations, or anyone acting on behalf of another person or in the interest of a group of persons can institute actions on behalf of an applicant.[292] The **Ugandan** Constitution similarly allows the filing of individual petitions before the High Court for the enforcement of constitutionally protected rights and such petitions can be filed by the victim or any individual or organisation acting on his or her behalf.[293]

While the **Namibian** Constitution does not provide a comparable redress mechanism, it provides that "aggrieved persons" can petition the competent court to enforce and protect their constitutional rights and the court "shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them."[294] The Constitution further provides that such an order can include compensation.[295]

[289] Constitution of Kenya, s. 165(3)(b).
[290] Ibid, s. 22(3).
[291] Kenya Gazette Supplement No. 95, Legal Supplement No. 47, Legal Notice No. 117, 28 June 2013.
[292] Fundamental Rights (Enforcement Procedure) Rules, 2009, s. 3(e).
[293] Constitution of Uganda, ss. 50, 137; the latter provides that the Constitutional Court has jurisdiction where a petition raises the interpretation of the Constitution.
[294] Constitution of Namibia, s. 25(2) and (3).
[295] Ibid, s. 25(4).

The **South African** Constitution only provides for partial recognition of the right to reparation, namely the right to have one's dispute resolved in a fair hearing before an independent and impartial tribunal.[296]

VII.2 Compensation in civil and criminal proceedings

Compensation for damages can be awarded in all countries in civil or criminal proceedings, although in countries such as **South Africa** and **Namibia**, damages are not awarded in criminal proceedings except for damage to or loss of property. Civil actions for damages can be brought against individuals or the relevant government entity or both and there are specific law in countries such as **Kenya**, **DRC**, **Uganda** and **South Africa** governing the liability of the State for acts committed by its officials. Such actions, unlike actions for the enforcement of constitutional rights, are subject to limitation periods in most jurisdictions ranging from 3 months[297] to 3 years.[298] These limitation periods significantly impact upon victims' access to civil remedies, and are contrary to international standards.

According to the UN Committee Against Torture, "statutes of limitation should not be applicable as these deprive victims of the redress, compensation and rehabilitation due to them…[S]tate parties shall ensure that all victims of torture or ill-treatment…are able to access their rights to remedy and to obtain redress."[299]

The right to seek compensation for damages in the context of criminal proceedings is firmly established in countries with a civil law tradition, such as the **DRC** and **Tunisia**. While this provides a clear procedure for victims to obtain civil remedies, such 'civil adhesion' claims usually only proceed at the end of a successful criminal trial, and are therefore contingent on the criminal trial, which can limit victims' access to civil remedies. The UN Committee Against Torture highlights in this respect that a "civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding."[300]

In **Kenya**, the enactment of the Victim Protection Act in 2014 constitutes an important new development as it provides for the victim's right to compensation and restitution that is enforceable against the perpetrator upon conviction. However, this is subject to the discretion of the judge. In the absence of relevant practice regarding torture, no evidence exists to suggest how this discretion will be exercised.

[296] Constitution of South Africa, s. 34.
[297] The relevant limitation period is 3 months in Nigeria and 12 months in Kenya; see s. 2 of the Public Officers Protection Law, 2003 of Nigeria and s.3 Public Authorities Limitation Act, Chapter 39 Laws of Kenya. In Uganda, tort actions against the government or a governmental authority must be brought within two years from the date the cause of action arose, see Civil Procedure and Limitation (Miscellanous Provisions) Act 1969, s.3.
[298] Nigeria; Section 11(d) of the Prescription Act 1969 of Namibia and South Africa.
[299] See UN Committee Against Torture, General Comment No.3, para. 40.
[300] See UN Committee Against Torture, General Comment No.3, para. 26.

VII.3 National human rights institutions

National human rights institutions can provide important non- or quasi- judicial avenues for victims of torture and other prohibited ill-treatment to seek redress, often in a less formal and time consuming manner than the ordinary judicial processes. While such institutions exist in all the countries considered, only the **Nigerian** and **Ugandan** human rights commissions have the mandate to adjudicate claims and order reparation. According to section 6(1) of the National Human Rights Commission Act, the **Nigerian** Human Rights Commission has the power to conduct investigations, institute civil action as it deems necessary, and determine damages or compensation payable where a violation has occurred.[301] The Commission may obtain a court order to summon and interrogate any person, issue a warrant to compel attendance, compel the sharing of relevant information, and the attendance of witnesses to produce evidence.[302] Refusal to provide evidence to the Commission in response to a written request or obstruction of the work of the Commission is an offense, punishable with up to six months imprisonment or a fine or both.[303] Section 22 of the Act provides that "an award or recommendation made by the commission shall be recognised as binding and subject to this section and this Act shall upon application in writing to the court be enforced by the court."

Similarly, the **Ugandan** Human Rights Commission has the power to provide redress to victims of torture and ill-treatment.[304] The decisions of the Commission – which may include orders for the payment of compensation, have the same effect as those of a court of law.[305] However, the Commission has no mandate to execute its judgments on particular complaints, and individual complainants must seek execution themselves.[306] As a result, the vast majority of its decisions awarding compensation have yet to be enforced.[307] According to the UHRC, in 2014, the Government owed 3 billion Ugandan shillings (approximately $876,449,050.00 USD) in unpaid compensation awards, with some unenforced awards dating back twelve years.[308]

VII.4 Enforcement of reparation awards

Where victims are awarded compensation, enforcement of the judgment or decision is usually a major obstacle, with victims frequently obtaining nothing at all, or having to wait for years to receive partial compensation. In 2013, a Promotion Mission of the African Commission in **Uganda** identified the "[B]acklog in the payment of compensations awarded to victims of torture" as an area of concern[309] and recommended that the

[301] National Human Rights Commission (Amended) Act, 2010, s. 6 (1).
[302] Ibid, s.6 (2).
[303] Ibid, s. 7 (4).
[304] Constitution of Uganda, Article 56 (1). .
[305] Human Rights Commission Act, s.8.2.
[306] UHRC, Complaints Handling Procedures Manual, p.85.
[307] Ibid.
[308] Joint Press Statement on the Commemoration of the UN Day in Support of Torture Survivors' (UHRC, 24 June 2014), available at http://uhrc.ug/joint-press-statement-commemoration-un-day-support-torture-survivors-theme-fight-torture-implement.
[309] African Commission on Human and Peoples' Rights, Report of the Joint Promotion Mission Undertaken to the Republic of Uganda by Commissioner Lucy Asuagbor, Commissioner Faith Pansy Tlakula, Commissioner Med S. K. Kaggwa & Commissioner Pacifique Manirakiza, 25-30 August 2013, Para 244(xxi), p. 59.

Government establish a Victims Compensation Fund "to provide speedy and timely payment of torture victims."[310] In **Kenya**, victims need to go through an elaborate process to enforce reparation awards and our research suggests that only few victims have received compensation. In the event of non-payment, victims can institute contempt of court proceedings against the relevant government officials responsible for the payment of compensation in order to enforce the decision.[311] In May 2015, a victim of torture successfully instituted contempt of court proceedings against the Deputy Solicitor General for failure to pay compensation of 4.5 million Kenyan Shillings (approximately $44, 208.00 USD) as directed by the High Court in 2013.[312]

In **Uganda**, the UHRC has suggested that a special compensation fund should be established to implement awards to victims. Similar suggestions have been made in **Kenya** and the **DRC**. The challenge of 'financing' redress has also been identified in **Namibia** and **Nigeria** during the drafting of both countries' anti-torture bills. The establishment of a reparation/ compensation fund for victims could assist to address the lack of enforcement, and has also been recommended by the ACHPR's Fair Trial and Legal Assistance Principles and Guidelines.[313] However, since in the scenarios above, it was the State that failed to enforce compensation awards, States might be similarly reluctant to establish and pay into a dedicated fund. The **Nigerian** anti-torture bill currently provides that any reparation ordered should be paid for by the perpetrator. However, as in many cases, perpetrators will not have the financial means to pay all or even parts of the reparation ordered, this is unlikely to assist in the enforcement of relevant awards.

VII.4 Rehabilitation

Under international law, victims of torture and ill-treatment have a right to obtain full and effective redress, including "the means for as full rehabilitation as possible."[314] Conversely, States have an obligation to "restore and repair the harm suffered by the victim." The Committee Against Torture's General Comment No. 3 outlines a number of steps States should take to provide rehabilitation including adoption of a long-term and integrated approach and ensuring that specialised services for the victim of torture and ill-treatment are available, appropriate and promptly accessible. In regards to rehabilitation, the Committee has underscored that:

> "The Committee emphasizes that the obligation of States parties to provide the means for "as full rehabilitation as possible" refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of

[310] Ibid, p. 61.
[311] See Section 5 of the Judicature Act.
[312] High Court of Kenya, *James H Gitau Mwara v Attorney General & Ms Muthoni Kimani*, Civil Case Nr 2892 of 1993, 7 May 2015; see also Standard Digital, 'Deputy solicitor general found guilty of contempt', 8 May 2015, http://www.standardmedia.co.ke/article/2000161470/deputy-solicitor-general-found-guilty-of-contempt.
[313] African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N (2) (a).
[314] See for instance Article 14 of UNCAT; also UN Committee Against Torture, General Comment No.3.

> torture. The obligation does not relate to the available resources of States parties and may not be postponed.
>
> In order to fulfil its obligations to provide a victim of torture or ill-treatment with the means for as full rehabilitation as possible, each State party should adopt a long-term, integrated approach and ensure that specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible. These should include: a procedure for the assessment and evaluation of individuals' therapeutic and other needs, based on, inter alia, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol); and may include a wide range of inter-disciplinary measures, such as medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education etc. A holistic approach to rehabilitation which also takes into consideration the strength and resilience of the victim is of utmost importance. Furthermore, victims may be at risk of re-traumatization and have a valid fear of acts which remind them of the torture or ill-treatment they have endured. Consequently, a high priority should be placed on the need to create a context of confidence and trust in which assistance can be provided. Confidential services should be provided as required."[315]

The African Commission has called on States parties to, amongst other things, "implement domestic laws prohibiting torture and to include clear provisions on the obligation to provide rehabilitation for victims of torture, to ensure that victims and their dependants are offered appropriate medical care and have access to appropriate social rehabilitation."[316]

These standards are not reflected in the legal frameworks of the countries reviewed. In **Kenya**, the Victim Protection Act of 2014 provides for rehabilitation of victims of human rights violations with resources from the Victim Protection Trust Fund. The Fund was expected to be resourced from the State budget and donations. However, the fund has not become operational at the time of writing. A Protection Board, also created under the Victim Protection Act, is operational and has a mandate to take measures to rehabilitate victims of crime, yet it had not applied its mandate at the time of writing.[317]

In **Uganda**, the PPTA of 2012 provides that a court may award, in addition to "any other penalty", rehabilitation, including: "(i) medical and psychological care; or (ii) legal and psycho-social services to the victim in case of trauma."[318] However, no specific rehabilitation programme exists that would facilitate such rehabilitation, and victims may

[315] Committee Against Torture, General Comment No. 3. paras. 12, 13.
[316] African Commission, Resolution on the Right to Rehabilitation for Victims of Torture- ACHPR/Res.303 (LVI) 2015, May 2015, at http://www.achpr.org/sessions/56th/resolutions/303/.
[317] Kenya, Victim Protection Act, 2014, section 32.
[318] Uganda, PPTA, 2012, s. 6(c).

therefore be referred to NGOs specialising in rehabilitation such the African Centre for the Treatment of Torture Victims. The PPTA of 2012 does not provide for the right of victims to obtain rehabilitation in non-judicial processes. In other countries, such as **South Africa**, medical and psychological treatment may be provided by public health institutions. In the **DRC**, rehabilitation programmes are entirely provided by civil society and international organisations.[319]

[319] Myriam KHALDI (ASF), 'L'assistance judiciaire des victimes de torture et autres peines et traitements cruels, inhumains ou dégradants', November 2010.

VIII. Law reform initiatives and legislative processes

The processes of introducing draft legislation vary between States. However, certain key principles should be observed in any legislative drafting process so as to ensure that the proposed legislation is effective, accessible, meets the objectives it set out to address and corresponds to international obligations. These include a transparent and participatory process that provides for ample opportunity for consultation with all stakeholders. Such a participatory process could consider establishing expert committees, joint task-forces, using bilateral expertise and inviting NGO participation in the drafting process. Copies of relevant draft legislation should be made available for consultation, for instance by putting relevant draft legislation online on the relevant ministries' websites or having a designated website that lists all draft legislation open for further contribution from stakeholders. In order to avoid delays, a precise timetable for the different steps in the drafting and adoption process should be established and published.

In the seven countries reviewed, legislative drafts can be proposed by the government, law reform committees or members of parliament, for instance through private member bills. In **Kenya** "every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation."[320] Legislative drafts have to pass through various stages of deliberation before being presented for adoption and/ or presidential assent. In **Namibia** for instance, the Law Reform and Development Commission may prepare a bill and submit it to the Attorney-General's Office. If the Attorney-General is of the view that a law is needed, a first draft will be prepared by the Minister of Justice (or any other relevant Ministry) prior to submission to the National Assembly. The Assembly will consider bills at several stages, and can hold hearings affording members of the public to make submissions.[321] Civil society may participate in the process by attending workshops organised for instance by the Law Reform and Development Commission, or make submissions when Bills are published in the official gazette by the National Assembly for public comments.

At the time of writing, anti-torture bills were pending at different stages of the legislative process in **Kenya**, **Nigeria** and **Namibia**. In **Nigeria**, an anti-torture bill had been adopted by parliament prior to the 2015 presidential elections but had not been assented to by the outgoing President Goodluck Jonathan. Following the election of a new government, the bill was sent back to the Law Reform Committee for further review. It will need to be presented to the (new) Attorney-General and Ministry of Justice who would then present the bill to the government, prior to discussion in Parliament. The review by the Law Reform Committee was ongoing at the time of writing, and initial concerns about a lack of transparency and clarity about the timeline of the process have been met by the Law Reform Committee, which shared a revised anti-torture bill prior to submission to the Attorney General. At the time of writing, civil society was organising a

[320] Kenya Law Reform Commission, A Guide to the Legislative Process in Kenya (2015), online: http://www.klrc.go.ke/index.php/reports-and-publications/562-a-guide-to-the-legislative-process-in-kenya, p. 31.
[321] Legal Assistance Centre, 'How laws are made' (1996), pp.11-12, at http://www.lac.org.na/projects/huricon/Pdf/howlaws.pdf.

meeting with the Law Reform Committee to discuss the latest version of the anti-torture bill.

In **Namibia**, the Ministry of Justice in July 2015 tasked the Law Reform and Development Commission to appoint an expert to draft a prevention of torture bill. The expert drafted a report discussing Namibia's obligations under the Convention Against Torture and prepared a draft bill which was presented to stakeholders at a consultative meeting in Windhoek on 7 August 2015. At the time of writing, the bill was still under review by the Namibian Law Review Commission, following which it can be tabled before Parliament by the government. However, as it was not identified as a priority bill, it was not placed on the legislative cycle for 2016, and will therefore not be presented before 2017. The Law Reform and Development Commission underlined that there is a need for "collective action" and further consultation and exchange with other law reform commissions in particular regarding provisions of redress in the current bill.

The Committee Against Torture's review of **Kenya**'s initial country report in 2009 led to recommendations to domesticate UNCAT into Kenyan law,[322] contributing to the development of a first draft anti-torture bill in 2011. As the bill had not been adopted by the time Kenya presented its second report to the Committee, the Committee expressed its "deep concern that the draft Prevention of Torture Bill (2011) is still not enacted."[323] The Kenyan Law Reform Commission highlighted that a number of challenges prevented adoption to date, including a lack of consensus among stakeholders on whether a separate piece of anti-torture legislation was required at all, given that the matter was already dealt with in various other pieces of legislation. The establishment of a fund for redress for victims was considered by some as too burdensome for taxpayers. In addition, the adoption of the bill required amendments of several pieces of existing legislation, contributing to severe delays. The Law Reform Commission further highlighted that the absence of a clear policy to "guide the drafting of the legislation so as to be clear and easy to understand and apply" resulted in further delays.[324] At the time of writing, the bill was reportedly being reviewed by the Office of the Attorney General. In light of the long delays in the process of adoption of the Bill, civil society is currently considering working with Members of Parliament to introduce a private members bill. In parallel, close collaboration with 'technocrats' in the relevant ministries was considered as crucial to know and to address concerns that could delay the process.

Other legislative processes ongoing at the time of writing include a draft bill tabled before Parliament in **South Africa** to remove the statute of limitation on the crime of torture by amending the Criminal Procedure Act. There was no ongoing initiative to address the absence of a right to redress in the Torture Act. In **Tunisia**, notable aspects of the definition of torture provided under the 2011 law require amendment to fully align the definition with article 1 of UNCAT. Some though not all of the problems identified in

[322] Committee Against Torture, Concluding observations of the Committee against Torture – KENYA, adopted by the Committee at its forty-first session (3-21 November 2008), UN Doc. CAT/C/KEN/CO/1 (19 January 2009), at paras. 1 and 8.
[323] Committee Against Torture, Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), UN Doc. CAT/C/KEN/CO/2 (19 June 2013) at para. 6.
[324] Presentation by the Kenyan Law Reform Commission at REDRESS – IMLU Workshop in Nairobi, 25-26 January 2016; copy on file with REDRESS.

the 2011 text were addressed through amendments to the Code of Criminal Procedure adopted on 2 February 2016 and these will enter into force in June 2016.

The experiences of countries such as **Uganda**, **South Africa** as well as **Kenya** highlight the important role that international mechanisms, including the Committee Against Torture, the African Commission as well as national human rights institutions and civil society organisations can play in triggering and promoting the enactment of anti-torture legislation. The Committee Against Torture's concluding observations were fundamental for the initiative to develop relevant legislation in **Uganda** and **Kenya**. In **Uganda**, a broad civil society coalition, working closely with the Uganda Human Rights Commission and Members of Parliament moved the process along to ensure timely adoption of a comprehensive bill. A petition drive was organised by Ugandan civil society to mobilise and demonstrate public support for the adoption of the Bill. Visits were facilitated for Members of Parliament to countries with recent experience in drafting anti-torture legislation, and a number of Parliamentarians and civil society representatives travelled to the Philippines to learn from experiences there.

Once the bill was adopted in **Uganda**, the national coalition against torture began work to disseminate and raise awareness about the Act throughout the country and used the Act in trainings with police officers and other actors. At the time of writing, civil society developed implementation and operational guidelines on the Act to address concerns from police investigators who stated that they did not know how to implement the Act in practice.

In **South Africa**, the Human Right Commission had played a crucial role in mobilising a number of civil society organisations by establishing a thematic committee on torture, which facilitated synergies in the campaign for the domestication of UNCAT, including the criminalisation of torture.

IX. Key considerations in the drafting and adoption of anti-torture legislation

Our research identified a range of issues that were the subject of divergent opinions during the development of relevant legislation in the countries examined. In addition, certain best practices and lessons learned can be identified that may assist States in the development and/or amendment of anti-torture legislation so as to ensure the drafting and, ultimately, adoption of comprehensive anti-torture legislation in line with international standards and designed to prevent and protect against torture and ill-treatment in the relevant country.

IX.1 Considerations at the outset

- The impetus for African States in drafting anti-torture legislation is the ratification of UNCAT and related obligations arising under Article 5 of the African Charter. Ratification without implementation of the obligations under these instruments would be practically meaningless.

- A thorough review and assessment of the domestic legal system's compliance with treaty obligations is necessary so as to identify legal gaps and legislation requiring reform and/or amendment. In reviewing domestic legislation, and/or introducing anti-torture legislation, substantive obligations – such as the criminalisation of torture and ill-treatment, as well as procedural obligations – such as ensuring victims' right to an effective remedy under UNCAT, need to be considered. The African Commission's Robben Island Guidelines provide an overview of States Parties' obligations under Article 5.

- The review process and initial reflections on the introduction of anti-torture legislation can benefit from consultation with experts from the CPTA and UN Committee Against Torture as well as civil society and victims associations in the countries concerned, so as to ensure that the drafting process is informed by regional and international standards and reflects the clear needs and gaps.

- The legislative review should be complemented by an assessment of the extent of torture and ill-treatment committed in the country as well as the different contexts in which torture is perpetrated, so as to ensure that the legislation to be introduced meets the current challenges and key problem areas.

IX.2 Considerations for the drafting process:

- The drafting process should be transparent and follow a participatory, inclusive and consultative approach. This should include consultation with a wide range of stakeholders, including representatives from civil society, lawyers, medical and

psychological experts. It should also see participation of and consultation with stakeholders who will be involved in the implementation of the legislation, such as police, prison officials, lawyers, prosecutors and judges to take into consideration concerns and raise awareness at the outset about the legislation, its objectives and proposed provisions.

- The drafting process should include an exchange of experiences with relevant stakeholders in other countries.

IX.3 Setting out a national "anti-torture policy"

- At the outset, the government should set out the State's policy to protect and prevent torture. Legislation should start with a section that emphasises the right to dignity and associated guarantees of respect for human rights. It should emphasise the right to freedom from torture and ill-treatment generally, and specifically refer to the absolute prohibition of torture and ill-treatment in specific contexts as relevant in the country. For instance, where a comprehensive assessment of the extent of torture and ill-treatment in the country has identified torture to be particularly common in the context of police custody, and during police investigations, the rights of all persons, including detainees and suspects of any offence, to freedom from torture and ill-treatment could be particularly highlighted.
- A section on the State's anti-torture policy should also refer to regional and international instruments ratified by the State and which will be reflected in the State's efforts to prevent and protect against torture and ill-treatment.

IX.4 Substantive provisions and questions to consider

(i) Does domestic law provide for the right to freedom from torture as a non-derogable right?

- The right to freedom from torture should be enshrined as a non-derogable right in the Constitution. A constitutional provision serves as a useful point of reference in times when the absolute prohibition of torture might become the subject of debate, such as for instance in the fight against terrorism and/or the introduction of emergency legislation. It also helps protect the absolute prohibition as changes to the Constitution are usually more difficult to achieve than amendments/repeal of statutory legislation.

- Specific anti-torture legislation should refer to the relevant Constitutional provision or, where such a provision is yet to be introduced, should include a provision itself setting out the non-derogable nature of the right, expressly

providing that no exceptional circumstances may be invoked as a defence or justification for torture and other prohibited ill-treatment.

(ii) How should torture be criminalised and defined?

- Criminalising torture as a separate offence is necessary to reflect the serious nature of the crime and to enable States to track, report and respond effectively to torture where it occurs. Criminalisation of torture is best achieved if the definition of torture that is included in the penal code and/or specific anti-torture legislation mirrors the definition of torture in Article 1 UNCAT. Anti-torture legislation therefore should provide for a definition of torture that includes the four minimum elements: (i) intentional infliction of (ii) severe pain or suffering, whether physical or mental; for (iii) such purposes as: obtaining information or a confession; punishment; intimidation or coercion; discrimination of any kind; and (iv) by a public official/ person acting in a public capacity.

(iii) Public officials and non-State actors?

- Whether or not to include acts committed by non-State actors in the definition of torture could depend on the extent to which such acts are being committed in the relevant country seeking to adopt anti-torture legislation. Where a thorough assessment of the extent of the practice of torture and ill-treatment reveals that acts committed by non-State actors is a significant challenge, a State may decide to extend the definition of torture to include non-State actors.

(iv) Should legislation provide for specific purposes?

- Where the anti-torture legislation does provide for a list of purposes, the list of purposes should, at a minimum refer to the list of purposes highlighted in Article 1 (1) UNCAT. Omitting a purpose listed in Article 1 may lead to practice inconsistent with obligations under UNCAT. The legislation should also make clear that the list of purposes included is a non-exhaustive list.

(v) Should legislation include a list of acts of torture?

- Rather than introducing lists of act constituting torture, States should consider introducing legislation that emphasises that what constitutes torture depends on the circumstances of the case and the nature, purpose and severity of the treatment applied. Where a list of acts of torture is introduced, it should be clearly designated as being non-exhaustive.

(vi) Should ill-treatment be defined and criminalised?

- When drafting anti-torture legislation, there are good reasons to also include an express criminalisation of ill-treatment: it will ensure that the legislation is

comprehensive and contributes to the prevention of ill-treatment in line with Article 16 UNCAT through the prosecution of perpetrators. It will help identify, track and report instances of ill-treatment.

- Ill-treatment should be a separate crime to torture with reference to the level of severity of the treatment, underlining that the assessment of severity should take into account "the circumstances of the case, including the duration of the treatment or punishment, its physical and mental effects and, in some cases, the sex, religion, age and state of health of the victim."[325]

(vii) Sanctions for torture and ill-treatment

- Lenient penalties may fail to deter torture, while rigid and draconian penalties may result in courts being unwilling to apply the law as it fails to flexibly take into account individual circumstances. Anti-torture legislation should therefore provide for adequate penalties for torture and ill-treatment, taking into account the gravity of the crime. A significant custodial sentence is considered an appropriate penalty, whereas financial or disciplinary penalties alone are insufficient.

(viii) Should anti-torture legislation include a specific provision prohibiting corporal punishment in all settings?

- The African Commission and other human rights bodies have confirmed that the prohibition of torture and ill-treatment extends to the prohibition of corporal punishment, including judicial, educative and disciplinary punishment and punishment in all settings, including medical/psychological and educational institutions and in the home. Where the review of domestic legislation has identified legislation allowing for corporal punishment, these pieces of legislation should be repealed. Anti-torture legislation could in addition expressly provide that such punishment is prohibited to further raise awareness that it constitutes ill-treatment and may amount torture. Such a provision may also help to counteract traditional/cultural justifications for corporal punishments.

- In a context where corporal punishment may be seen as acceptable under certain circumstances, consultation and debate with relevant stakeholders (teachers, religious leaders, medical and psychological experts and others) in the development of the anti-torture legislation can assist in clarifying perspectives, identifying areas of concern and explaining the position under regional and international law.

[325] See for instance definition of ill-treatment in the Section 7 of the Anti-Torture Act 2009 of the Philippines.

(ix) Should safeguards be expressly included in the anti-torture legislation?

- Where they exist, safeguards enshrined in the Constitution should be explicitly referred to and set out in anti-torture legislation so as to underline the close link between safeguards and prevention of torture and ill-treatment.

- While noting that torture and ill-treatment will not only occur in detention settings, States should also consider introducing specific provisions in anti-torture legislation setting out safeguards specifically in the context of arrest and detention, including:

    - 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 right to challenge the legality of one's detention;
    - Access to a lawyer of one's choice;
    - The right to medical examination upon arrest and after detention, and access to regular medical examination throughout detention.

- Such a provision should underline that these safeguards are applicable at all times and cannot be suspended under any circumstance.

- Anti-torture legislation could also usefully include a provision on the institution responsible for monitoring compliance with these safeguards in practice. Where applicable, this may include a reference to the National Preventive Mechanism, or, where an NPM has yet to be established, any other institution that should be tasked with monitoring compliance with those safeguards. This provision could then also set out the mandate of the institution, its powers and guarantees.

(x) What should a provision on the 'exclusionary rule' entail?

- Anti-torture legislation should provide for the exclusion of evidence obtained by torture or ill-treatment, and emphasise that this applies to all evidence and information obtained. To ensure that prosecutors, lawyers and judges can apply the provision in practice, such a provision should clarify that the burden of proof is on the prosecution to show that evidence was obtained voluntarily and without duress.

- Given the importance attached to a confession in criminal investigations in many countries, it would be important to specifically discuss and exchange on the exclusionary with police and other law enforcement agencies already at the outset of the drafting of the legislation, so as to raise awareness and facilitate implementation once the bill has been adopted.

(xi) The provision on 'non-refoulement'

- Anti-torture legislation should include a provision specifically incorporating the principle of non-refoulement. States may also consider to include a provision to the effect that the burden of proof in non-refoulement cases shifts to the State where the individual has provided sufficient credible information that "substantial grounds exist for believing that the individual would be subjected to torture were he/ she to be expelled, returned or extradited."

(xii) Should anti-torture legislation include a provision on jurisdiction?

- The obligation to investigate and prosecute suspects of torture applies regardless of the nationality of the perpetrator or the victim and the location of the torture. This in turn requires States to ensure that their domestic law provides for jurisdiction enabling domestic authorities to investigate, prosecute and, where applicable, convict perpetrators of torture committed on and outside their territory, regardless of the nationality of the perpetrator or the victim.

- A separate provision on jurisdiction in the anti-torture legislation is warranted to ensure that the different types of jurisdiction are adequately provided for and anti-torture legislation should therefore expressly provide for jurisdiction where torture was committed: (i) on the State's territory (territorial jurisdiction); (ii) by one of the State's nationals (active personality jurisdiction); (iii) against one of the State's nationals (passive personality jurisdiction); (iv) outside the State's territory by and against non-nationals (universal jurisdiction).

(xiii) Anti-torture legislation should provide for the extradition of alleged perpetrators of torture

- States are obliged to prosecute or extradite suspects of torture found on their territory. Anti-torture legislation should therefore provide for the possibility of extradition of suspects and ensure that torture is an extraditable offence. The legislation should specify that suspects of torture will not be extradited where there are substantial grounds for believing that the alleged perpetrator would be in danger of being subjected to torture.

(xiv) Amnesties, immunities and statutes of limitations

- One major objective of anti-torture legislation criminalising torture and ill-treatment is to prevent and protect against torture. Impunity for torture is one of the main contributing factors in the recurrence of torture and ill-treatment, and it is therefore of paramount importance that anti-torture legislation expressly addresses obstacles to accountability for torture.

- Anti-torture legislation should therefore expressly exclude the application of amnesties, immunities and statutes of limitation (criminal and civil) in cases of

torture and ill-treatment. Such provisions would not only be in line with the overall objective of the legislation, but also ensure compliance with relevant provisions of UNCAT and African Commission standards and jurisprudence.

(xv) The right to redress in anti-torture legislation

- Regional and international instruments require States to ensure that victims of torture and ill-treatment have access to, and obtain, redress. Anti-torture legislation should therefore explicitly set out the right to redress, including that victims of torture and ill-treatment have a right to an effective remedy and to adequate reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

(xvi) The right to an effective remedy

- Anti-torture legislation should set out that victims of torture and ill-treatment have a right to complain and that impartial and effective complaint mechanisms are established so as to guarantee victims' right to complain. The provision on the right to an effective remedy should also set out that complaints will be investigated promptly, impartially and thoroughly in line with the Istanbul Protocol.

- The legislation should provide that victims, witnesses, investigators, human rights defenders and families have a right to protection against any form of violence, threats of violence, intimidation and reprisals. The relevant provision on protection could also criminalise threats, harassment and other forms of reprisals against victims, witnesses, investigators, human rights defenders and families.

(xvii) The right to reparation

- Anti-torture legislation should include the right to reparation for victims of torture and ill-treatment, emphasising that for reparation to be adequate, it needs to include restitution, rehabilitation, satisfaction and guarantees of non-repetition. While emphasising that victims must have a right and access to judicial procedures to obtain reparation, the legislation could also provide that certain forms of reparation, such as rehabilitation, should be provided and accessible for victims of torture and ill-treatment without having to go through a judicial process.

  The legislation should emphasise that it is a responsibility of the State to provide redress to victims of torture and ill-treatment. As the question of enforcement of reparation awards is a challenge in any country, possibilities for enforcement of awards, in particular compensation should be discussed with a range of stakeholders during the drafting of the legislation.

(xviii) A section on implementation?

- Our research indicated that the existence of anti-torture legislation notwithstanding, torture and ill-treatment continue being an area of great concern in countries such as Uganda and South Africa. While the respective acts have only been in force four and three years respectively, it indicates that such Acts risk being meaningless if not or only partially implemented. This is particularly evident in regards to the number of prosecutions initiated under relevant laws.

- A section specifically dedicated to implementation of the anti-torture law in the law itself may also contribute to increasing implementation in practice. Such a provision/ section could for instance provide for regular reports on the implementation of the legislation to Parliament and provide for the training of relevant actors in the application of the legislation, including judges, prosecutors, lawyers and police and other law enforcement agencies.

Annex: The Robben Island Guidelines

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

Preamble

Recalling the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment;

Deeply concerned about the continued prevalence of such acts;

Convinced of the urgency of addressing the problem in all its dimensions;

Recognising the need to take positive steps to further the implementation of existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment;

Recognising the importance of preventive measures in the furtherance of these aims;

Recognising the special needs of victims of such acts;

Recalling the provisions of:

- Art. 5 of the African Charter on Human and Peoples' Rights which prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment;

- Art. 45 (1) of the African Charter which mandates the African Commission to, inter alia, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;

- Arts. 3 and 4 of the Constitutive Act of the African Union by which States Parties undertake to promote and respect the sanctity of human life, rule of law, good governance and democratic principles;

Recalling further the international obligations of States under:

- Art. 55 of the United Nations Charter, calling upon States to promote universal respect for and observance of human rights and fundamental freedoms;

- Art. 5 of the UDHR, Art. 7 of the ICCPR stipulating that no one shall be subjected to torture, inhuman or degrading treatment or punishment;

- Art. 2 (1) and 16 (1) of the UNCAT calling upon each State to take effective measures to prevent acts of torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction;

Noting the commitment of African States as reaffirmed in the Grand Bay Declaration and Plan of Action adopted by the 1st Ministerial Conference on Human Rights in Africa to ensure better promotion and respect of human rights on the continent;

Desiring the implementation of principles and concrete measures in order to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment in Africa and to assist African States to meet their international obligations in this regard;

The “Robben Island Workshop on the Prevention of Torture” has adopted the following guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment and propose that they are adopted, promoted and implemented within Africa.

Part I: Prohibition of Torture

Ratification of Regional and International Instruments

1. States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish. This would include:

a) Ratification of the Protocol to the African Charter of Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights;

b) Ratification of or accession to the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment without reservations, to make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 and recognising the competency of the Committee to conduct inquiries pursuant to Article 20;

c) Ratification of or accession to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the First Optional Protocol thereto without reservations;

d) Ratification of or accession to the Rome Statute establishing the International Criminal Court.

Promote and Support Co-operation with International Mechanisms

2. States should co-operate with the African Commission on Human and Peoples' Rights and promote and support the work of the Special Rapporteur on prisons and conditions of detention in Africa, the Special Rapporteur on arbitrary, summary and extra-judicial executions in Africa and the Special Rapporteur on the rights of women in Africa.

3. States should co-operate with the United Nations Human Rights Treaties Bodies, with the UN Commission on Human Rights’ thematic and country specific special procedures, in particular, the UN Special Rapporteur on Torture, including the issuance of standing invitations for these and other relevant mechanisms.

Criminalization of Torture

4. States should ensure that acts which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.

5. States should pay particular attention to the prohibition and prevention of gender-related forms of torture and ill-treatment and the torture and ill-treatment of young persons.

6. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of the UN Convention against Torture.

7. Torture should be made an extraditable offence.

8. The trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards.

9. Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.

10. Notions such as “necessity”, “national emergency”, “public order”, and “ordre public” shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.

11. Superior orders shall never provide a justification or lawful excuse for acts of torture, cruel, inhuman or degrading treatment or punishment.

12. Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.

13. No one shall be punished for disobeying an order that they commit acts amounting to torture, cruel, inhuman or degrading treatment or punishment.

14. States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

Non-Refoulement

15. States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.

Combatting Impunity

16. In order to combat impunity States should:

a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process
b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.
c) Ensure expeditious consideration of extradition requests to third states in accordance with international standards.
d) Ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody.
e) Ensure that where criminal charges cannot be sustained because of the high standard of proof required, other forms of civil, disciplinary or administrative action are taken if it is appropriate to do so.

Complaints and Investigation Procedures

17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.

18. Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.

19. Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)

Part II: Prevention of Torture

Basic Procedural Safeguards for those deprived of their liberty

20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:

a) The right that a relative or other appropriate third person is notified of the detention;
b) The right to an independent medical examination;

c) The right of access to a lawyer;
d) Notification of the above rights in a language which the person deprived of their liberty understands;

Safeguards during the Pre-trial process

21. States should establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 2.

22. Ensure that criminal investigations are conducted by those subject to the relevant codes of criminal procedure.

23. Prohibit the use of unauthorised places of detention and ensure that it is a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.

24. Prohibit the use of incommunicado detention.

25. Ensure that all detained persons are informed immediately of the reasons for their detention.

26. Ensure that all persons arrested are promptly informed of any charges against them.

27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.

28. Ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of video and/or audio taped recordings of interrogations.

29. Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.

30. Ensure that comprehensive written records of those deprived of their liberty are kept at each place of detention, detailing, inter alia, the date, time, place and reason for the detention.

31. Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members.

32. Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.

Conditions of Detention

33. Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN Standard Minimum Rules for the Treatment of Prisoners.

34. Take steps to improve conditions in places of detention which do not conform to international standards.

35. Take steps to ensure that pre-trial detainees are held separately from convicted persons.

36. Take steps to ensure that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities.

37. Take steps to reduce over-crowding in places of detention by inter alia, encouraging the use of non-custodial sentences for minor crimes.

Mechanisms of Oversight

38. States should ensure and support the independence and impartiality of the judiciary including by ensuring that there is no interference in the judiciary and judicial proceedings, guided by the UN Basic Principles on the Independence of the Judiciary

39. Encourage professional legal and medical bodies, to concern themselves with issues of the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment.

40. Establish and support effective and accessible complaint mechanisms which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.

41. Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.

42. Encourage and facilitate visits by NGOs to places of detention.

43. Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State Party.

44. Examine the feasibility of developing regional mechanisms for the prevention of torture and ill-treatment.

Training and empowerment

45. Establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups.

46. Devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel.

Civil Society Education and Empowerment

47. Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.

48. The work of NGOs and of the media in public education, the dissemination of information and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment shall be encouraged and supported.

Part III: Responding to the Needs of Victims

49. Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.

50. The obligation upon the State to offer reparation to victims exists irrespective or whether a successful criminal prosecution can or has been brought. Thus all States should ensure that all victims of torture and their dependents are:

a) Offered appropriate medical care;
b) Have access to appropriate social and medical rehabilitation;

c) Provided with appropriate levels of compensation and support;

In addition there should also be a recognition that families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as victims.